

H.E. NO. 2023-1

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2018-308

NEWARK POLICE SUPERIOR
OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Newark Police Superior Officers' Association's (SOA) motion for summary judgment. The Hearing Examiner determined that the City of Newark violated 5.4a(1) and (5) when it refused to negotiate the impact of its revisions to General Orders 99-04 and 89-02 regarding random drug testing with SOA.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Kenyatta Stewart, Corporation Counsel
(Chane M. Jones, Esq., Assistant Corporation Counsel,
on the brief)

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

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On June 26, 2018 and March 29, 2021, Newark Police Superior Officers' Association (SOA) filed an unfair practice charge and an amended charge, respectively, against the City of Newark (Newark). The amended charge alleges that Newark violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5), and (7),^{1/} when it revised General Orders 99-04 and 89-

1/ These provisions prohibit public employers, their representatives or agents from: (1) Interfering with,
(continued...)

02 regarding random drug testing, and refused to negotiate the impact of those revisions with SOA. Specifically, in the amended charge, SOA alleges that Newark revised General Orders 99-04 and 89-02 with regard to the frequency and number of officers to be randomly drug tested, and with regard to the random testing process, SOA demanded impact negotiations, and Newark refused.

On March 30, 2021, a Complaint and Notice of Hearing issued. A pre-hearing conference was conducted on April 15, 2021. Newark filed an answer by letter dated May 14, 2021.

On June 8, 2021, SOA filed a motion for summary judgment supported by a brief, exhibits, and the certification of its President, Captain John J. Chrystal III. On June 10, 2021, the Commission case administrator advised Newark that it may file a response to SOA's motion for summary judgment by July 12, 2021. On July 6, 2021, Newark filed its opposition brief and exhibits. SOA did not file a reply brief.

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit; and (7) Violating any of the rules and regulations established by the commission.

On July 15, 2021, the Chair referred the motion to me for disposition. N.J.A.C. 19:14-4.8(a).

FACTS

SOA is the majority representative for all police superior officers employed by Newark in the ranks of sergeant, lieutenant, and captain. SOA and Newark are parties to a collective negotiations agreement (CNA) effective January 1, 2013 through December 31, 2015. SOA and Newark are currently engaged in collective negotiations for a successor agreement.

On March 20, 2018, New Jersey Attorney General Gurbir S. Grewal issued Law Enforcement Directive 2018-02, implementing statewide mandatory random drug testing for all state, county, and municipal law enforcement agencies and sworn officers. The Attorney General's Directive 2018-02 required all state, county and municipal law enforcement agencies to "adopt and/or revise their existing drug testing policies" consistent with the directive.

On April 9, 2018, Newark's public safety director Anthony F. Ambrose issued Memorandum 18-223, which announced revisions to General Order 99-04 regarding Newark's existing random drug testing program in accordance with the Attorney General Law Enforcement Directive 2018-02. These revisions to General Order 99-04 appear in two separate sections of the order. Substantively, these revisions relate to both the frequency of

random drug testing, as well as to the number of officers to be randomly drug tested.

Specifically, the revisions to the frequency and number of officers to be tested appear first in section E of General Order 99-04, and provide as follows:

E. Frequency and Number of Officers to be tested - The Public Safety Director shall delineate the frequency and number of officers to be selected for random drug testing. At a minimum, random drug testing shall be conducted at least once in the remainder of 2018 and at least twice in every subsequent calendar year. At least (10%) of the total number of sworn officers within an agency shall be randomly tested each time.
[Emphasis added.]

Next, the same revisions regarding frequency and number of officers to be tested appear in General Order 99-04 in a section entitled "Random Testing Process," which provides as follows:

VI. Random Testing Process

A. Random Selection

. . .

2. The Office of Professional Standards shall be responsible for conducting the random test selection. At a minimum, random drug testing shall be conducted at least once in the remainder of 2018 and at least twice in every subsequent calendar year. The authorization for random testing shall be made by the Public Safety Director.
3. At least 10% of the total number of sworn officers within an agency

shall be randomly tested each time.
This minimum may be increased at
the discretion of the Public Safety
Director. [Emphasis added.]

On June 15, 2018, SOA sent a letter to Director Ambrose demanding negotiations over these revisions to General Order 99-04, and the impact of those revisions on terms and conditions of employment, which reads in part as follows:

The SOA demands to negotiate over the revisions to . . . General Order [99-04], or the impact from this general order, specifically frequency and number of officers to be tested. This is a revision to a prior term and condition of employment. The employer is supposed to negotiate over revisions to any term and condition of employment prior to its implementation.

Later the same day on June 15, 2018, Director Ambrose replied by email and denied SOA's request.

On January 29, 2021, Newark issued another revised version of General Order 99-04 regarding random drug testing, as well as General Order 89-02 regarding its drug screening policy. The 2021 revisions to these two general orders are similar to those detailed above in the April 9, 2018 revision to General Order 99-04, and also relate to the frequency of testing and the number of officers to be tested.

LEGAL ARGUMENTS

SOA argues that its motion for summary judgment should be granted because "most, if not all," of the material facts are not in dispute. Specifically, SOA maintains that Newark's 2018 and

2021 revisions to General Order 99-04, as well as Newark's 2021 revisions to General Order 89-02, regarding random drug testing constitute a change in mandatorily negotiable terms and conditions of employment made during the course of collective negotiations in violation of N.J.S.A. 34:13A-5.3 and 33. SOA further argues that even if Newark has a managerial prerogative to implement revisions to General Orders 99-04 and 89-02, due to the Attorney General's Law Enforcement Directive 2018-02, Newark has an obligation to negotiate with SOA regarding the impact of its revisions to General Orders 99-04 and 89-02, and Newark violated the Act when it refused to negotiate that impact with SOA.

Newark argues that it has a managerial prerogative to implement revisions to General Orders 99-04 and 89-02, as it was required to do so by Attorney General Law Enforcement Directive 2018-02, and therefore it does not need to negotiate these revisions with SOA. Newark further argues that its random drug testing policy was impacted by the COVID-19 pandemic, which provides a further basis for its managerial prerogative to revise General Orders 99-04 and 89-02 without negotiations.

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter

of law.^{2/} Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the [opposing] party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER (¶16 2006).

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Paterson Police PBA Local No.

^{2/} N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), with Local 195, IFPTE v. State, 88 N.J. 393, 403-404 (1982). Paterson provides:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Here, Newark appropriately argues that it has a managerial prerogative to implement revisions to General Orders 99-04 and 89-02, as it was required to do so by Attorney General Law Enforcement Directive 2018-02. However, it is well settled that even if a public employer has a managerial prerogative to implement a substantive decision, the procedural aspects of that decision, and their severable economic consequences or "impact," are mandatorily

negotiable. See Local 195, IFPTE v. State of N.J., 88 N.J. 393, 410, 417 (1982); State of N.J. v. State Supervisory Employees Assn., 78 N.J. 54, 90-91 (1978); see also City of Newark, P.E.R.C. No. 91-5, 16 NJPER 435 (¶21186 1990) (procedures associated with police officer drug testing are mandatorily negotiable in general), aff'd NJPER Supp.2d 257 (¶212 App. Div. 1991); City of Newark, P.E.R.C. No. 2005-43, 30 NJPER 506 (¶172 2004).

Beyond the well-settled principle that a public employer must engage in impact negotiations after it exercises its managerial prerogative, the Commission has also previously recognized -- in two separate matters also involving Newark -- that public employers must negotiate random drug testing procedures. In City of Newark, 16 NJPER at 436, supra, the Commission found that a negotiated agreement on drug testing procedures would not significantly interfere with the exercise of Newark's inherent or express managerial prerogatives, as "[d]rug testing procedures addressing notification, chain of custody, confidentiality and accuracy protect employees' interests without significantly interfering with the exercise of any prerogatives." Id. The Commission concluded that Newark violated subsections 5.4(a) (5) and derivatively (a) (1) by failing to negotiate drug testing procedures before announcing a testing policy. Id.

Indeed, this same principle that police drug testing procedures are mandatorily negotiable was recognized in another

Newark matter, City of Newark, 30 NJPER at 506, supra, involving an earlier version of the same General Order 99-04 at issue in this matter. Furthermore, it is undisputed that SOA expressly demanded impact negotiations, which Newark refused. See State of New Jersey, P.E.R.C. No. 2012-24, 38 NJPER 205 (¶70 2011) (in matters "involving managerial policy changes that result in severable alterations in working conditions, the duty to negotiate arises only where the majority representative makes a demand").

Therefore, even if Newark had a managerial prerogative to revise its random drug testing program, at the very least, Newark was required to negotiate over the impact of those revisions with SOA. Newark had an obligation to negotiate the impact of its revisions with SOA, SOA demanded impact negotiations, and Newark refused in violation of the Act.

Applying the summary judgment standard to the facts and arguments made by the parties, we conclude that the material facts are not in dispute and that SOA is entitled to judgment as a matter of law on its charge that Newark violated 5.4a(5) and, derivatively, a(1) when it refused to negotiate the impact of its 2018 and 2021 revisions to General Order 99-04, and its 2021 revisions to General Order 89-02, regarding random drug testing with SOA.

CONCLUSIONS OF LAW

Newark violated 5.4a(1) and (5) of the Act when it refused to negotiate the impact of its 2018 and 2021 revisions to General Order 99-04, and its 2021 revisions to General Order 89-02 regarding random drug testing with SOA.

RECOMMENDED ORDER

SOA's motion for summary judgment is granted.

Newark is ordered to:

A. Cease and desist from:

1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate the impact of its 2018 and 2021 revisions to General Order 99-04, and its 2021 revisions to General Order 89-02, regarding random drug testing with SOA.

2) Refusing to negotiate in good faith with SOA concerning terms and conditions of employment of employees in its unit, particularly by refusing to negotiate the impact of its 2018 and 2021 revisions to General Order 99-04, and its 2021 revisions to General Order 89-02, regarding random drug testing with SOA.

B. Take the following action:

1) Negotiate the impact of its 2018 and 2021 revisions to General Order 99-04, and its 2021 revisions to General Order 89-02, regarding random drug testing with SOA.

2) Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such, on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and,

3) Within twenty (20) days of receipt of this order, notify the Chair of the Commission what steps the Respondent has taken to comply with this Order.

/s/Lisa Ruch
Hearing Examiner

DATED: August 2, 2022
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by August 12, 2022.



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate the impact of the 2018 and 2021 revisions to General Order 99-04, and the 2021 revisions to General Order 89-02, regarding random drug testing with SOA.

WE WILL cease and desist from refusing to negotiate in good faith with SOA concerning terms and conditions of employment of employees in its unit, particularly by refusing to negotiate the impact of the 2018 and 2021 revisions to General Order 99-04, and the 2021 revisions to General Order 89-02, regarding random drug testing with SOA.

WE WILL take the following action and negotiate the impact of the 2018 and 2021 revisions to General Order 99-04, and the 2021 revisions to General Order 89-02, regarding random drug testing with SOA.

WE WILL post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such, on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and,

WE WILL within twenty (20) days of receipt of this order, notify the Chair of the Commission what steps the Respondent has taken to comply with this Order.

Docket No. CO-2018-308

City of Newark
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830