

P.E.R.C. NO. 96-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-H-95-360

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party,

-and-

NEWARK PBA LOCAL #3,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act by granting paid release time pursuant to a collective negotiations agreement with Newark PBA Local #3 to PBA members employed by the City and represented for purposes of collective negotiations by Fraternal Order of Police, Newark Lodge No. 12. The Commission holds that release time for FOP unit members is an issue that must be negotiated exclusively by the FOP. The PBA's release time provision may be applied only to employees in the PBA's negotiations unit.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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NEWARK PBA LOCAL #3,

Intervenor.

Appearances:

For the Respondent, Gregory J. Franklin, Assistant
Corporation Counsel

For the Charging Party, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

For the Intervenor, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On April 20 and May 19, 1995, the Fraternal Order of
Police, Newark Lodge No. 12 ("FOP") filed an unfair practice charge
and amended charge against the City of Newark. The charge alleges
that the employer violated the New Jersey Employer-Employee
Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections

5.4(a) (1), (2) and (5),^{1/} by refusing to stop granting paid release time to PBA officials in the FOP's negotiations unit.

On June 23, 1995, a Complaint and Notice of Hearing issued. On July 21, the FOP moved for summary judgment. The motion was referred to Hearing Examiner Jonathon Roth. N.J.A.C. 19:14-4.8.

The City did not file an Answer, but indicated that it did not oppose the FOP's motion. The Hearing Examiner therefore deemed all the allegations in the Complaint to be admitted to be true. N.J.A.C. 19:14-3.1.

On August 21, 1995, the Hearing Examiner granted Newark PBA Local #3's motion to intervene. The PBA then filed a brief opposing the motion for summary judgment and the FOP filed a reply.

On September 22, 1995, the Hearing Examiner recommended granting the FOP's motion for summary judgment. H.E. No. 96-4, 21 NJPER 371 (¶26233 1995). Relying on our holding in City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990), he found that application of a release time provision in a PBA contract to

^{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. (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."

employees represented by the FOP violated principles of exclusive representation.

On October 16, 1995, the PBA filed exceptions. It argues that: the FOP does not have standing to challenge the interpretation and application of its contract with the City; the release time provision does not violate the principle of exclusive representation; the principle would be violated if the relief sought by the FOP were granted; the Hearing Examiner should have deferred to a grievance arbitration award sustaining the PBA's arguments; Commission precedent commands that the status quo be maintained; and P.E.R.C. No. 90-122 is not dispositive of the factual and legal issues in this case. The PBA also relies on its brief opposing the motion for summary judgment.

On October 13, 1995, the FOP informed us that it relies on its brief supporting its motion for summary judgment.

Summary judgment will be granted:

[i]f 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 ... is entitled to its requested relief as a matter of law.... [N.J.A.C. 19:14-4.8(d)]

The respondent did not file an Answer and does not oppose the charging party's motion. The intervenor opposes summary judgment but does not contest the Hearing Examiner's findings of fact (H.E. at 4-5). We incorporate those undisputed findings.

The FOP represents a negotiations unit that includes all of the City's police officers. The PBA represents a negotiations

unit that includes all of the City's identification officers. Article XXIX, Section 5 of the PBA's collective negotiations agreement provides that the PBA "shall be given adequate office space staffed by three full-time Newark PBA members chosen by the State Delegate of the Newark PBA." The PBA members designated under Article XXIX, Section 5 are police officers in the FOP's negotiations unit. The FOP asked the City to stop granting paid release time to members of its negotiations unit. The City did not respond. This unfair practice charge ensued.

We reject the PBA's assertion that the FOP does not have standing to bring this charge. The FOP is not challenging the PBA's agreement with the City to have three full-time staff members to represent identification officers. Rather the FOP contests the application of that agreement to provide for release time for employees in the FOP's negotiations unit. Release time for FOP unit members is an issue that must be negotiated exclusively by the FOP.

We reject the PBA's assertion that granting summary judgment would interfere with the identification officers' right to select their own representatives. They retain that right. What they cannot do is negotiate to have FOP-represented employees be granted paid release time to engage in that representation.

We reject the PBA's assertion that granting summary judgment would violate the exclusivity principle by rendering the

PBA's release time provision a nullity. The clause remains mandatorily negotiable and enforceable. However, it may only be applied to employees in the PBA's negotiations unit.

We reject the PBA's assertion that we should defer to a prior arbitration award. That 1978 award held that the PBA was still entitled to office space and a paid staff even though it no longer represented police officers and only represented identification officers. The award did not address whether the PBA's release time provision could be applied to FOP-represented police officers. In any event, the statutory principle of exclusive representation could override a contrary contractual provision negotiated by an organization that did not represent negotiations unit employees.

Finally, we reject the PBA's assertion that P.E.R.C. No. 90-122 mandates that existing release time arrangements be maintained. To the contrary, that decision held that the release time agreement for PBA officials could not be applied to allow release time for union officials represented by different unions. 16 NJPER at 397. We reaffirm that holding and grant summary judgment for the charging party.

ORDER

The City of 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

New Jersey Employer-Employee Relations Act, particularly by granting paid release time pursuant to a collective negotiations agreement with Newark PBA Local #3 to PBA members employed by the City and represented for purposes of collective negotiations by Fraternal Order of Police, Lodge No. 12.

2. Refusing to negotiate in good faith with FOP Lodge No. 12, particularly by granting paid release time pursuant to a collective negotiations agreement with PBA Local #3 to PBA members employed by the City and represented for purposes of collective negotiations by FOP Lodge No. 12.

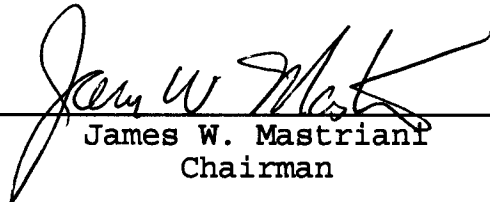
B. Take this action:

1. Stop granting paid release time pursuant to a collective negotiations agreement with PBA Local #3 to PBA members represented for purposes of collective negotiations by FOP Lodge No. 12.

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

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Finn abstained from consideration.

DATED: January 19, 1996
Trenton, New Jersey
ISSUED: January 19, 1996



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 New Jersey Employer-Employee Relations Act, particularly by granting paid release time pursuant to a collective negotiations agreement with Newark PBA Local #3 to PBA members employed by the City and represented for purposes of collective negotiations by Fraternal Order of Police, Lodge No. 12.

WE WILL cease and desist from refusing to negotiate in good faith with FOP Lodge No. 12, particularly by granting paid release time pursuant to a collective negotiations agreement with PBA Local #3 to PBA members employed by the City and represented for purposes of collective negotiations by FOP Lodge No. 12.

WE WILL stop granting paid release time pursuant to a collective negotiations agreement with PBA Local #3 to PBA members represented for purposes of collective negotiations by FOP Lodge No. 12.

Docket No. CO-H-95-360

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 96-4

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-H-95-360

FRATERNAL ORDER OF POLICE
NEWARK LODGE NO. 12,

Charging Party,

-and-

NEWARK PBA LOCAL #3,

Intervenor.

SYNOPSIS

A Hearing Examiner grants a charging party's Motion for Summary Judgment on a charge alleging that the public employer violated 5.4(a)(1), (2) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by granting release time to PBA officials who are employees included in the charging party's collective negotiations unit. Relying on City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990), the Hearing Examiner determined that arguments raised by intervenor PBA were meritless.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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 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.

H.E. NO. 96-4

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

In the Matter of

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Respondent,

-and-

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Appearances:

For the Respondent, Gregory J. Franklin, Assistant
Corporation Counsel

For the Charging Party, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

For the Intervenor, Klausner, Hunter & Seid, attorneys
(Stephen B. Hunter, of counsel)

HEARING EXAMINER'S RECOMMENDED DECISION ON
MOTION FOR SUMMARY JUDGMENT AND
MOTION TO INTERVENE

On April 20 and May 19, 1995, the Fraternal Order of Police, Newark Lodge No. 12 filed an unfair practice charge and amended charge against the City of Newark. The charge alleges that the City unlawfully grants paid release time to PBA officials who are employees included in the FOP unit; that as majority representative of City police officers, it demanded in an April 4,

1995 letter that the City stop its action and that the City refused. These acts allegedly violate 5.4(a)(1), (2) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On June 23, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On July 21, 1995, the FOP filed a Motion for Summary Judgment with the Commission. On August 3, 1995, the motion was referred to me for a decision. N.J.A.C. 19:14-4.8.

On August 10, 1995, the City filed a letter, stating it "does not oppose the position of the FOP" in this case.^{2/}

On August 11, 1995, Newark PBA Local 3 filed a Motion to Intervene, and supporting affidavits, pursuant to N.J.A.C.

^{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. (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."

^{2/} N.J.A.C. 19:14-3.1 requires the respondent to file an Answer within ten days from the date of service of the Complaint. The Rule also states that "[a]ll allegations in the Complaint, if no answer is filed, or any allegation not specifically denied or explained, unless respondent shall state he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Commission, unless good cause to the contrary is shown." The City did not file a timely Answer; for that reason and its August 10 letter, I consider the allegations in the charge to be true.

19:14-4.3. Newark PBA Local 3 represents identification officers employed by the City. On August 15, the Commission Chairman referred the Motion to me for a decision.

On August 16, the FOP filed a letter opposing the Motion to Intervene, and it was referred to me.

On August 21, 1995, I issued a letter, permitting intervention and scheduling a filing date for opposition papers.

On September 6, 1995, Newark PBA Local 3 filed a brief in opposition to the Motion for Summary Judgement along with an affidavit. On September 12, the FOP filed a response.

Summary judgment will be granted,

...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 the movement....is entitled to its requested relief as a matter of law....
[N.J.A.C. 19:14-4.8(d)].

Rulings on motions for summary judgment require that all inferences be drawn against the moving party and in favor of the party opposing the motion--in this case, Newark PBA Local 3. No credibility determinations are made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(d). A motion for summary judgment should be granted with extreme caution--the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 117 N.J.Super. (App. Div. 1981); Essex Cty Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

Upon application of these standards and relying upon papers filed in this proceeding, I make the following:

FINDINGS OF FACT

1. The Fraternal Order of Police, Newark Lodge No. 12 is the exclusive representative of all police officers (more than one thousand), employed by the City of Newark. The FOP and the City have signed a collective negotiations agreement extending from January 1, 1995 through December 31, 1997.

2. Policemen's Benevolent Association, Local No. 3 is the exclusive representative of all identification officers employed by the City. Their expired agreement ran from January 1, 1992 through December 31, 1994. Article XXIX, Section 5 of the agreement states:

The Newark PBA shall be given adequate office space staffed by three full-time Newark PBA members chosen by the State Delegate of the Newark PBA. These members shall be issued detective badges, if applicable, and gas allowance. One City-owned vehicle, with gasoline, shall be assigned to the officer.

The provision has been included in numerous identification officer unit collective agreements.

3. The "Newark PBA members" designated under Article XXIX, Section 5 are police officers included in the negotiations unit represented by the FOP.

4. The FOP asked the City to "cease and desist" from granting paid release time to the designated "Newark PBA members" included in its unit. On April 4, 1995, FOP president Jack McEntee

sent a letter to the Newark Police Director, repeating the request. No response was received.

5. On May 30, 1978, an arbitrator issued an opinion on a grievance over the issue, "Is the PBA [Local 3] entitled at the Cities [sic] expense, to facility and staff pursuant to the terms and conditions of the collective bargaining agreement"?

The award was in favor of the PBA, "as a bargaining agent" of identification officers. The opinion does not refer to Article XXIX, Section 5.

ANALYSIS

N.J.S.A. 34:13A-5.3 requires that representatives selected by public employees in an appropriate unit "...shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit." Exclusivity is a bedrock of national labor policy and is consistent with the State Constitution. Lullo v. Int'l. Assn. of Firefighters, Loc. 1066, 55 N.J. 409, 426, 430 (1970).

In City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990), the Commission was asked to determine the negotiability of a clause virtually identical to Article XXIX Section 5. The parties to that dispute were the City and Newark PBA Local 3, in its capacity as majority representative of identification officers. The FOP, then as now, was the majority representative of City police officers. The City contended that the

provision violated the exclusivity principle. The Commission wrote of the release time agreement for PBA officials:

The wording of the release time agreement does not violate [the] principle [of exclusive representative] and is within the scope of mandatory negotiations. But the application of the principle to provide release time to employees represented by the FOP does compromise the exclusivity principle (citations omitted). The clause cannot be applied to allow release time for union officials represented by different unions (my emphasis). [Id. at 395].

I cannot imagine a clearer statement of law, notwithstanding the PBA's contention that the Commission's decision, at least as applying to this dispute, is dicta only.

The PBA raises other arguments which are not persuasive. It first contends that the FOP has no "standing" to challenge a contract provision between the City and another labor organization; that it has no stake in the outcome; that the agreement does not hamper the FOP's ability to represent police officers, etc. It also contends that the release time agreement "does not interfere with the exclusive bargaining rights of the F.O.P. concerning a totally different bargaining unit." Rather, it argues, that relief sought by the FOP violates the exclusivity principle--that is, it would compromise the integrity of the PBA agreement and would prevent the "effective representation" of identification officers. Finally, the PBA contends that the 1978 arbitration award disposed of "the identical issue" raised in that matter by the City.

The charge alleges nothing about the collective agreement executed by the PBA and the City. What the FOP contends is that as the exclusive representative of all police officers in the City, IT has THE right to negotiate terms and conditions of employment for all unit employees, including those now being released to represent employees in another unit. The FOP's standing to vindicate this right, embodied in the Act and explicated in Lullo, is unique and compelling.

The PBA's standing is problematic, given the Commission's prohibition against an employee organization's negotiating a provision for employees whom it does not represent. City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985). Although the Commission found "the wording" of the release time provision mandatorily negotiable, it warned that the application of the PBA provision in the same way now complained of, violates the exclusivity principle. Newark at 16 NJPER 395. The PBA does not deny that the release time provision is being applied in the specific way which the Commission has rejected.

Finally, the arbitration award addresses the PBA's entitlement to staff and facilities; it is not concerned with the unit membership of designated representatives or the specific contract provision now being applied impermissibly.

The intervenor has not offered evidence establishing a genuine issue of material fact. Nor has it shown why Newark does not control the outcome of this matter. Only the exclusive

representative has the right to negotiate terms and conditions of employment of unit members. By that I am not referring to the ample provisioning of union representatives to the identification officers. That right of contract is not absolute, however; it is circumscribed by the statutory guarantee that the exclusive representative of (other) unit employees speaks for them.

The FOP is entitled to judgment as a matter of law. Accordingly, I recommend that the City of Newark violated subsections 5.4(a)(1), (2) and (5) of the Act by granting paid release time to PBA members represented by the FOP for purposes of collective negotiations.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Respondent City cease and desist from:

1. Interfering with the existence of FOP Lodge No. 12 by granting paid release time to PBA members employed by the City and represented for purposes of collective negotiations by FOP Lodge No. 12.

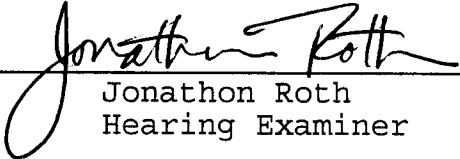
2. Refusing to negotiate in good faith with FOP Lodge No. 12 concerning paid release time to PBA members represented for purposes of collective negotiations by FOP Lodge No. 12.

B. That the Respondent City take the following action:

1. Cease and desist from granting paid release time to PBA members represented for purposes of collective negotiations by FOP Lodge No. 12.

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

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Jonathon Roth
Hearing Examiner

DATED: September 22, 1995
Trenton, New Jersey

NOTICE TO ALL 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 NOT interfere with the existence of FOP Lodge No. 12 by granting paid release time to PBA members employed by the City and represented for purposes of collective negotiations by FOP Lodge No. 12.

WE WILL NOT refuse to negotiate in good faith with FOP Lodge No. 12 concerning paid release time to PBA members represented for purposes of collective negotiations by FOP Lodge No. 12.

WE WILL cease and desist from granting paid release time to PBA members represented for purposes of collective negotiations by FOP Lodge No. 12.

Docket No. CO-H-95-360

City of Newark

(Public Employer)

Dated _____

By _____

(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.