

D.U.P. NO. 2019-2

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

In the Matter of

ESSEX COUNTY SHERIFF,

Respondent,

-and-

Docket No. CO-2018-052

PBA LOCAL 183,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by PBA Local 183 (PBA) against the Essex County Sheriff (Sheriff). The charge alleged that the Sheriff violated section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act) by failing to properly train officers in the use of body worn cameras (BWC) and supporting equipment; failing to properly maintain and inventory BWCs and supporting equipment; disciplining certain officers when their BWCs and/or supporting equipment malfunctioned or was unavailable for use; and failing to respond to a grievance regarding these issues. The Sheriff argued that disputes pertaining to disciplinary action must be resolved in accordance with the parties' self-executing grievance procedure and that public employers have a managerial prerogative to require the use of BWCs and to establish related policies and procedures pertaining to training, maintenance, and inventory and that any safety issues have been insufficiently alleged. The Director agreed, finding that the PBA could have demanded binding arbitration if it believed it had a valid grievance and was dissatisfied with the Sheriff's response or failure to respond. The Director also found that the Sheriff has a non-negotiable managerial prerogative to require the use of BWCs and supporting equipment and to establish related policies and procedures pertaining to training, maintenance, and inventory; and that although related severable impact issues may be negotiable, the PBA has not alleged that the Sheriff refused to negotiate in response to a demand to negotiate.

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Appearances:

For the Respondent,
Courtney Gaccione, Essex County Counsel
(Sylvia Hall, Assistant County Counsel)

For the Charging Party,
Law Offices of Nicholas J. Palma, Esq., attorneys
(Valerie Palma DeLuisi, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 11, 2017, PBA Local 183 (PBA) filed an unfair practice charge against the Essex County Sheriff (Sheriff). The charge alleges that sometime after August 2015 the Sheriff violated section 5.4a(1) and (5)^{1/} of the New Jersey

^{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 refusing to process grievances presented by the majority representative.

Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by failing to properly train officers in the use of body worn cameras (BWC) and supporting equipment; failing to properly maintain and inventory BWCs and supporting equipment; disciplining officers Dennis Kihlberg (Kihlberg), Michael Kihlberg (Kihlberg), and Kevin Gregowicz (Gregowicz) when their BWCs and/or supporting equipment malfunctioned or was unavailable for use; and failing to respond to a grievance regarding these issues filed by the PBA in March 2017. As a remedy, the charge requests a determination that the Sheriff committed an unfair practice and an order compelling the Sheriff to rescind the one-day suspensions; provide all officers with proper training on the use of BWCs and supporting equipment; inventory all BWCs and supporting equipment to ensure sufficient supplies; and inspect all BWCs and supporting equipment to ensure proper functionality.

On October 27, 2017, the PBA served a position statement on the Sheriff. The PBA argues that this unfair practice charge must be resolved before or concurrently with the disciplinary actions because the underlying issues are interrelated. The PBA maintains that ". . . even if [the Commission is] not the proper venue for adjudication of the suspension of the named PBA members, [the Commission] would still be the proper venue for determination of whether the [Sheriff] committed an unfair [] practice." The PBA contends that the Sheriffs ". . . creating an

unsafe work environment by forcing [PBA members] to utilize faulty equipment, which results in members constantly checking their BWCs to ensure they are functioning."

On October 30, 2017, the Sheriff served a position statement on the PBA. The Sheriff asserts that the parties have negotiated a self-executing grievance procedure that the PBA is bound to use for resolving disputes over disciplinary action. The Sheriff also maintains that as a law enforcement agency, it has a managerial prerogative to require the use of BWCs and to establish related policies and procedures pertaining to training, maintenance, and inventory of BWCs. The Sheriff contends that the concerns raised by the PBA ". . . are best treated as administrative law enforcement issues" that can ". . . be effectively addressed . . . through administrative reports from officers through the chain of command"; and that ". . . many issues are already being handled due to the alleged generalized safety issues implied in officers' administrative reports" such that ". . . some of the [PBA's] [c]laims are now moot." The Sheriff claims that ". . . issues of BWC design defects are beyond [its] ken and control . . . [and] non-cognizant under [the Act]"; and that ". . . any implied safety issue . . . is insufficiently alleged."

On November 3, 2017, a staff agent held an exploratory conference.

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 PBA and the County of Essex (County) and Sheriff are parties to a collective negotiations agreement (CNA) in effect from January 1, 2002 through December 31, 2005. Since 2005, the parties have been subject to two interest arbitration awards (Dkt. No. IA-2006-052 dated November 20, 2007; Dkt. No. IA-2008-098 dated September 7, 2011) and several memoranda of agreement (MOA) that modified and/or extended terms and conditions of employment. The parties' most recent MOA extends from January 1, 2014 through December 31, 2017.

Article XI of the parties' 2002-2005 CNA, entitled "Grievance Procedure," provides in a pertinent part (emphasis supplied):

B. Definitions

The term "grievance" shall mean an allegation by the PBA that there has been:

1. A misinterpretation or violation of the terms of this Agreement which is subject to the grievance procedure outlined herein and shall hereinafter be referred to as a "contract grievance" and shall include disciplinary action; or

2. Inequitable, improper, unjust application, misinterpretation or violations of rules or regulations, existing policy, or orders applicable to the Sheriff's Department, which shall be processed up to and including the Sheriff or his designee, and shall hereinafter be referred to as a "non-contractual grievance."

* * *

D. Steps of the Grievance Procedure

1. The following constitutes the sole and exclusive method for resolving grievances between the parties covered by this Agreement.

STEP 1

(a) Grievance arising solely from actions taken by the County Executive shall be filed by the PBA with the County Administrator with a copy of the Sheriff.

(b) Grievance arising solely from actions taken by the Sheriff or his staff shall be filed by the PBA with the Sheriff.

(c) The grievance shall be filed in writing to the appropriate office with a copy of the grievance to the Labor Relations Office within thirty (30) calendar days of the occurrence of the grievance. Failure to act within said thirty (30) calendar days shall be deemed to constitute an abandonment of the grievance.

(d) The appropriate official shall render a decision in writing within fifteen (15) calendar days after receipt of the grievance. Failure to respond within the said fifteen (15) days shall be deemed to be a denial of the grievance.

BINDING ARBITRATION

1. In the event the grievance is not resolved or no response is given within the time provided at Step 1, the grievance may be referred to binding arbitration only if each and every one of the following conditions is met.

(a) The request for arbitration shall be filed in writing with the State Board of Mediation with copies of the County Executive and the Sheriff;

(b) The PBA and only the PBA may file for arbitration;

(c) The request for arbitration must be filed within twenty (20) calendar days of the response or time for response at Step 1;

(d) The grievance is a contract grievance within the meaning of Section B.1 of this Article.

On July 28, 2015, the State of New Jersey (State) Attorney General's Office (AG) promulgated AG Law Enforcement Directive (Directive) 2015-1, entitled "Law Enforcement Directive Regarding Police BWCs and Stored BWC Recordings." AG Directive 2015-1 establishes statewide standards regarding the basic requirements that all police departments must satisfy while also permitting departmental policies to address local concerns. Every State law enforcement agency - including County Sheriffs - that equipped

any of its officers with a BWC was required to promulgate and enforce a policy or procedure that complied with AG Directive 2015-1 by September 26, 2015.^{2/}

On August 3, 2015, in response to AG Directive 2015-1, the Sheriff issued General Order No. 2015-07, entitled "Body Worn Cameras." Section VI of General Order No. 2015-07, entitled "Compliance," provides in a pertinent part:

Failure to comply with any provisions in this Order may result in disciplinary action.

On August 31, 2015, the County purchased 32 BWCs, 32 locking magnetic chest mounts, 32 charging base kits, and related software from a State-authorized distributor of police and homeland security equipment. The purchase was partially funded by a matching grant from the AG's BWC Assistance Program. In September, 2015, the Sheriff received the BWCs and distributed them to officers in the patrol division together with copies of AG Directive 2015-1 and General Order No. 2015-07. Initially, in-house training demonstrations were given in small groups or on a

^{2/} Under the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., the State's public policy is "to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State." N.J.S.A. 52:17B-98.

one-to-one basis. Subsequently, training has been administered on a one-to-one basis.

On February 15, 2017, the Sheriff disciplined officers Kihlberg, Kihlberg, and Gregowicz for failing to patrol with functioning BWCs in violation of General Order No. 2015-07 and imposed a one-day suspension on each officer. On March 29, 2017, the PBA filed a grievance on behalf of the officers requesting that the Sheriff rescind the one-day suspensions; provide all officers with proper training on the use of BWCs; inventory all BWCs and supporting equipment to ensure sufficient supplies; and have all BWCs and supporting equipment inspected to ensure proper functionality. The Sheriff did not respond to the grievance. The PBA did not demand binding arbitration.

On June 20, 2017, the Sheriff issued Memo No. 2017-18, which amends General Order No. 2015-07, in order to specify when an officer equipped with a BWC is required to activate and deactivate the device.

From September, 2015 through August, 2017, sheriff's officers filed with their supervisors a significant number of administrative submissions regarding issues related to the use of BWCs (e.g., technical malfunctions/defects, physical attachment defects, safety concerns). However, the PBA has not alleged that it made a demand to negotiate, or that the Sheriff refused to

negotiate in response, regarding any severable impact related to the use of BWCs and/or supporting equipment.

ANALYSIS

Grievance Procedure

The PBA alleges that the Sheriff violated the Act by disciplining officers when their BWCs and/or supporting equipment malfunctioned or was unavailable for use and by failing to respond to a related grievance. The Sheriff counters that disputes pertaining to disciplinary action must be resolved in accordance with the parties' self-executing grievance procedure. I agree with the Sheriff and dismiss these aspects of the PBA's charge.

N.J.S.A. 34:13A-5.4a(5) prohibits public employers from refusing to process grievances presented by the majority representative. However, N.J.S.A. 34:13A-5.3 requires any dispute covered by the terms a collective negotiations agreement to be resolved in accordance with the parties' negotiated grievance procedure. State of New Jersey (Dep't of Human Services), D.U.P. No. 2018-8, 44 NJPER 366 (¶103 2018), adopted P.E.R.C. No. 2018-55, 45 NJPER 24 (¶6 2018).

Article XI of the parties' 2002-2005 CNA^{3/} provides that if the employer does not issue a written decision within 15 calendar days after receipt of a grievance, the PBA has the right to demand binding arbitration of a grievance pertaining to disciplinary action. See Art. XI(D)(1), Step 1(a-d); Art. XI(D)(1), Binding Arbitration(1)(a-d). Thus, the grievance procedure is self-executing. The Commission has held that a public employer's failure to respond to a grievance at intermediate steps is typically not an unfair practice when the underlying collective negotiations agreement includes a self-executing grievance procedure ending in binding arbitration. New Jersey State Judiciary (Cumberland Cty. Vicinage), D.U.P. No. 2006-3, 31 NJPER 345 (¶136 2005); City of Newark, D.U.P. No. 95-22, 21 NJPER 53 (¶26037 1995); see also City of Pleasantville, D.U.P. No. 77-2, 2 NJPER 372, 373 (1976) (holding that in such instances, ". . . the employee organization is not precluded from pursuing the arbitration to conclusion ex parte and the grievance will be 'processed' to arbitration pursuant to the parties' contract notwithstanding the public employer's failure to take part in that process").

3/ Although the PBA "does not concede that [its members] are bound by a [CNA] to follow any certain grievance procedure" because "it is nearly impossible" to determine which terms and conditions of employment "are currently relevant," neither party has provided any evidence demonstrating that the grievance procedure set forth in the parties' 2002-2005 CNA has been modified.

The PBA and the Sheriff have collectively negotiated a self-executing grievance procedure pertaining to the disciplinary aspects of the PBA's charge. Regardless of the Sheriff's rationale for allegedly failing to respond to the March 2017 grievance, the PBA could have demanded binding arbitration if it believed it had a valid grievance and was dissatisfied with the Sheriff's response or failure to respond. Accordingly, I decline to issue a complaint on any facts alleging a violation of section 5.4a(1) or (5) of the Act regarding disciplinary action taken against officers Kihlberg, Kihlberg, and Gregowicz and/or failure to respond to a related grievance.

Body Worn Cameras

The PBA also alleges that the Sheriff violated the Act by failing to properly train officers in the use of BWCs and supporting equipment and failing to properly maintain and inventory BWCs and supporting equipment. The Sheriff counters that it has a managerial prerogative to require the use of BWCs and to establish related policies and procedures pertaining to training, maintenance, and inventory and that any safety issues have been insufficiently alleged. I agree with the Sheriff and dismiss the remaining aspects of the PBA's charge.

The State AG has sanctioned the use of BWCs and established statewide standards regarding the basic requirements that all police departments must satisfy while also permitting

departmental policies to address local concerns. See AG Directive 2015-1; N.J.S.A. 52:17B-98. In order to comply with AG Directive 2015-1, the Sheriff issued guidelines regarding the proper and lawful use of BWCs and specified that failure to comply could result in disciplinary action. See General Order No. 2015-07; Memo No. 2017-18. The Commission has held that the ". . . the installation of exposed cameras for the purpose of protecting people and property is a significant governmental interest in which the employer's interest for security outweighs the employees interest for privacy, placing the issue outside of the scope of negotiability." Belleville Bd. of Ed. and Belleville Ed. Ass'n, P.E.R.C. No. 2015-79, 42 NJPER 41, 43 (¶12 2015), aff'd 45 NJPER 8 (¶3 App. Div. 2018) (holding that the installation of exposed cameras with both audio and video capabilities in certain public spaces of school district buildings was a managerial prerogative while the severable impact of the extensive security system on staff was negotiable upon demand); City of Paterson, H.E. No. 2007-3, 33 NJPER 9 (¶7 2007), adopted P.E.R.C. No. 2007-62, 33 NJPER 143 (¶50 2007) (holding that the installation of overt security cameras in non-private areas of the workplace to protect people and property was a managerial prerogative while the impact of the employer using video footage for investigation and disciplinary action was negotiable, but only upon demand); City of Paterson, P.E.R.C. No.

2011-5, 36 NJPER 300 (¶114 2010) (holding that the installation of security cameras in the public safety complex within the radio room where 911 calls are received and police/fire services are dispatched was a managerial prerogative given the employer's interest in ensuring that employees are not fighting or sleeping on duty while acknowledging that the impact of the installation may be negotiable upon demand); New Jersey Transit Bus Operations, P.E.R.C. No. 2015-53, 41 NJPER 392 (¶123 2015) (holding that the installation of DriveCam videos on buses and the use of information gathered from surveillance equipment to discipline bus operators was a managerial prerogative; finding that negotiations regarding employee privacy or job security interests implicated by use of DriveCam evidence for discipline would substantially implicate the employer's interests in implementing its statutory mission of efficiently and effectively operating a safe, responsive public transportation system).

The Commission has also held that ". . . an employer has a prerogative to decide which employees will be trained, how they will be trained, and how long they will be trained." City of Englewood, P.E.R.C. No. 2016-41, 42 NJPER 300, 302 (¶86 2015); see also Monmouth Cty. and Monmouth Cty. Sheriff, P.E.R.C. No. 2010-30, 35 NJPER 393, 396 (¶132 2009) (holding that ". . . the extent and type of training of public safety officers is a managerial prerogative"). The ". . . non-discriminatory

assignment of unit members to training schools is not a mandatory subject of negotiation" and ". . . [a]n employer is not required to negotiate over whether or which officers should receive additional training or which training programs it deems to be most appropriate to further the development of its police department." Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308, 308 (¶13136 1982).

The Sheriff has a non-negotiable managerial prerogative to require the use of BWCs and supporting equipment and to establish related policies and procedures pertaining to training, maintenance, and inventory. Although related severable impact issues may be negotiable, the PBA has not alleged that the Sheriff refused to negotiate in response to a demand to negotiate. See City of Paterson, 33 NJPER at 18 (holding that ". . . [w]ithout a demand, no obligation to negotiate impact is triggered"); accord Belleville Bd. of Ed. and Belleville Ed. Ass'n; City of Paterson, 36 NJPER at 300; New Jersey Transit Bus Operations. Accordingly, I decline to issue a complaint on any facts alleging a violation of section 5.4a(1) or (5) of the Act regarding failure to properly train officers in the use of BWCs and supporting equipment or failure to properly maintain and inventory BWCs and supporting equipment.

The PBA's unfair practice charge does not satisfy the complaint issuance standard. N.J.A.C. 19:14-2.1.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth

Jonathan Roth

Director of Unfair Practices

DATED: January 16, 2019
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 January 30, 2019.