

P.E.R.C. NO. 2013-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2008-339

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (5), when it refused to provide FOP Lodge 12 with documents that are potentially relevant to the FOP's evaluation of four grievances. The grievances involve alleged disparate treatment of unit officers who received sick leave counseling. The Commission granted the FOP's exception to the Hearing Examiner's decision that the City was not required to provide sick leave comparative information for non-unit employees. The Commission applied a relevance standard and orders the City to provide the FOP with the sick or injured leave records and the counseling forms for unit and non-unit employees in the 12 month period preceding the filing of the grievances.

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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Appearances:

For the Respondent, Anna P. Pereira, Corporation
Counsel (Alison Brown-Jones, Assistant Corporation
Counsel)

For the Charging Party, Markowitz and Richman (Matthew
D. Areman, of counsel)

DECISION

The Fraternal Order of Police, Newark Lodge No. 12 (FOP), has filed exceptions to a Hearing Examiner's decision finding that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it refused to provide the FOP with certain sick leave records of unit employees the FOP needed to process the grievances of other unit members. H.E. No. 2013-7, 39 NJPER 165 (¶51 2012). The FOP excepts to the Hearing Examiner's finding that the City was not required to provide the same information for non-unit City employees. After an independent review of the record, we find that the City had an obligation to provide the records for non-unit City employees.

The FOP's unfair practice charge was filed on May 6, 2008. A Complaint and Notice of Hearing was issued on October 7, 2008. On October 13, 2008 the City filed its Answer. On December 31, 2008, the City filed a motion for summary judgment seeking dismissal of the Complaint. On January 29, 2009, the FOP filed a cross-motion for summary judgment in support of the Complaint.

On August 13, 2009, we issued a decision granting the FOP's cross-motion as to two of its requests, but denied the City's motion and the remainder of the FOP's cross-motion. City of Newark, P.E.R.C. No. 2010-11, 35 NJPER 298 (¶104 2009). The parties then resolved several aspects of the charge.

On March 31, 2011, a hearing was conducted to determine whether the City was required to produce the requested information in four separate grievance arbitrations. Each grievance concerns the counseling of an FOP unit member for sick leave use. The FOP alleges that the subject officers improperly received sick time counseling on February 8, 2008. It requested the City to provide: 1) the sick and injured leave records and counseling notices of the grievants; and 2) the sick and injured leave records and counseling notices of all police officers and all superior officers in the same precinct or work unit as the grievants. The City provided the requested information for the grievants, but not the comparative information.

On October 3, 2012, the Hearing Examiner issued his decision. He found that the City violated the Act when it refused to provide information of unit employees; that the Health Insurance Portability Act did not restrict the City from providing the requested information; and that the City is not required to provide the comparative information for superior officers or other City employees outside the FOP's unit.

N.J.S.A. 34:13A-5.4(a) (5) prohibits public employers from "refusing to negotiate in good faith with a majority representative concerning terms and conditions of employment." An employer's refusal to provide a majority representative with information that the union needs to represent its members constitutes a refusal to negotiate in good faith. UMDNJ, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996). An employer must supply information if there is a probability that the information is potentially relevant and that it will be of use to the representative in carrying out its statutory duties. State of N.J. (OER), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd NJPER Supp. 2d 198 (¶177 App. Div. 1988).

The FOP's exceptions challenge the Hearing Examiner's holding that without substantial evidence showing why superior

officer sick leave records are particularly necessary to process the grievances, he was concerned that the FOP's effort in that regard is beyond its legal entitlement and is burdensome to the City. Specifically, the FOP argues that the Hearing Examiner did not apply a relevance test to determine whether the City was required to comply with the FOP's request for non-bargaining unit members' records. Instead, the FOP asserts the Hearing Examiner created a substantial evidence test requiring a particular need.^{1/}

We grant the FOP's exception. The Hearing Examiner should have determined whether the comparative information for non-unit members was relevant to the grievances. The FOP cites to the undisputed fact that the sick leave policy applies equally to both FOP members and supervisors. Relevance is determined through a discovery-type standard, therefore a broad range of potentially useful information is allowed to the union for effectuation of the negotiations process. State of N.J. (OER). However, a union's right to receive information from an employer is not absolute. The employer is not required to produce information clearly irrelevant, confidential or information it does not possess.

The four grievances at issue here involve alleged disparate treatment of officers who received sick counseling. Each officer

^{1/} The City did not respond to this argument.

alleges that other officers in their command had worse sick records, but were not counseled. The FOP alleges it requires the documentation of non-unit employees to evaluate the merits of the grievances. In one grievance, the officer alleges that she was counseled by her superior officer who has a worse sick record. The sick records of non-unit employees, on this record, are relevant to the grievances in issue as there is a possibility the information is potentially relevant to the grievances and will be useful to the FOP in carrying out its statutory duties.

Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981). The probative value of the information, if used, is for the arbitrator to determine. We therefore find that the City of Newark violated 5.4a(5) and (1) of the Act by failing to provide the sick-injury leave information from non-unit employees under the particular facts of this case.

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 Act, particularly by refusing to provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by refusing to provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

B. Take the following affirmative action:

1. Provide the FOP with the following documents:

- a. Sick or Injured Leave Records
- b. Counseling Forms

for police officers in the FOP unit in the fourth and fifth precincts for the twelve month period prior to the filing of grievances 08-05, 08-06 and 06-41 and for the non-unit employees included in the FOP request.^{2/}

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.

^{2/} If the City has not provided the non-unit employee information for grievance 08-15, that information must also be provided.

3. Notify the Chair 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

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: April 25, 2013

Trenton, New Jersey

**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 provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by refusing to provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

WE WILL take the following affirmative action:

1. Provide the FOP with the following documents:
 - a. Sick or Injured Leave Records
 - b. Counseling Forms

for police officers in the FOP unit in the fourth and fifth precincts for the twelve month period prior to the filing of grievances 08-05, 08-06 and 06-41 and for the non-unit employees included in the FOP request.^{3/}

Docket No. CO-2008-339

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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^{3/} If the City has not provided the non-unit employee information for grievance 08-15, that information must also be provided.