

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2017-269

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the SOA's motion for summary judgment and denies the City's cross-motion for summary judgment in an unfair practice case filed by the SOA. The unfair practice charge alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by unilaterally adding a new paragraph to "Disciplinary Action/Penalty" section of a General Order that would find employees liable for replacement costs or repairs for damages to motor vehicles as a result of willful misuse or unjustifiable neglect. Finding that the City had an obligation to negotiate with the SOA before imposing a reimbursement obligation as a penalty for such motor vehicle incidents, the Commission holds that the City breached its statutory obligation under N.J.S.A. 34:13A-5.3 to negotiate with the SOA over proposed new rules or modification of existing rules, thereby violating N.J.S.A. 34:13A-5.4a(5) and derivatively N.J.S.A. 34:13A-5.4a(1).

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, France Casseus, Assistant
Corporation Counsel

For the Charging Party, John J. Crystal, III,
President, Newark Police Superior Officers' Association

DECISION

This case comes to us by way of a motion for summary judgment filed by the Newark Police Superior Officers' Association (SOA), and of a cross-motion for summary judgment filed by the City of Newark (City), in an unfair practice case filed against the City by the SOA. The unfair practice charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1), (3), (5), and (7),^{1/} when it added a new

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"; (3) Discriminating
(continued...)

paragraph to the "Disciplinary Action/Penalty" section of the "Newark Police Division General Order" without first negotiating it with the SOA.

PROCEDURAL HISTORY

On June 6, 2017, the SOA filed its unfair practice charge. On February 26, 2018, the Acting Director of Unfair Practices issued a complaint and notice of pre-hearing on the a(1), and (5) allegations; the a(3) and (7) allegations were dismissed.

On May 23, 2018, the SOA filed a motion for summary judgment supported by a brief, exhibits, and the certifications of its President, Captain John J. Chrystal III (Chrystal), and its Treasurer, Captain Gary D. Vickers. (Vickers).

On June 4, 2018, the City filed a cross-motion for summary judgment supported by a brief, exhibits, and the certifications of its Public Safety Director (Director), Anthony F. Ambrose (Ambrose), and its attorney, France Casseus (Casseus). On May 31, 2018, the SOA filed a reply brief.

On June 7, 2018, the SOA's motion for summary judgment and the City's cross-motion for summary judgment were referred to the

1/ (...continued)
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"; "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit; and "(7) Violating any of the rules and regulations established by the commission."

Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a). On August 13, both parties, at the request of the Commission, made supplemental submissions.

FACTS

The SOA represents all superior officers employed by the City in the ranks of sergeant, lieutenant, and captain. The City and the SOA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2013 through December 31, 2015.

Prior to May 12, 2017, General Order 65-05, Section VII "Disciplinary Action/Penalty" read:

Personnel shall be subject to disciplinary action for violation of the following:

- A. Driving while on the revoked or suspended list;
- B. Driving while under the influence of alcohol;
- C. Driving while under the influence of a controlled dangerous substance/any prescribed medication, or over-the-counter medication or substance that would adversely affect an operator's ability to drive a motor vehicle.
- D. Intoxication and impairment due to alcohol and/or chemical abuse while on duty;
- E. Leaving the scene of an accident;
- F. Mental or physical incapacity;
- G. Identified, as a vehicle operator, in more than two (2) preventable police involved accidents in a five (5) year

period via an Early Intervention Alert (EIA);

- H. Failing to report an accident;
- I. Driving while not in possession of a license;
- J. Driver negligence;
- K. Failing to comply with Operator Requirements, Section III, of this order.

On May 12, 2017 Director Ambrose issued a memorandum adding this paragraph to the end of Section VII:

Personnel found to be contributory to a motor vehicle accident shall be liable for replacement costs or repairs for any damaged motor vehicle as a result of willful misuse or unjustifiable neglect. This is consistent with [N.J.A.C.] 4A:2-2.4^{2/} and Newark Police Division Rules & Regulations Chapter 15:1.5.

2/ N.J.A.C. 4A:2-2.4 provides in pertinent part:

(a) No suspension or fine shall exceed six months except for suspensions pending criminal complaint or indictment. See N.J.A.C. 4A:2-2.7.

(b) In local service, the appointing authority may provide that a suspension be with or without pay. . .

(c) An appointing authority may only impose a fine as follows:

1. As a form of restitution;
2. In lieu of a suspension, when the appointing authority establishes that a suspension of the employee would be detrimental to the public health, safety or welfare; or
3. Where an employee has agreed to a fine as a disciplinary option.

LEGAL ARGUMENTS

The SOA argues that its motion for summary judgment should be granted because "most, if not all," of the material facts are not in dispute. Specifically, the SOA maintains that the paragraph added to Section VII constitutes a change in a mandatorily negotiable term and condition of employment made during the course of collective negotiations in violation of N.J.S.A. 34:13A-5.3 and 33.^{3/} It further contends that N.J.A.C. 4A:2-2.4 does not preempt negotiations and that Police Department Rules 15:1.5 "Negligent Loss or Damage of City Issued Equipment" and 15:1.6, listing 13 items, does not refer to motor vehicles.

The City counters that the paragraph added to Section VII was not a modification of existing terms and conditions of employment and was consistent with the City's rights under the CNA and N.J.A.C. 4A:2-2.4. It notes that the SOA has not shown that the new language has been applied to an employee. It maintains that hypotheticals and speculation are not sufficient to grant the SOA's motion.

STANDARD OF REVIEW

We note that summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America,

^{3/} The SOA, citing Township of Montclair, P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000) asserts that penalties for discipline are mandatorily negotiable.

142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{4/} In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the [opposing] party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523.

ANALYSIS

Applying the summary judgment standard to the facts and arguments made by the parties, we conclude that the material facts are not in dispute and that the SOA is entitled to judgment as a matter of law on its charge that the City violated N.J.S.A. 34:13A-5.4a(5) and derivatively, N.J.S.A. 34:13A-5.4a(1).

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Paterson Police PBA Local No.

^{4/} N.J.A.C. 19:14-4.8(e) provides:

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.

1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), with Local 195, IFPTE v. State, 88 N.J. 393, 403-404 (1982).^{5/}

However, where, as here, a public employer is charged with refusing to negotiate over terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4a(5), to prevail, the Charging Party must show that the dispute involves a change in a mandatorily negotiable, as opposed to a permissive, subject. Paterson, at 88, noting that an employer can refuse to negotiate over a permissive subject and that even if it agrees to incorporate a permissive subject into an agreement, it may unilaterally excise that accord when the CNA expires. See also

5/ Paterson provides:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Fairfield Township, D.U.P. No. 2011-6, 37 NJPER 129 (¶38 2011)

(Complaint will not issue based on unfair practice charge alleging public employer violated N.J.S.A. 34:13A-5.4a(5) by changing permissive subject for negotiations).

In general, a public employer has a prerogative to determine the basis for discipline, i.e. what transgressions by employees warrant the imposition of discipline. City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358 (¶120 2009). However, a public employer's prerogative to determine the basis for discipline is not impeded by negotiated agreements over sanctions or penalties to be imposed for specific transgressions.^{6/} Negotiating about such issues comports with the bar set by N.J.S.A. 34:13A-5.3 against unilateral action over "proposed new rules or modifications of existing rules affecting working conditions" and that law's further mandate that public employers and majority representatives shall "negotiate in good faith with respect to . . . disciplinary disputes."^{7/}

We conclude that the City had an obligation to negotiate with the SOA before adding the new paragraph to Section VII,

^{6/} Sanctions can be challenged through the negotiated grievance procedure or statutory disciplinary procedures. The ability to contest disciplinary penalties is not at issue here.

^{7/} Negotiations are required regardless of how the term or condition of employment was established. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secs., 78 N.J. 1, 6-7 (1978) (Board violated negotiations obligation by cutting work hours that existed prior to Association became majority representative and before and during negotiations for a first contract).

specifically the creation of a reimbursement obligation for officers engaging in the described conduct. Had the City limited its modification to advising employees that their "willful misuse or unjustifiable neglect" that contributed to a motor vehicle accident would be grounds for discipline, it would have acted pursuant to its managerial prerogative. But unilaterally adding the directive that employees would have to pay for the damage violated the mandate of N.J.S.A. 34:13A-5.3 that collective negotiations were required to add a restitution rule."^{8/}

Because the addition of the language to Section VII imposed the obligation to make restitution, we conclude that the City's action breached its statutory obligation under N.J.S.A. 34:13A-5.3 to negotiate with the SOA over "proposed new rules or modifications of existing rules" as well as "disciplinary disputes," and violated N.J.S.A. 34:13A-5.4a(5) and derivatively, N.J.S.A. 34:13A-5.4a(1).

ORDER

A. The motion of the Newark Superior Officers Association for summary judgment is GRANTED.

B. The City of Newark's cross-motion for summary judgment is DENIED.

^{8/} A dollar for dollar restitution penalty might not be allowed by N.J.A.C. 4A:2-2.4. See In re McCrary, OAL Dkt. No. CSV 4540-07, 2008 N.J. AGEN LEXIS 1223 (unsafe operation of state vehicle, causing \$1,700 in property damage, did not justify fine equal to 15-day suspension or payment of \$1,700; fine equal to three days pay was proper sanction).

C. The City of Newark shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act and from refusing to negotiate in good faith with the majority representative of employees in the appropriate unit concerning terms and conditions of employment in that unit, particularly by unilaterally modifying the terms and conditions of employment of employees represented by the Newark Superior Officers Association, specifically by imposing a restitution requirement for damages to vehicles caused by an employee's "willful misuse or unjustifiable neglect."

2. Take the following affirmative action:

a. Rescind the language added May 12, 2017 to General Order 65-05, Section VII.

b. Negotiate in good faith, and subject to the impasse resolution procedures of the New Jersey Employer-Employee Relations Act, with the Newark Superior Officers Association over the establishment, as a disciplinary sanction, of a restitution requirement for damage to vehicles caused by an employee's "willful misuse or unjustifiable neglect."

c. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of the notice, after being signed by the City's authorized representative, shall be posted immediately and

maintained by it for at least sixty consecutive days. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by other materials.

d. Within twenty days of receipt of this decision, notify the Chair of the steps it has taken to comply with this Order.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Boudreau was not present.

ISSUED: December 20, 2018

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 and from refusing to negotiate in good faith with the majority representative of employees in the appropriate unit concerning terms and conditions of employment in that unit, particularly by unilaterally modifying the terms and conditions of employment of employees represented by the Newark Superior Officers Association, specifically by imposing a restitution requirement for damages to vehicles caused by an employee's "willful misuse or unjustifiable neglect."

WE WILL rescind the language added May 12, 2017 to General Order 65-05, Section VII.

WE WILL negotiate in good faith, and subject to the impasse resolution procedures of the New Jersey Employer-Employee Relations Act, with the Newark Superior Officers Association over the establishment, as a disciplinary sanction, of a restitution requirement for damage to vehicles caused by an employee's "willful misuse or unjustifiable neglect."

Docket No. CO-2017-269

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) 292-9830