

D.U.P. NO. 2018-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

CITY OF NEWARK,

Charging Party,

-and-

Docket No. CE-2015-011

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the City of Newark (City) against the Newark Police Superior Officers' Association (SOA). The charge alleges the SOA violated section 5.4b(2), (3) and (5) of the New Jersey Employer-Employee Relations Act (Act) by filing several criminal complaints against a City budget director; filing an ethics complaint against a City attorney; refusing to meet and negotiate with City officials for a successor agreement; refusing to respond to an information request issued by a former City Business Administrator and by filing "frivolous" unfair practice charges. During the time period this alleged misconduct occurred, the SOA and City were involved in litigation over several unfair practice charges and the SOA obtained interim and final agency relief in cases alleging the City repudiated the parties' collective negotiations agreement and unilaterally altered terms and conditions of employment. The Director found several of the City's allegations fell outside the Act's six month statute of limitations and were untimely; that the SOA was relieved of its obligation to negotiate with the City unless and until it restored the status quo and benefits it unilaterally deprived SOA unit members; that the SOA had a statutory right to file charges (even if those charges were meritless) and that the Commission lacked jurisdiction to address the ethics complaint filed against a City attorney.

D.U.P. NO. 2018-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

CITY OF NEWARK,

Charging Party,

-and-

Docket No. CE-2015-011

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Respondent.

Appearances:

For the Respondent
John J. Chrystal, III, President

For the Charging Party
Carmagnola & Ritardi LLC, attorneys
(Sean P. Joyce, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 22, 2015, the City of Newark (City) filed an unfair practice charge against the Newark Police Superior Officers' Association (SOA). The charge alleges that on April 5, 2011, SOA President John Chrystal filed eight criminal complaints against City Director of Management and Budget Darlene Tate, requiring her to appear in the City's municipal court on April 19, 2011; on February 3, 2012, Chrystal issued correspondence to the Essex County Prosecutor requesting "a criminal investigation" regarding City attorney Brendan Egan's "possession and

introduction of documents" at an arbitration proceeding; the SOA filed unspecified "frivolous labor practice charges" in lieu of negotiating in good faith with the City for a successor collective negotiations agreement; the SOA failed to respond to a March 6, 2014 City request for information and on an unspecified date, SOA President Chrystal filed an ethics complaint against a City attorney. These actions allegedly violates section 5.4b(2), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq. (Act).

On April 2, 2015, the SOA filed a letter denying that it violated the Act and asserting that many of the allegations in the charge are untimely. The SOA further contends that it has prevailed against the City in several unfair practice cases by obtaining interim and final agency relief and that several other charges are pending against the City. The SOA writes that the charge was filed against it in retaliation for exercising its rights under the Act.

^{1/} These provisions prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and (5) Violating any of the rules and regulations established by the Commission."

On May 22, 2015, the City filed a reply to the SOA's position statement, denying that its charge was in retaliation for the SOA's "success" in several other charges. It contends that it has attempted to meet with and negotiate a collective agreement with the SOA in September 2014 but "was rebuffed at every turn." Admitting that the allegations pertaining to the March 2014 information request and 2011 criminal complaint fall outside the Act's six month statute of limitations, the City contends these allegations should be considered as evidence of a "pattern and practice of harassment and intimidation" by the SOA. The City further counters that the ethics complaint was filed in January 2015, within the six month statute of limitations and that due to confidentiality restrictions, the City cannot divulge information about that investigation.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), *aff'd*, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The SOA is the exclusive majority representative of police superior officers employed by the City, including sergeants, lieutenants, and captains. John Chrystal is employed as a captain by the City and is President of the SOA. The SOA and City are parties to a collective negotiations agreement (CNA) extending from January 1, 2009 through December 31, 2012 (Agreement).^{2/}

On December 20, 2007, the Commission granted summary judgment in favor of the SOA on an unfair practice charge and complaint filed against the City (docket number CO-2007-105). City of Newark, P.E.R.C. No. 2008-34, 33 NJPER 316 (¶120 2007), recon. den. P.E.R.C. No. 2008-53, 34 NJPER 71 (¶29 2008). The charge alleged that the City refused to implement a settlement agreement reached between the Police Director and SOA regarding a grievance over the allocation of vacation leave to superior officers. The grievance procedure in the parties' collective negotiations agreement designated the Police Director as a Step 5 decision-maker. 33 NJPER at 317-318. The Commission determined that "the authority of the City's grievance representative

^{2/} On February 25, 2016, the Public Employment Relations Commission (Commission) ordered the City to sign a successor agreement for the period from January 1, 2013 through December 31, 2015 and to present the same to the City Council for a ratification vote. City of Newark, P.E.R.C. No. 2016-56, 42 NJPER 441 (¶119 2016). It is unclear whether the City has complied with the Commission's order.

[Police Director] to resolve grievances is settled" and held that the City violated the Act by refusing to implement the settlement. 33 NJPER at 318. The Commission rejected the City's argument that the Police Director lacked authority to enter into the settlement because the settlement was inconsistent with the CNA. In rejecting this argument, the Commission ruled:

The City cannot unilaterally rescind a grievance settlement reached by its Police Director under the negotiated grievance procedure. That rescission repudiates the grievance procedure and violates section 5.4a(5). Id., 33 NJPER at 318.

Despite the Commission's direction that the City Police Director is contractually authorized to decide and/or settle SOA grievances, the SOA has filed numerous unfair practice charges alleging subsequent instances of the City's refusal to implement Police Director grievance determinations or settlements. City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013) (final agency decision) (City refused to implement settlement between SOA and Police Director providing for the payment of 105 days of terminal leave to a retired unit employee); City of Newark, H.E. No. 2014-1, 40 NJPER 124 (¶48 2013) (final agency decision) (City refused to implement Police Director's decision sustaining a SOA grievance for the payment of 208 hours of compensatory time to a sergeant); City of Newark, H.E. No. 2015-8, 41 NJPER 454 (¶141 2015) (final agency decision) (City refused to implement Police Director's decisions to sustain SOA grievances for the payment of

accrued compensatory time and longevity to four retired captains and a retired lieutenant); City of Newark, H.E. No. 2015-12, 42 NJPER 121 (¶35 2015) (final agency decision) (City refused to provide health benefits to a retired unit officer pursuant to a grievance settlement reached by SOA and Police Director). During this period, a Commission designee also ordered the City to pay SOA unit employees tens of thousands of dollars of accumulated benefits wrongfully withheld in repudiation of the parties' collective negotiations agreement. City of Newark, I.R. No. 2015-1, 41 NJPER 287 (¶95 2014), app. disp. 42 NJPER 212 (¶59 App. Div. 2015); City of Newark, I.R. No. 2015-3, 41 NJPER 364 (¶115 2015); City of Newark, I.R. No. 2015-5, 41 NJPER 435 (¶136 2015).

The litigious relationship between the SOA and City over the last half decade provides the appropriate context in which the City's allegations against the SOA may be properly understood.

On April 5, 2011, John Chrystal filed eight criminal complaints charging the City Director of the Office of Management and Budget with wrongfully withholding monies due upon retirement to eight SOA members under the parties' collective negotiations agreement in violation of N.J.S.A. 2C:40A-2. The statute makes it a disorderly persons offense for an employer to not pay wages "due" within 30 days after they become due.

The City alleges that on February 3, 2012, Chrystal sent correspondence to the Essex County Prosecutor's Office requesting that a criminal investigation be conducted regarding the introduction of documents at an arbitration proceeding by a City attorney. In January, 2015, Chrystal filed an ethics complaint against a City attorney. No additional facts are alleged about the nature of that complaint.

On April 1, 2014, the City's former Business Administrator, Julien X. Neals, served Chrystal with an information request by letter dated March 26, 2014. Neals requested "copies of any and all agreements of any kind or type-including, but not limited to grievance settlement agreements and so called 'Side Letter Agreements' that purport to resolve any grievance filed by the SOA against the City" involving an alleged contract violation. (Exhibit 1 to City's Charge). The City alleges SOA did not provide the information requested.

According to the City, the SOA has also refused to meet and negotiate a successor agreement and has elected, instead, to file "frivolous unfair practice charges." (Paragraph 23 of Charge). City representatives met with Chrystal in September 2014 and presented negotiations proposals. By letter dated October 20, 2014 to Chrystal, Assistant Business Administrator Michael Green requested a response from SOA to the City's proposals. At the time of Green's letter, the City and SOA were involved in

litigation over several unfair practice charges alleging the City's repudiation of the parties' collective negotiations agreement and the City's failure to reduce to writing and sign a successor collective negotiations agreement covering the 2013-2015 period.^{3/}

No facts are alleged in the charge that indicate the SOA interfered with the City's selection and use of a collective negotiations representative.

ANALYSIS

N.J.S.A. 34:13A-5.4c provides:

[No] complaint shall issue based on any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In determining whether a party was "prevented" from filing a charge, the Commission conscientiously considers the circumstances of each case and assesses the Legislature's objectives in prescribing the time limits as to a particular claim. The word "prevent" ordinarily connotes factors beyond a

^{3/} Around this time, the Commission found that the parties had reached a successor agreement to the 2009-2012 agreement and that the City violated the Act by attempting to insert a provision in a Memorandum of Agreement the parties had not agreed to. City of Newark, P.E.R.C. No. 2016-56, 42 NJPER 441 (¶119 2016).

complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978). Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. Sussex Cty. Com. Col., P.E.R.C. No. 2009-55, 35 NJPER 131 (¶46 2009); State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

The allegations concerning the filing of criminal complaints by the Association president, the President's letter to the Essex County Prosecutor and the failure to respond to the City's March 26, 2014 information request all fall outside the six month statute of limitations and are untimely. The 2011 criminal complaints were filed more than three and a half years before the City's charge was filed. The February 3, 2012 letter to the Essex County Prosecutor was sent almost three years before the City's charge was filed. The City requested information from the SOA on March 26, 2014 and yet the City's charge was not filed until January 22, 2015. No facts indicate that the City was prevented from filing a charge within six months of the events

complained of. The City concedes in its May 2015 position statement that these events occurred outside the Act's six month statute of limitations. I therefore dismiss these claims as untimely.

Refusal to Negotiate Claims

Filing of "Frivolous" Charges

A majority representative, like a public employer, has a statutory right to file unfair practice charges. N.J.S.A. 34:13A-5.4. The right to file a charge is protected under the Act even for charges that lack merit or, in the respondent's view, are "frivolous." Warren Tp. Bd. of Ed., D.U.P. No. 94-34, 20 NJPER 164, 165 (¶25076 1994) (Director dismisses employer's charge and notes that the "Association's statutory right to file unfair practice charges is not dependent upon the ultimate determination of the charge's merits."); Carteret Housing Authority, D.U.P. No. 2000-1, 25 NJPER 358 (¶30152 1999) (Director dismisses employer's charge and notes that a majority representative's right to file a charge is a "fundamental right under the Act."); North Hudson Regional Fire & Rescue, D.U.P. No. 2012-2, 38 NJPER 169 (¶50 2011) (Director dismisses charge by employer alleging majority representative violated Act by filing charges in lieu of grievances and noting that the majority representative has a statutory right to file a charge).

The City's claim that the SOA filed "frivolous unfair practice charges" in lieu of negotiating with the City is factually inaccurate and of no legal consequence. Of the three charges the City identifies in paragraph 23 of its charge as "frivolous," one does not exist (CO-2014-539); regarding another, the Director of Unfair Practices issued a Complaint (CO-2015-076); and the SOA prevailed on the third matter by obtaining a final Commission decision in its favor (P.E.R.C. No. 2016-56; docket number CO-2014-268). These facts show that the charges were not "frivolous." Even if SOA's charges were frivolous, the mere filing of them is not a violation of the Act. Warren Tp. Bd. of Ed.; Carteret Housing Authority; North Hudson Regional Fire & Rescue. I therefore dismiss the City's allegations that the SOA violated the Act by filing unfair practice charges in lieu of negotiating with the City.

Duty to Negotiate

Majority representatives, like public employers, are obligated to negotiate in good faith over terms and conditions of employment. N.J.S.A. 34:13A-5.3. Sometimes, actions of a public employer will relieve a majority representative of the obligation to negotiate in good faith. Unilateral changes to existing terms and conditions of employment are "unlawful because they frustrate the statutory objective of establishing working conditions

through bargaining.” Galloway Tp. Educ. Ass’n v. Galloway Tp. Bd. of Ed., 78 N.J. 25, 48 (1978). Such conduct “by a public employer would also have the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect” on employees’ statutory right to negotiate through their majority representative. 78 N.J. at 49. See also City of Newark, I.R. No. 2015-1, 41 NJPER 287 (¶95 2014), app. disp. 42 NJPER 212 (¶59 App. Div. 2015). If an employer unilaterally alters the status quo, a majority representative is under no obligation to meet with and negotiate with that employer unless and until the employer restores the status quo. Hudson Cty., P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978), aff’d NJPER Supp.2d 62 (¶44 App. Div. 1979).

In Hudson Cty., the Appellate Division affirmed a Commission decision holding that the county had violated the Act by unilaterally discontinuing the practice of paying salary increments to union members. The employer argued, in pertinent part, that the union had an obligation to meet with the county and negotiate over the continued payment of salary increments. The Commission disagreed, explaining:

Concerning the Union’s failure to discuss the dispute over increments at negotiating sessions held subsequent to the Board’s unilateral action, the Commission concludes that the Union was justified in not attempting to negotiate the subject, leaving

its resolution to the Commission under an unfair practice charge. The Act requires that both parties negotiate in good faith. When an employer has clearly evidenced his bad faith by unilaterally altering a term and condition of employment, the employee organization, provided it has filed an unfair practice charge with the Commission, is relieved of its obligation to negotiate further on the particular subject as long as the employer, by failing to reinstitute the status quo, demonstrates his continued bad faith. Such conduct by an employer negates the possibility of any meaningful negotiations on the subject. Requiring the employee organization to negotiate under such conditions would place it in an untenable position by allowing the employer to benefit from his unfair practice through the improved negotiating leverage he has obtained as a result of his unilateral withdrawal of a then existing benefit. Such a result would undermine the unfair practice provisions of the Act and the requirement of good faith negotiations as a method for insuring labor peace.

[Id., 4 NJPER at 90]

See also City of Newark, 41 NJPER at 289 (Commission designee, citing Galloway, noted that the "repudiation of an economic benefit such as the timing and method of receiving accrued leave upon retirement undermines the union's ability to represent its unit and chills the employees' rights to negotiate collectively").

Like the union in Hudson Cty., the SOA was not obligated to meet with and negotiate with the City unless and until it restored the benefits it unilaterally withheld from SOA unit members. After the City violated the Act five times and withheld

hundreds of thousands of dollars of accrued benefits to which SOA unit members were contractually entitled, the SOA was not obligated to negotiate with the City in order to restore those benefits. Such a result would have a coercive and chilling effect on the collective negotiations process and is anathema to the Act. Galloway; Hudson Cty. Accordingly, I dismiss the City's claim that the SOA's refusal to meet with and respond to its negotiations proposals in October 2014 was a violation of the Act.^{4/}

5.4b(2) Claim

The City alleges the SOA violated section 5.4b(2) of the Act. Section 5.4b(2) prohibits a majority representative from engaging in a coercive pattern of conduct designed to interfere with the employer's right to choose a collective negotiations representative. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12

^{4/} The SOA was also not obligated to respond to the City's March 26, 2014 information request. At the time of the request, the parties were involved in related litigation concerning five unfair practice charges. The City's request was akin to a discovery request and was not relevant to its duty to administer the parties' CNA. NLRB v. WXON-TV, Inc., 289 NLRB 615, 128 LRRM 1313 (1988) (Respondent employer was not obligated to furnish information to union during pendency of unfair labor practice charge); accord NLRB v. Fremont Medical Ctr., 357 NLRB 1899, 192 LRRM 1393 (2011); see also Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981) (Commission relies on federal law in analyzing duty to supply information).

NJPER 3 (¶17002 1985); Wayne Tp., D.U.P. No. 2017-3, 43 NJPER 167 (¶50 2016). In Downe Tp. Bd. of Ed., the Commission discussed several examples of a "coercive pattern of conduct" under section 5.4b(2), such as union threats of strikes, work stoppages or refusing to bargain unless the employer discharged, demoted or otherwise changed their negotiations representative. 12 NJPER at 6.

The City has not alleged any facts indicating the SOA interfered with the City's designation of a collective negotiations representative. I therefore dismiss the City's 5.4b(2) claim.

5.4b(3) Claim

The City alleges that the SOA refused to "negotiate the terms of a successor agreement" to the parties' 2009-2012 CNA. (Paragraph 33 of Charge). I dismiss this claim since the Commission held that the SOA *did* negotiate and reach a successor agreement with the City. City of Newark, P.E.R.C. No. 2016-56, 42 NJPER 441 (¶119 2016).

Section 5.4b(3) of the Act requires a majority representative to negotiate in good faith with a public employer concerning terms and conditions of employment. N.J.S.A. 34:13A-5.4b(3); Glen Rock Bd. of Ed., P.E.R.C. No. 82-11, 7 NJPER 454 (12201 1981); Rutgers University, D.U.P. No. 2016-5, 43 NJPER 15

(¶5 2016); aff'd P.E.R.C. No. 2017-4, 43 NJPER 71 (¶18 2016). To establish a 5.4b(3) violation, the employer must demonstrate that the majority representative, by its action, adversely impacted negotiations or was an impediment to reaching an agreement. Rutgers, P.E.R.C. No. 2017-4, 43 NJPER 71 (¶18 2016).

As explained above, the SOA's refusal to meet with and negotiate with the City in the fall of 2014 was excusable in the context of the pendency of unfair practice charges filed by the SOA against the City. Further, the Commission found that the City's conduct was an impediment to reaching an agreement when it inserted a provision that had not been negotiated into the parties' memorandum of agreement. The Commission also found that the SOA did reach a successor agreement with the City to the 2009-2012 CNA. City of Newark, 42 NJPER at 444. Therefore, I dismiss the City's 5.4b(3) claim.^{5/}

Jurisdiction over Ethics Complaint

I also dismiss the City's claim that the SOA's filing of an ethics complaint against a City attorney in January 2015 violates the Act. The New Jersey Supreme Court "exercises plenary authority over the regulation of the practice of law in New Jersey, including disciplinary grievances against attorneys and

^{5/} The City does not cite any Commission rule or regulation the SOA violated. I therefore dismiss the City's 5.4b(5) claim.

business entities authorized to practice law in New Jersey.”

O’Boyle v. Supreme Court of New Jersey et. al., 421 N.J.Super.

457, 465 (App. Div. 2011). We lack jurisdiction over this claim.

ORDER

The unfair practice charge is dismissed.

/s/Daisy Barreto
Daisy Barreto
Acting Director of
Unfair Practices

DATED: August 4, 2017
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to
N.J.A.C. 19:14-2.3.**

Any appeal is due by August 14, 2017.