P.E.R.C. NO. 2016-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2014-268

NEWARK POLICE SUPERIOR OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's legal conclusion that the City of Newark violated N.J.S.A. 34:13A-5.4(a)(5) and (6), and derivatively, (1) of the New Jersey Employer-Employee Relations Act when its agent unilaterally added a provision to an agreement reached during negotiations with the Newark Police Superior Officers' Association (SOP) and the City refused to execute an agreement that did not contain the contested provision. Though granting the City's exception regarding certain attorney-client communications and modifying the Hearing Examiner's findings and decision accordingly, the Commission nevertheless finds that the SOA's certifications from the City's former mayor and his confidential aide, both of whom were authorized to negotiate an agreement with the SOA, demonstrate that the parties reached an agreement on the terms of a successor agreement that did not include the contested provision. The Commission orders the City to sign the agreement reached and, following SOA ratification, present it to City Council for a ratification vote.

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.

P.E.R.C. NO. 2016-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2014-268

NEWARK POLICE SUPERIOR OFFICERS' ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Carmagnola & Ritardi, LLC (Domenick Carmagnola, of counsel)

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

DECISION

On May 27, 2014, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge against the City of Newark. The charge alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(1), (5), (6), and (7), by unilaterally adding wording to a draft memorandum of agreement for a successor agreement and by failing to reduce to writing the agreed upon terms for the successor agreement.[1/]

1/ 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 (continued...)

On November 17, 2014, the Director of Unfair Practices issued a Complaint and Notice of Hearing with respect to the 5.4(a)(1), (5), and (6) allegations. On December 1, 2014, the City filed an answer denying that it violated the Act and asserting affirmative defenses.

On April 1, 2015, the SOA filed a motion for summary judgment, exhibits and certifications of Councilman Luis Quintana and his confidential aide David Giordano. On April 27, the City filed a response brief, exhibits and the certification of Anna Pereira, Corporation Counsel. On June 24, the Commission referred the motion to the Hearing Examiner for decision. See N.J.A.C. 19:14-4.8(a).

On September 22, 2015, the Hearing Examiner issued a report and recommended decision granting summary judgment in favor of the SOA. H.E. No. 2016-6, 42 NJPER 246 (¶69 2015). He found that the City violated subsection 5.4(a)(5), (6), and derivatively, (1) by inserting a sentence that had not been collectively negotiated into a draft memorandum of agreement for

---

1/ (...continued)
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. . . .(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. . . . (7)Violating any of the rules and regulations established by the Commission."

a successor contract, and by refusing to reduce the agreed-upon terms to writing and to sign the agreement.

On October 2, 2015, the City filed exceptions. The City argues that the Hearing Examiner erred in finding that the Commission had jurisdiction over the SOA's charge inasmuch as it involves contract formation issues. It also argues that the Hearing Examiner erred in finding that the certifications of Councilman Quintana and Mr. Giordano did not implicate the attorney-client privilege and that an alleged statement attributed to Corporation Counsel Pereia as to why she inserted the contested sentence into the draft memorandum of agreement was not protected by the privilege. Lastly, the City argues that the Hearing Examiner erred in granting summary judgment in that (1) there were disputed material issues of fact as to whether there had been a meeting of the minds on the terms of a final agreement, and (2) discovery had not commenced but was necessary to resolve the disputed issues of fact.

On October 13, 2015, the SOA filed a response to the City's exceptions. The SOA argues that the Hearing Examiner's findings of fact were accurate, not arbitrary or unreasonable, and were supported by sufficient, competent and credible evidence and we should therefor reject the exceptions.

We have reviewed the record. The Hearing Examiner's findings (H.E. at 4-11) are generally accurate and sufficient evidence supports them. We incorporate them with these comments, clarifications, and modifications.

We clarify finding 4 (H.E. at 6-7) with regard to the purpose and outcome of the February 18, 2014 meeting between Mr. Giordano, to whom then Mayor Quintana had delegated authority to negotiate a successor agreement, and the several SOA representatives. The meeting's purpose was "to discuss and finalize the terms of a successor agreement," and its outcome was "an agreement in principal." (See Giordano cert., ¶¶ 13 and 14).

We modify finding 10 where it states (H.E. at 9) that "the prepared two-page 'collective negotiations proposal'" dated March 18, 2014 "included the terms agreed upon on March 17, 2014." The proposal, or "memorandum of agreement" as it was also denominated, did not include the statement, "All other terms and conditions of employment would remain the same." It appears from the certification of Mr. Giordano that the omitted statement was 1 of 4 terms comprising the verbal agreement in principal reached on February 18, 2014, as well as the "deal" made on March 17,

2014, which also was not contemporaneously memorialized in writing.[2/] (See Giordano cert., ¶¶ 13-14 and 19-21).

As we read Giordano's certification, there were two drafts of the memorandum of agreement at the meeting on March 18, 2014. The SOA's motion includes exhibits D and E, which appear to be the draft memorandums. Neither party's motion papers explicitly identify who prepared exhibit D or state when it was prepared. In comparison, Counsel Pereira acknowledges "assist[ing] in editing" exhibit E. (See Pereira cert., ¶ 10). There are minor variations between the two documents.[3/] There are also two not insignificant differences between the documents.

One is that exhibit E includes the sentence "All terms and conditions of the January 1, 2009 Collective Bargaining Agreement not addressed in this Memorandum of Agreement shall remain in

---

2/ As found by the Hearing Examiner, the agreement and deal consisted of 4 terms: namely, (1) that the successor contract would cover the years 2013 through 2015, (2) that members would receive no raise the first year but a 2% increase in 2014 and, again, in 2015; (3) that a deceased member's spouse/partner and dependents would continue to receive health benefits for the 2 months following the month of the member's death, and (4) that "All other terms and conditions of employment would remain the same." (See Giordano cert., ¶¶ 13 - 14 and 19 - 21).

3/ The minor variations appear under Article X in Section 13, the 2nd version of the memorandum correcting a typographical error; under Article XXX in Section 2, the 2nd version containing a number of days after the expiration of the successor agreement versus fixed dates by which a party "may serve notice" of a desire to change the agreement; and the 2nd version includes Mayor Quintana as a signatory to the memorandum.

full force and effect." That sentence is not set forth in exhibit D. It is consistent, however, with the agreement in principal that all "terms and conditions of employment" other than the new contract term and years of coverage, salary increases, and survivor benefit, "would remain the same."

The second more substantive difference is that only exhibit E includes the contested statement, "In addition, any terms and conditions not set forth in the January 1, 2009 through December 31, 2012 Collective Bargaining Agreement or this Memorandum of Agreement are null and void." This is the statement that the Hearing Examiner finds the parties' representatives did not agree to but Counsel Pereira included in the memorandum for the successor agreement.

The Hearing Examiner orders the City to sign exhibit D after its ratification and execution by the SOA. Since exhibit D does not set forth all of the agreed upon terms of the agreement in principal, we modify the recommended order accordingly.

For the same reasons, we modify finding 11 (H.E. at 10) where it states that the agreement that Counsel Pereira printed for the Mayor's review "added" the contested sentence but "did not otherwise change the agreement that Pereira took from

Giordano." [4/] As noted above, there are differences between exhibit D, which appears to be the document that Giordano certifies Pereira took from him, and exhibit E, the document she admittedly assisted in editing.

We also modify findings 10 and 11 (H.E. at 9-11) to remove statements that we find to be protected from disclosure by the attorney-client privilege, a subject discussed below in addressing the City's second exception. Specifically, we remove from finding 10 the statement that "Giordano said to Pereira and Neals, 'You should tell the SOA what you are doing. This is going to be a deal breaker.'" From finding 11, we remove the statement, "Pereira grabbed the Mayor's right arm, leaned towards him and said: Mr. Mayor, I had to put this in here to protect you." Neither statement affects the outcome in this matter.

The City's first exception lacks merit. N.J.S.A. 34:13A-5.4(c) vests jurisdiction in the Commission to prohibit any party from engaging in any unfair practice listed in the statute. N.J.S.A. 34:13A-5.4(a)(6) makes it an unfair practice for a public employer to refuse "to reduce a negotiated agreement to writing and to sign such an agreement." We have held that such a refusal also violates N.J.S.A. 34:13A-5.4(a)(5), prohibiting a refusal to negotiate in good faith, and derivatively, N.J.S.A.

4/ The H.E. Report contains 2 findings of fact both numbered as 11. We refer here to language contained in the first finding of fact number 11. (H.E. at 10).

34:13A-5.4(a)(1), prohibiting interference with employees exercising their rights under the Act. Township of Irvington, P.E.R.C. No. 2010-44, 35 NJPER 458 (¶151 2009); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282 (¶18118 1987); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983).

Similarly, N.J.S.A. 34:13A-5.3 provides, in part:

> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Accordingly, we have jurisdiction to determine whether an agreement was formed and if so, whether the City refused to sign a written agreement embodying the terms of the agreement.

Conversely, there is some merit to the second exception regarding attorney-client communications. "A communication made in the course of the relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege." N.J.S.A. 2A:84A-20(3)(b); Evid. R. 504. The attorney-client privilege extends to public entities and their attorneys. In re Grand Jury Subpoenas, 241 N.J. Super. 18, 28 (App. Div. 1989). The authority to waive the privilege on behalf of an organizational client is generally restricted to those who manage or control the organization's activities, such as officers or directors; only an agent acting within the scope

of his or her authority can waive privilege. See, Hedden v. Kean Univ., 434 N.J. Super. 1, 10,(App. Div. 2013); Stewart Equipment Co. v. Gallo, 32 N.J. Super. 15, 17 (Law Div. 1954); Commodity Futures Trading Co. v. Weintraub, 471 U.S. 343, 348-349 (1985). A manager or officer's power to assert or waive the entity's attorney-client privilege terminates and passes to new management when the manager or officer is no longer employed by the entity. See Weintraub, supra. Unauthorized disclosure by someone who is not the holder of the privilege does not generally constitute a waiver. See, e.g., Hedden; In re Grand Jury Subpoenas; Stewart Equipment Co.

In his analysis, the Hearing Examiner states that Counsel Pereira was not speaking in confidence when she allegedly told the Mayor why she added the contested statement to the memorandum she assisted in drafting. The Hearing Examiner rejected the City's contention that the alleged comment was protected by the attorney-client privilege because he found that it was made in the presence of SOA representatives. (H.E. at 14).

As the City notes, however, Captain Chrystal did not certify that he or any other SOA representative overheard Counsel Pereira's comment to the Mayor, and there is no evidence in the record that Pereira intended the statement to be overheard by anyone other than the Mayor. Indeed, one might infer from the Mayor's description of Pereira as leaning toward him before

making the comment that she did not intend the comment to be heard by an SOA representative.

Nor is there any evidence in the record that the City, the holder of the privilege, authorized either Mr. Giordano or then Mayor Quintana to disclose the communication to the SOA when it prepared the certifications of the now former aide and former mayor. The same holds true with regard to Mr. Giordano's disclosure of the alleged exchange between him and Counsel Pereira regarding the inclusion of the contested statement into the memorandum she assisted in editing. Therefore, and viewing the evidence in the light most favorable to the non-moving party, we resolve these confidentiality issues in favor of the City and modify the Hearing Examiner's decision accordingly.[5/]

Nevertheless, even without the statements that implicate the attorney-client privilege, the certifications of Councilman Quintana and Mr. Giordano demonstrate that the parties reached an agreement on the terms of a successor contract and that agreement did not include the contested sentence inserted by Counsel Pereira into the memorandum she edited. Pereira's certification does not raise a material issue of fact precluding summary judgment because it does not deny that an agreement in principal

---

5/ See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (N.J. 1995)(instructing to view the evidential materials in the light most favorable to the non-moving party in deciding a motion for summary judgment).

was reached on February 18, 2014; that after the agreed upon terms for a successor agreement were verbally presented to then Mayor Quintana at the March 17 meeting, he and Captain Chrystal agreed that they had a "deal;" that a written memorandum incorporating the agreed upon terms was prepared and exchanged at the March 18 meeting; and that the terms of the memorandum were consistent with the agreement in principal and the deal made by the representatives except for the sentence unilaterally inserted by Pereira.

Counsel Pereira links her claim that there was no final agreement to the fact that the SOA did not agree to the statement she inserted in the memorandum of agreement. However, her belated attempt to add language to the agreement cannot change the terms already agreed to by the parties' representatives.

As for Counsel Pereira's assertion that there was no final agreement because City Council has not ratified the memorandum of agreement, there is no dispute that any negotiated agreement would still need to be properly ratified and approved by both parties. That condition is set forth in the memorandum of agreement.

Summary judgment is properly granted in a case alleging a violation of 5.4(a)(6) if the material facts of record establish without any genuine dispute that the parties have reached an agreement and that the respondent has refused to sign that agreement. Irvington, supra.

In Irvington, we granted summary judgment against the Township, finding that it violated subsections (a)(1), (5) and (6) by refusing to sign draft contracts that reflected the terms of the parties' written and executed memorandum of agreement. Rather than sign the contracts, the Township changed the salary guide of one of them for the stated reason that it was correcting an error and returned the revised agreement to the majority representative for approval. We found that the draft contract "clearly and faithfully" tracked the memorandum of agreement and "established the parties' intent," and therefore, there was no genuine issue of fact and the Township was obligated to sign the contract.

The facts of Irvington are analogous in that after an agreement was reached, one of the parties' representatives unilaterally attempted to alter its terms. Here, a draft memorandum of agreement prepared or edited by Newark's counsel included a statement that did not accurately reflect the parties' actual agreement.

Based on the specific facts of this case, we adopt the Hearing Examiner's legal conclusion that the City violated subsections 5.4(a)(5) and (6), and derivatively, (1) when its agent unilaterally added an provision to the agreement reached during negotiations and the City refused to execute an agreement

that did not contain the contested provision. Accordingly, we reject the City's remaining exceptions.[6/]

ORDER

The City of Newark is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of their rights under the Act by refusing to negotiate in good faith with the Newark Police Superior Officers' Association by unilaterally inserting, "In addition, any terms and conditions not set forth in the January 1, 2009 through December 31, 2012 collective bargaining agreement or this memorandum of agreement are null and void") (hereafter "the contested sentence") into the memorandum of agreement for a successor contract.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment in that unit by unilaterally inserting the contested sentence into the memorandum of agreement.

3. Refusing to reduce a negotiated agreement to writing and to sign such agreement, particularly by unilaterally including the contested sentence into the negotiated agreement

---

6/ Since the essential facts are not disputed, we reject the City's claim and its corresponding exception that discovery is needed in order to resolve disputed facts.

when reducing it to writing and by refusing to sign an agreement that did not include the contested sentence.

B. Respondent City of Newark take the following affirmative action:

1. Authorized representatives (minimally including the Mayor) shall forthwith sign and date the agreed-upon terms set forth in the "Collective Negotiations Proposal Between the City of Newark and the Police Superior Officers' Association Newark New Jersey, Inc.," dated March 18, 2014, specifically identified as Exhibit "E" in the SOA's motion for summary judgment, but excluding the contested sentence.

2. Upon the City's receipt of the "Proposal" signed by the SOA President (creating a fully-executed agreement) and authorized notice that it has been ratified by SOA membership, the City Council shall promptly be presented and shall vote to approve or not approve an appropriate and authorized resolution ratifying such agreement. The ratification vote shall take place in the normal course of business for such voting.

3. 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.

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

BY ORDER OF THE COMMISSION

Commissioners Boudreau, Eskilson Jones, Voos and Wall voted in favor of this decision. None opposed. Chair Hatfield and Commissioner Bonanni were not present.

ISSUED: February 25, 2016

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 their rights under the Act by refusing to negotiate in good faith with the Newark Police Superior Officers' Association by unilaterally inserting, "In addition, any terms and conditions not set forth in the January 1, 2009 through December 31, 2012 collective bargaining agreement or this memorandum of agreement are null and void") (hereafter "the contested sentence") into the memorandum of agreement for a successor contract.

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 in that unit by unilaterally inserting the contested sentence into the memorandum of agreement.

WE WILL cease and desist from refusing to reduce a negotiated agreement to writing and to sign such agreement, particularly by unilaterally including the contested sentence into the negotiated agreement when reducing it to writing and by refusing to sign an agreement that did not include the contested sentence.

WE WILL forthwith sign and date through authorized representatives (minimally including the Mayor) the agreed-upon terms set forth in the "Collective Negotiations Proposal Between the City of Newark and the Police Superior Officers' Association Newark New Jersey, Inc.," dated March 18, 2014, specifically identified as Exhibit "E" in the SOA's motion for summary judgment, but excluding the contested sentence.

WE WILL, upon the City's receipt of the "Proposal" signed by the SOA President (creating a fully-executed agreement) and authorized notice that it has been ratified by SOA membership, promptly present it to the City Council which shall vote to approve or not approve an appropriate and authorized resolution ratifying such agreement. The ratification vote shall take place in the normal course of business for such voting.

Docket No. CO-2014-268 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

APPENDIX "A"