

P.E.R.C. NO. 2015-64

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

FRATERNAL ORDER OF POLICE,  
NEWARK LODGE NO. 12,

Docket Nos. CO-2013-248  
CO-2013-363  
CO-2014-204

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the motion for summary judgment filed by the Fraternal Order of Police, Newark Lodge No. 12 (FOP) and the cross-motion for summary judgment filed by the City of Newark. The Commission finds that the City violated N.J.S.A. 34:13A-5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act by failing to provide information potentially relevant to processing grievances, and orders the City to provide the requested information which remains outstanding. The Commission dismisses the FOP's allegations that the City violated the Act due to fulfilling one of the information requests approximately three months late.

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, Karen Brown, Corporation Counsel  
(Alison Brown-Jones, Assistant Corporation Counsel)

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

DECISION

The Fraternal Order of Police, Newark Lodge No. 12 (FOP) filed unfair practice charges against the City of Newark on February 26, 2013 (CO-2013-248), June 28, 2013 (CO-2013-363), and March 4, 2014 (CO-2014-204). The charges allege that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5)<sup>1/</sup>, by failing to

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<sup>1/</sup> 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  
(continued...)

provide the FOP with information it requested in order to process grievances and otherwise represent its unit members.<sup>2/</sup>

The charges in Docket No. CO-2013-248 allege:

(1) By letter dated January 23, 2013, the FOP requested information in support of a pending grievance. The FOP had grieved the City's failure to reimburse eligible retirees for Medicare Part "B" payments. In support of the grievance, the FOP requested the names of all retirees eligible for Medicare Part "B" reimbursement; the amount reimbursed by the City of Newark to each of the eligible retirees and spouse where applicable; and the date that the last Medicare Part "B" reimbursement by the City of Newark was made. (See Attachment 1.)

(2) The City of Newark recently advised that it would not comply with its contractual obligation to provide bargaining unit members with scheduled longevity and step increases in 2013. In defense of this position, the City claimed that providing said benefits would necessitate a 7% budget increase. In response to that claim, the FOP, by letter dated February 5, 2013, requested any and all documents used in the calculation to support the claim of a 7% budget increase. (See Attachment 2.).

On March 5, 2013, the Director of Unfair Practices wrote to the parties regarding Docket No. CO-2013-248. Among other things, she indicated that the case was assigned to a staff agent and the respondent was requested to submit a Statement of

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1/ (...continued)  
refusing to process grievances presented by the majority representative."

2/ The FOP, in its brief, indicated that it withdrew the charges filed in Docket No. CO-2013-363 during an August 6, 2014 pre-hearing conference. In an August 11 letter, the Hearing Examiner confirmed withdrawal of that charge.

Position by April 16 explaining why the allegations in the charges, if true, would or would not constitute unfair practices.

On April 16, 2013, the City's Assistant Corporation Counsel filed a Statement of Position asserting that: "The information requested by the FOP was recently compiled by the Department of Personnel of the City and was sent to the FOP on this date." The City's Statement of Position enclosed information regarding retired employees eligible for Medicare Part "B" payments, which it collected based on retiree age. By letter of July 16 to the Assistant to the Director of Unfair Practices, Christina Gubitosa, counsel for the FOP clarified the status of its information requests as follows:

As you are aware, subsequent to the filing of the unfair practice charge in this matter, the City provided the FOP with a list of the retirees and/or spouses for whom the Medicare Part "B" payments were made. The City has not, however, provided any information with regard to when the payments were made or for what period of time the payments were made. This information is obviously necessary in order to determine the extent to which the City has complied with its obligations in this regard.

With respect to the FOP's claim that the City did not provide information concerning its calculation to support the claim of a 7% budget increase...the matter has become essentially moot. While the information has never been provided, the City did, in fact provide the longevity and step increases so the information is no longer needed for the purpose for which it was originally requested.

By letter of July 26, Ms. Gubitosa wrote to the parties to schedule a conference call and request that the City "provide the Medicare Part B information that the FOP views as outstanding regarding the timing of payments."

The charge in Docket No. CO-2014-204 alleges:

By letter dated January 27, 2013 (sic), the FOP filed a grievance protesting the City's failure to make the required reimbursement payments for Medicare Part "B". (See Attachment 1). In support of the grievance, the FOP requested information including (1) the names of all members and their spouses who are eligible for Medicare Part "B" payments; and (2) the dates when members and their spouses were reimbursed for their 2012 and 2013 Medicare Part "B" payments.

In response, the City advised, by letter dated February 7, 2014, that it was not the custodian of those records and does not have any of the responsive documents sought. (See Attachment 2).

On March 19, 2014, the Director of Unfair Practices wrote to the parties regarding Docket No. CO-2014-204. Among other things, she indicated that the case was assigned to a staff agent and the respondent was requested to submit a Statement of Position by April 18 explaining why the allegations in the charges, if true, would or would not constitute unfair practices. The City did not file a Statement of Position in response to this charge.

On April 22, 2014, the Director of Unfair Practices consolidated CO-2013-248 and CO-2013-363 and issued a Complaint

and Notice of Pre-Hearing on the consolidated charges. On May 12, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on CO-2014-204 and consolidated it with CO-2013-248 and CO-2013-363. The April 22 and May 12 Complaint cover letters to the parties reminded the respondent of its obligation to file an Answer and that, if no Answer was filed, all allegations in the Complaint would be deemed to be admitted to be true, unless good cause to the contrary was shown. The cover letter also reminded the respondent that a statement of position does not automatically constitute an Answer and that should a respondent desire that a Statement of Position constitute an Answer, it must so inform the Hearing Examiner in writing. The City did not file an Answer to either Complaint. Nor did it write the Hearing Examiner to request an extension to file an Answer, or to request that its Statement of Position in response to CO-2013-248 constitute its Answer for that charge.

On September 22, 2014, the FOP filed a motion for summary judgment and brief with the Commission. It argues that because the City did not file an Answer, the allegations set forth in the charges are to be considered true. Therefore, it argues, there can be no genuine issue of material fact and the FOP is entitled to judgment as a matter of law and a remedy ordering the City to provide the outstanding requested information.

On October 14, 2014, after having been granted a one-week extension by the Commission, the City filed its response and cross-motion for summary judgment along with a brief and exhibit. After asserting that there is no genuine issue of material fact in the case, the City then disputes the FOP's factual allegations of its failure to provide requested documents. The cross-motion asserts that: "the information was provided in regard to CO-2013-248 and the additional information has been requested from the Division of Personnel and will be forwarded upon receipt"; that there is no bad faith by the City in not providing the requested information; and that based on these alleged material facts the City's actions do not constitute an unfair practice.

On March 19, 2015, the Chair referred the motion and cross-motion to the full Commission for decision pursuant to N.J.A.C. 19:14-4.8(a).

N.J.A.C. 19:14-3.1 provides that if a respondent in an unfair practice proceeding does not file an Answer, "all allegations in the complaint ... shall be deemed to be admitted to be true and shall be so found by the hearing examiner and the Commission, unless good cause to the contrary is shown." This procedural requirement of filing an Answer and the consequences of not filing one are established parts of our jurisprudence. Hearing Examiners and the Commission have consistently enforced N.J.A.C. 19:14-3.1 by admitting as true a charging party's

allegations when a respondent has either not filed an Answer or has filed a purported Answer that did not comply with our rules. See, e.g., City of Newark, P.E.R.C. No. 2002-28, 28 NJPER 50 (¶33015 2001); Fort Lee Bor., P.E.R.C. No. 98-118, 24 NJPER 208 (¶29096 1998); Fairfield Tp., P.E.R.C. No. 97-60, 23 NJPER 13 (¶28013 1996); Passaic Cty., P.E.R.C. No. 88-64, 14 NJPER 124 (¶19047 1988); and City of New Brunswick, P.E.R.C. No. 87-68, 13 NJPER 11 (¶18008 1986).

In the instant case, the City did not file an Answer or request that its Statement of Position constitute its Answer. Nor has it offered any explanation for not complying with the Answer requirement. The City was put on notice that failure to file an Answer has consequences and that a Statement of Position would not automatically constitute an Answer. The failure to file an Answer triggers the requirement that the allegations in the Complaint be deemed admitted to be true, unless good cause to the contrary is shown. The City has not proffered any reason for overcoming that presumption and may not, by way of motions or exceptions, present additional facts to contradict those already deemed admitted by application of N.J.A.C. 19:14-3.1. See Fort Lee, supra; and Tenafly Bor., P.E.R.C. No. 98-129, 24 NJPER 230 (¶29109 1998). To allow a Statement of Position or a motion for summary judgment to automatically substitute for an Answer would



effectively invalidate the requirement that an Answer be filed. See Newark, supra.

Given the admissions, we grant summary judgment for the FOP on the information requests included in Docket Nos. CO-2013-248 and CO-2014-204 which remain outstanding. N.J.A.C. 19:14-4.8(d) provides that:

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.

The first question is whether there exists any genuine issue of material fact. The FOP, through the admissions discussed above, has presented evidence that it requested and did not receive information potentially relevant to two grievances regarding the City's alleged failure to reimburse eligible retirees for Medicare Part "B" payments (one filed on December 20, 2012; the other filed on January 27, 2014). There is no genuine issue of material fact because the respondent has not submitted any evidence by way of affidavit or document to sustain a judgment in its favor. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

The next question is whether, given the undisputed facts in this record, the charging party is entitled to its requested relief as a matter of law. The answer is yes.

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). 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. 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 which it does not control or possess.  
State of N.J. (OER).

Employers have a duty to respond to relevant requests for information in a timely manner or to adequately explain why the information will not be furnished, and an unfair practice may occur if an employer does not provide the requested information reasonably promptly. See City of Newark, P.E.R.C. No. 2010-11, 35 NJPER 298 (¶104 2009); and N.J. Transit Bus Operations, Inc., P.E.R.C. No. 88-12, 13 NJPER 661 (¶18249 1987). While a per se rule cannot be defined, a good faith effort on the part of the employer is expected in responding to an information request as promptly as circumstances allow, considering the extent of the information sought, the availability of the information, and any difficulty in retrieving it. Newark, 35 NJPER at 299.

The FOP's January 23, 2013 request for the names of all retirees eligible for Medicare Part "B" reimbursement was, after the filing an unfair practice charge, fulfilled by the City on April 16, 2013. Under these circumstances, we do not find that the City's response to that information request in less than three months was so untimely as to constitute an unfair practice, and we consider that aspect of the grievance moot.

The remaining information sought by the FOP as part of its 2012 Medicare reimbursement grievance and CO-2013-248 is: the Medicare "B" amount reimbursed by the City to each eligible

retiree and spouse; and the date the last Medicare Part "B" reimbursement was made by the City. The remaining information sought by the FOP for its 2014 Medicare reimbursement grievance and CO-2014-204 is: the names of all members and their spouses who are eligible for Medicare Part "B" payments; and the dates when members and their spouses were reimbursed for their 2012 and 2013 Medicare Part "B" payments.

We find that the information sought by the FOP for processing the grievances must be produced by the City as it is potentially relevant to the grievances and therefore useful to the FOP in carrying out its statutory duties. City of Newark, P.E.R.C. No. 2013-73, 39 NJPER 481 (¶152 2013); 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. The City has never asserted confidentiality concerns or otherwise challenged the FOP's entitlement to the documents. Furthermore, the City's explanation for failing to produce the documents thus far involves a claimed bureaucratic delay in obtaining the requested information from its Division of Personnel, which we find an insufficient explanation for documents requested more than one year ago. We therefore find that the City of Newark violated 5.4a(5) and (1) of the Act by failing to provide requested information.

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 Medicare Part "B" reimbursement information.

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 Medicare Part "B" reimbursement information.

B. Take the following affirmative action:

1. Provide the FOP with the following documents:

a. Information requested in the FOP's January 23, 2013 letter to Personnel Director Kecia Daniels pertaining to the Medicare Part "B" reimbursement grievance filed on December 20, 2012.

b. Information requested in the FOP's January 27, 2014 letter to Police Director Samuel DeMaio pertaining to the Medicare Part "B" reimbursement grievance, Grievance No. 14-02.

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 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 and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: April 23, 2015

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 Medicare Part "B" reimbursement information.

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 Medicare Part "B" reimbursement information.

WE WILL take the following affirmative action:

1. Provide the FOP with the following documents:

a. Information requested in the FOP's January 23, 2013 letter to Personnel Director Kecia Daniels pertaining to the Medicare Part "B" reimbursement grievance filed on December 20, 2012.

b. Information requested in the FOP's January 27, 2014 letter to Police Director Samuel DeMaio pertaining to the Medicare Part "B" reimbursement grievance, Grievance No. 14-02.

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CO-2014-204

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) 984-7372