

I.R. NO. 87-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-87-287

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

A Commission designee denied interim relief on an application by the Charging Party to restrain the City from preventing the Charging Party from addressing recruits at the Police Academy during the period of their training. Charging Party sought to explain to the recruits what their rights were under the contract and our Act.

The designee determined that the Charging Party failed to satisfy one of the standards involved, namely, a substantial likelihood of success on the merits as to the facts. It appeared that there is a material issue of fact of whether or not recruits in training are covered by the recognition clause in the contract. This must await a plenary hearing.

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Appearances:

For the Respondent
Glenn A. Grant, Corporation Counsel

For the Charging Party
Markowitz & Richman, Esqs.
(Joel G. Scharff, Esq.)

INTERLOCUTORY DECISION AND ORDER

On April 2, 1987, the Fraternal Order of Police, Newark Lodge No. 12 (hereinafter the "Charging Party" or the "FOP") filed an Unfair Practice Charge with the Public Employment Relations Commission (hereinafter the "Commission") alleging that the City of Newark (hereinafter the "Respondent" or the "City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that on or about March 30, 1987, the City hired 38 "police officers" and assigned them for training at

the Police Academy, after which the City refused to recognize the FOP as the exclusive representative for these employees, notwithstanding that the certification of representative of the FOP, which was issued on November 24, 1986, certified the FOP as representative of all rank and file police officers, which is set forth in the recognition clause of the 1987-88 collective negotiations agreement; on March 30, 1987, the City refused to permit FOP representatives access to address "officers at the Police Academy" in alleged violation of the agreement and past practice; the City has ordered officers of the Police Academy to turn over "A & D" cards of the FOP to supervisory personnel with threats of disciplinary charges; and, also, on March 30, 1987, the City assisted the representatives of PBA Local No. 3, a minority representative, in permitting them access to the Police Academy to solicit employee authorizations, notwithstanding provisions in the FOP and City collective negotiations agreement; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1)-(5) of the Act.^{1/}

^{1/} These subsections 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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or

On April 2, 1987, the FOP, upon notice to the City and a City attorney having appeared, presented to the undersigned Commission designee the above Unfair Practice Charge together with an affidavit by FOP President Thomas Possumato and certain exhibits, among which was the 1987-88 collective negotiations agreement between the parties, a certification of representative of the FOP, dated April 8, 1981, in which the FOP was certified as the exclusive representative for all police officers of the City "...including all police officers currently enrolled at the Academy..." and two earlier agreements for consent election, one of which in 1978 described the eligible voters as all police officers and, also, "...all police officers currently enrolled at the Academy..." but, however, a second agreement for consent election in 1979 referred only to "all police officers of the Newark Police Department."

The affidavit of Possumato, supra, averred, inter alia, that on Monday, March 30, 1987, 38 new police employees commenced training at the Police Academy and that under the agreement and the practice of many years the FOP was permitted to address the recruit trainees in order to acquaint them with their contractual and

1/ Footnote Continued From Previous Page

complaint or given any information or testimony under 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."

statutory rights; and that shortly before this group of recruits entered the Police Academy in March 1987, the City had confirmed through Robert Worthington that the FOP would be permitted to address them; however, on March 30, 1987, the FOP was advised that the Chief of Police had ordered that the FOP not be permitted to address the recruits on the ground that they were not "police officers"; but, thereafter, the FOP was advised by the City's Acting Personnel Director that the newly hired personnel (recruits) were hired in the title of "police officer"; and, finally, the Chief of Police advised the FOP that the City did not recognize the applicability of the FOP agreement to trainees (recruits) and the City did not permit the transmission of dues deductions or representation fee deductions to the FOP from the trainees (recruits).

After hearing the arguments of the parties on April 2nd, and considering the facts presented, none of which were materially disputed by the City, the undersigned executed an Order granting temporary restraints, pending a formal hearing on April 7, 1987, in which the City was restrained from refusing to permit access to representatives of the FOP to address recruits regarding the provisions of the collective negotiations agreement and their rights under the Act and, further, the City was restrained from refusing to permit recruits in the Police Academy to sign authorization and designation cards to the FOP and from demanding a turnover of such cards to any City personnel other than representatives of the FOP;

and such cards heretofore turned over to representatives of the Police Department administration were to be returned to the FOP.

The parties appeared by counsel before the undersigned on April 7, 1987, where testimony without cross-examination was elicited through Possamuto, both as to events prior to April 2, 1987, and subsequent thereto. The City proffered an affidavit by Louis Greenleaf, the Director of Police for the City, who essentially averred that the individuals appointed from Police Officer Lists and who attend the Academy attend so as "probationary recruits from the date of appointment to the completion of Police Academy training..." These individuals at the Police Academy (recruits) are not sworn in as Police Officers until the completion of their training and they are, until that time, probationary appointments. Thus, the City avers by Greenleaf that the recruits are not covered by the FOP contract and consequently the union has no right to address them until they are sworn in as police officers. Finally, Greenleaf states in his affidavit that the City will allow the FOP to address the recruits within the month of July 1987, which is close to the graduation date and the time of their being sworn in as Police Officers. Further, Greenleaf avers that the City recognizes the FOP's right to deduct dues or representation fees from the individuals who are sworn in as "police officers."

Possamuto, in his testimony supplementing his earlier affidavit, stated that Appendix "A" of the current collective negotiations agreement, which sets forth the salary schedule, has

always applied to individuals in training at the Police Academy. Possamuto also testified that after he served the undersigned's order with temporary restraints on April 2, 1987, his request for access to address recruits on April 3, 1987, was denied and, further, he has received no "A & D" cards from Police Department supervision since the date of the temporary restraints in this matter on April 2, 1987.

Finally, Possamuto acknowledged that he had been provided the opportunity to address six police officers, who had been sworn in subsequent to April 2, 1987.

DISCUSSION AND ANALYSIS

The Applicable Standard

As an example of one of many decisions on interim relief where the applicable standards for the grant thereof are set forth, see City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981). In that case it was stated once again that the test for the grant of relief is twofold: there must be (1) a substantial likelihood of success on the merits both as to the facts and the law; and (2) irreparable harm if the requested relief is not granted.

Commission designees have more recently been admonished to address these standards in the light of the New Jersey Supreme Court decision in Crowe v. DeGoia, 90 N.J. 126 (1982) where the above-stated test is substantially the same, supplemented, however, by an additional requisite, namely, that a court or as here, an administrative agency, must consider the relative hardship to the parties if the requested relief is granted or denied.

The Temporary Restraints Of April 2, 1987,
Must Be Dissolved.

It is clear to the undersigned that the Charging Party has failed to fulfill all of the requisites to the grant of interim relief after hearing and, thus, the temporary restraints issued on April 2nd must be dissolved. The undersigned does not quarrel with the fact that the Charging Party has satisfied the standard of irreparable harm in that, if it has a right to address recruits in the Police Academy during their training as to the content and particulars of the collective negotiations agreement, then this right can only be vindicated by an ongoing opportunity to do so. Obviously, once a recruit has gone through the Academy in the several months of training any suggestion that this opportunity can be remedied after a plenary hearing is without merit. Further, assuming for purposes of this decision that the relative hardship falls upon the FOP if the requested relief is denied, there is still the requisite for interim relief that the FOP establish a substantial likelihood of success on the merits both as to the facts and the law.

The undersigned is persuaded that, as a result of the interim relief hearing on April 7, 1987, a serious factual issue exists between the parties, which requires that the application for interim relief be denied and that temporary restraints granted on April 2nd be dissolved. The basic factual question, which must be resolved at a plenary hearing, following the issuance of a complaint, is the status of recruits under the recognition clause of

the current agreement while at the Police Academy and prior to their satisfactorily completing the training and being sworn in as police officers. Are they, in other words, covered by the recognition clause, notwithstanding that Article 1, §1 of this agreement describes the unit as "all police officers of the Newark Police Department" and excludes thereafter named groups of employees, ending with the phrase "and all others." In the opinion of the undersigned the language of Article 1, §1 is plainly ambiguous as to whether or not recruits at the Police Academy are covered by the recognition clause.

The undersigned also refers to p. 6 of the same agreement which provides that the City shall deduct "...the representation fee from a new employee as soon as possible after thirty (30) days from the beginning date of employment in a position in this unit..." (emphasis supplied). This provision of the agreement begs the question as to whether or not a recruit at the Police Academy is "in this unit."

The sworn testimony of Possamuto that the Police Academy recruits have been considered as eligible for salary under Appendix "A" of the current agreement still does not resolve the question of whether the term therein "...The salary for a police officer..." is intended to cover recruits at the Police Academy.

It is true that the certification of representative, certifying the FOP for a unit of all police officers in the Police Department of the City of Newark "...including all police officers

currently enrolled at the Academy....," dated April 8, 1981, affords some support for the Charging Party's position that enrollees at the Police Academy are in the unit. However, this language, which appeared in the certification of representative in April 1981 was never incorporated, at least on this record, into the recognition clause, which is currently Article 1 of the 1987-88 agreement. The fact of its omission may indicate an intention to modify what was the certified unit in 1981 or it may, upon plenary hearing, be found to be the agreed upon language, which included enrollees at the Police Academy.

The ambiguity in the proper interpretation to be given the recognition clause is also complicated by the fact that in the election agreement of January 1978, the unit was described as all police officers, including police officers currently enrolled at the Academy while a later agreement for election in 1979 referred only to "all police officers of the Newark Police Department." One wonders why there is this omission, notwithstanding the explanation of counsel for the FOP at the interim relief hearing that it was because there were no recruits in the Police Academy at the time that the 1979 agreement for election was executed.

Finally, when one examines the affidavit of Possamuto for the FOP and the affidavit of Greenleaf for the City, it is apparent that the factual issue discussed above as to coverage of recruits at the Police Academy under the FOP collective negotiations agreement is the subject of sharp disagreement. Greenleaf is adamant in ¶4 of

his April 7th affidavit that individuals appointed from the Police Officer Civil Service List serve as probationary recruits until they have completed Police Academy training and they are not sworn in until that time. His position is, on behalf of the City, that individuals at the Police Academy, not yet having been sworn in as police officers, are not covered by the FOP contract and thus the FOP has no right to address these recruits until they are appointed as police officers, which occurs with their swearing in after graduation from the Police Academy.

In summary, because of the absence of a substantial likelihood of success on the merits as to the factual question of unit coverage of recruits, supra, the undersigned must order that the temporary restraints of April 2, 1987, be dissolved and that the request for interim injunctive relief be denied.

ORDER

It is hereby Ordered that the temporary restraints, entered April 2, 1987, enjoining the City from refusing to permit access to representatives of the FOP to address personnel in training at the Police Academy and, further, enjoining the City from refusing to permit trainees at the Police Academy from signing authorization and designation cards be and same is hereby DISSOLVED.

It is further Ordered that the request of the FOP for injunctive relief pending the disposition of its Unfair Practice Charge before the Commission be and same is hereby DENIED.



Alan R. Howe
Commission Designee

Dated: April 10, 1987
Trenton, New Jersey