P.E.R.C. NO. 2020-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and- Docket No. CO-2018-131

EAST ORANGE FIRE OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

Upon review of the exceptions of both parties to the report and recommended decision of a Hearing Examiner (HE) on an unfair practice charge filed by the East Orange Fire Officers' Association, the Public Employment Relations Commission adopts the HE's decision, as modified, finding that the City of East Orange violated subsection 5.4a(5) and, derivatively, 5.4a(1) of the Act when, in revising departmental rules and regulations the City, without negotiation: (1) altered the schedule of potential disciplinary penalties that could be imposed on firemen; and (2) established minor disciplinary review procedures by reference to N.J.S.A. 40A:14-147, which does not apply to municipal fire departments, and to the Civil Service Act, which does not provide for review of minor discipline of municipal firemen. The Commission also modifies the HE's findings of fact to reflect that the City unilaterally imposed a new rule concerning the calendar period authorized for the wearing of shorts by uniformed officers. However, the Commission finds that the City's unilateral imposition of that timetable is not an unfair practice since it concerns a newly imposed rule on a permissively negotiable subject. The Commission rejects all other exceptions to the HE's report and recommended decision.

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. 2020-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and- Docket No. CO-2018-131

EAST ORANGE FIRE OFFICERS' ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, O'Toole, Scrivo, Fernandez, Weiner Van Lieu, LLC (Marlin G. Townes, III, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman (Paul L. Kleinbaum, of counsel)

DECISION

On November 29, 2017 and January 9, 2018, the East Orange Fire Officers' Association (FOA) filed an unfair practice charge and amended charge against the City of East Orange (City). The charge, as amended, alleges three claims: (1) In or about July 2017, the City unilaterally changed terms and conditions of employment by revising, without negotiations, the East Orange Fire Department's Rules and Regulations (Rules); (2) the City failed to provide information in response to the FOA's May 31, 2017 letter requesting information about meetings between FOA representatives and City officials in 2016; and (3) on or about November 8, 2017, the City unilaterally implemented changes to certain personal, vacation and sick leave procedures without

negotiations with the FOA. The FOA claims the City's conduct violates 5.4(a)(5) and, derivatively, (a)(1)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On June 14, 2018, the Director of Unfair Practices issued a Complaint and Notice of Pre-hearing. On July 6, 2018, the City filed an Answer, denying it violated the Act and asserting that the City discussed the Rule changes with the FOA in 2016 and the FOA agreed to those changes in 2017. On January 29 and March 27, 2019, the Commission's Hearing Examiner conducted a hearing at which the parties examined witnesses and introduced exhibits. Post-hearing briefs were filed on May 31, 2019.

On July 31, 2019, the Hearing Examiner issued a report and recommended decision, H.E. No. 2020-1, 46 NJPER 62 (¶14 2019), concluding that the City violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1) of the Act by unilaterally changing the Rules concerning the usage of personal and vacation leave, which were mandatorily negotiable; and by refusing to provide information to the FOA in response to its May 31, 2017 request for information. The Hearing Examiner found that fourteen other

---

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; and (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."

disputed Rule changes were not mandatorily negotiable because they either: (1) did not intimately and directly affect the work and welfare of FOA unit employees; (2) they had a de minimis impact on FOA unit employees' terms and conditions of employment; and/or (3) they were the exercise of the City's inherent managerial prerogative.

On October 4, 2019, each party filed exceptions to the Hearing Examiner's report and recommended decision. The FOA's exceptions are as follows:

1. The Hearing Examiner erred by failing to find that the City refused to negotiate in good faith.

2. The Hearing Examiner erroneously found that the FOA did not request impact[2/] negotiations regarding the Professional Standards Unit (PSU)[3/].

3. The Hearing Examiner erred in finding that the procedural aspects of discipline associated with the Appropriate Authority were non-negotiable.

4. The Hearing Examiner erred in finding that procedural aspects of discipline associated with substituting the Board of Fire Commissioners with the Fire Chief was non-negotiable.

5. In finding that the City was free to

2/ The FOA's point heading for this exception in its brief lacks the word "impact," yet the supporting argument makes clear that the FOA challenges the Hearing Examiner's conclusion that the FOA never demanded to negotiate the impact of the City's establishment of the PSU.

3/ The City created the PSU "to investigate disciplinary matters and verify the appropriate use of leave." H.E. at 55.

reassign the position of Administrative Assistant to the Chief, the Hearing Examiner disregarded negotiable aspects of seniority.

6. The Hearing Examiner erroneously found that the change in time requests do not require prior authorization.

7. The Hearing Examiner erred in finding that the City did not unilaterally impose a time period for wearing shorts - a mandatorily negotiable term and condition of employment.

The City filed the following exceptions:

1. The Hearing Examiner erred by finding that the City unilaterally changed its vacation, sick and personal leave policy.

2. The Hearing Examiner erred by finding that the City refused to provide information to the FOA.

On October 11, 2019, the FOA filed a letter brief in opposition to the City's exceptions. The City did not file opposition to the FOA's exceptions.

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. We have reviewed the record, the Hearing Examiner's Findings of Fact and Conclusions of Law, and the parties' submissions. We find that the Hearing Examiner's findings of fact, H.E. at 3-36, as modified herein, are supported by the record and we adopt them. We further adopt the Hearing Examiner's conclusions of law, as modified herein.

The parties' exceptions focus on the Hearing Examiner's analysis of certain of the City's changes to the Rules and Regulations governing the Fire Department. Unless noted otherwise, our topical subheadings set forth below, and their order of appearance, track those in the Hearing Examiner's Decision. The exceptions relevant thereto are indicated in parentheses.

Changes to Dept. Rules

Administrative Assistant to the Chief
(H.E. at 48; FOA Exception No. 5)

We reject the FOA's exception no. 5, which contends that the Hearing Examiner erred in finding that the City had a managerial prerogative to change the qualifications for the position of Administrative Assistant to the Chief (previously and currently held by a Deputy Chief) such that it may be assigned to a lower ranking officer. We adopt the Hearing Examiner's conclusion that the City "was not obligated to negotiate this change in policy." H.E. at 54. For the reasons comprehensively set forth in his decision, id. at 48-54, we agree with the Hearing Examiner that this was a product of the exercise of the City's managerial prerogative to assign, appoint, and deploy personnel, and its right to determine the "criteria for the selection of employees to perform particular duties on a temporary or a permanent basis," which is "not subject to mandatory negotiations." Id. at 48-49, quoting, inter alia, Town of Kearny, P.E.R.C. No. 80-81, 6

NJPER 15, 16 (¶11009 1979), aff'd, NJPER Supp.2d 106 (¶88 App. Div. 1981) (emphasis added).

In finding the issue not mandatorily negotiable, the Hearing Examiner properly balanced "the interest of the FOA to keep one classification of unit employees (deputy chiefs) as the exclusive pool of applicants for Administrative Assistant versus the City's [predominant] interest in having the flexibility to consider other qualified candidates for the position." H.E. at p. 53. We also agree with the Hearing Examiner that the Civil Service Commission's authority to "decide whether a job title's duties are consistent with that title's job description/duties or the job description/duties of another title . . . cannot supplant the Commission's jurisdiction to decide whether the City can change a job description/duties or hiring criteria without negotiating the change with the FOA." Id. at 54. The FOA cites no contrary authority, and neither explains nor cites any precedent to support its contention that this change to "qualifications criteria affect[s] seniority and do[es] so on a permanent basis." (FOA Br., p. 16).

Professional Standards Unit, Fire Chief's Role in Discipline (H.E. at 54; FOA Exception Nos. 1, 2, 3 & 4)

The FOA's exception No. 1 asserts that the Hearing Examiner failed to find that the City refused to negotiate in good faith and instead engaged in "surface bargaining" about its proposed new or modified work rules. (FOA Br., pp. 6-7). We reject this

exception to the extent it demands a blanket statement applicable to the entirety of the Hearing Examiner's findings. The Hearing Examiner, in fact, found that the City violated N.J.S.A. 34:13A-5.4(a)(5) by unilaterally changing mandatorily negotiable terms and conditions of employment through: restricting the use of personal days by in-staff FOA unit officers before and after holidays; requiring FOA unit employees to provide ten days notice and obtain prior approval ten days in advance of a planned vacation day; and refusing to provide requested information to the FOA. H.E. at 82-83. We agree with and adopt those findings.

However we grant this exception to the extent it argues that the Hearing Examiner should have found that "the City had an obligation to negotiate with the union concerning sanctions and penalties imposed by the PSU." (FOA Br., p. 8). This subject is mandatorily negotiable, as the Hearing Examiner correctly noted. H.E. at 58 n.23. But the documentary record reflects that the City altered the potential penalties for a disciplinary infraction.[4/] The 1998 Rules specify a penalty of a fine of up to five days pay for a minor disciplinary action (CP-7, Art. 17, § 6, p. 50), and for "disciplinary action on a serious matter, .

4/ The City's determination of the basis for discipline is not mandatorily negotiable, City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2018), and that did not change here. That is, the 1998 and the 2017 versions of the Rules identify the same specific transgressions that could result in discipline. (CP-7, Art. 17, § 1, p. 49; CP-9, Art. 13, § 1, p. 46).

. . up to six (6) months suspension without pay or the termination of the employee." (CP-7, Art. 17, § 7, p. 50). Whereas the 2017 Rules specify new potential penalties, including "oral or written reprimand; . . . demotion; [and] loss of promotional opportunity . . . ."[5/] (CP-9, Art. 13, § 15, p. 50).

In light of this record, and in light of the fact that the Hearing Examiner credited the FOA's testimony "that between the January 2017 meeting and the issuance of the Dept. Rules in August 2017, the City did not meet with the FOA to discuss the Dept. Rule changes and . . . did not respond to the FOA's concerns and objections concerning the proposed rule changes (CP-8)," H.E., ¶ 22, p. 22, we disagree with the Hearing Examiner's requirement that the FOA had to prove a severable "impact," or demand impact negotiations, regarding these changes. H.E. at 58 n.23. Rather, because the subject is mandatorily negotiable, we find that the City was affirmatively obligated to seek negotiations with the FOA before making any such changes, as there is no evidence in the record that the FOA clearly and unequivocally waived its right to negotiate. Kean University, P.E.R.C. No. 2018-18, 44 NJPER 221 (¶64 2017).

In sum, the record shows that the City made changes to the range of potential disciplinary penalties that could be imposed

---

5/ The Hearing Examiner did not list these changes in his chart identifying "the language changes between the 1998 Rule Book (CP-7) and the revised, August 2017 Rule Book (CP-9)." H.E. ¶ 26, pp. 25-32.

by the PSU, a mandatorily negotiable subject, without negotiations. This violated subsection 5.4(a)(5) and, derivatively, 5,4(a)(1). We modify the Hearing Examiner's Decision accordingly.

We reject FOA's exception No. 2, which contends that the Hearing Examiner erroneously found that the FOA did not request impact negotiations regarding the creation of the PSU. We reject this exception as being factually unsupported. As we noted in State of N.J., P.E.R.C. No. 2012-24, 38 NJPER 205 (¶70 2011):

> In unilateral change cases involving mandatorily negotiable topics, N.J.S.A. 34:13A-5.3's 'proposed new rules' language imposes an affirmative duty to negotiate prior to making the change. In the mixed cases involving managerial policy changes that result in severable alterations in working conditions, the duty to negotiate arises only where the majority representative makes a demand.
>
> [Id. (internal citations omitted).]

The FOA's exceptions point to no specific evidence that it requested negotiations regarding the impact of the PSU's creation.

The FOA urges that the record as a whole shows that it "challenged the lack of negotiations in connection with the PSU including the impact," and that the City's refusal to supply the requested information left the FOA with no "ability to discern 'identifiable impact-related issues,' still less to 'specifically demand negotiations.'" (FOA Br. at 10).

We agree that under the circumstances, the FOA's ability to make informed and specific demands for negotiation was frustrated by the City's unresponsiveness to the FOA's requests for information. The Hearing Examiner found "no indication in the record that the documents requested were provided to the FOA or that the City advised the FOA such documents did not exist or were otherwise unavailable." H.E. ¶ 24, pp. 24-25.

But the Hearing Examiner also correctly accorded significance to the fact that, at the hearing, he received no "probative evidence of what the PSU's severable impact was." Id., at 59. In its exceptions, the FOA again identifies no specific severable impacts. Thus, our rejection of this exception is due to the FOA's ultimate inability to identify or prove a severable impact, either at the hearing or in its exceptions.

We address nos. 3 and 4 of the FOA's exceptions together, as they both concern the negotiability of procedural aspects of discipline. The FOA contends that the 2017 Rules adopted by the City "grant the Appropriate Authority . . . power over disciplinary provisions that implicate negotiable procedure," (FOA Br., p. 12), as does the 2017 Rules' substitution of the Fire Commission with the Fire Chief as the hearing officer in minor disciplinary matters. (Id., p. 14).

Specifically, the FOA points to Article 29 of the 2017

Rules, which provides that "[a]ppeals from penalties imposed as disciplinary measures may be taken as provided by N.J.S.A. 11A:1-1 et seq. [the Civil Service Act] and N.J.S.A. 40A:14-147 [governing removals and suspensions of municipal police officers] and the municipal ordinances," and which further provides that "the 'Disciplinary Authority' accorded to the Fire Chief exists '[w]ithin the limitations set forth in N.J.S.A. 40A:14-147 to 151 inclusive[.]'" (FOA Br., p. 12, citing CP-9 at 83-84, Article 29, Section 11; and p. 15, citing CP-9 at 82, Article 29, Section 6). This language is new to the 2017 Rules (CP-9), and is not found in the 1998 Rules (CP-7) or the grievance procedures of the applicable CNAs.[6/] (J-1, Art. III; J-2, Art. III).

The FOA argues that because N.J.S.A. 40A:14-147 applies to municipal police departments, not fire departments, and because the Civil Service Act[7/] does not provide for review of minor discipline, the 2017 Rules do not provide "a legitimate procedure for review of minor discipline, still less one that the parties negotiated." (FOA Br., p. 12). Relying on Fire Dist. 1 of Woodbridge v. Public Empl. Rels. Comm'n, et al, 2009 N.J.Super. Unpub. LEXIS 1687 (App. Div. 2009), the FOA argues that this is so even if the City meant to refer to the statutes governing the

---

6/ The Hearing Examiner did not list these changes in his chart identifying "the language changes between the 1998 Rule Book (CP-7) and the revised, August 2017 Rule Book (CP-9)." H.E. ¶ 26, pp. 25-32.

7/ East Orange is a Civil Service municipality.

discipline of fire fighters, N.J.S.A. 40A:14-19 to 22.

We note that the FOA did not make this specific argument or cite to Fire Dist. 1 in its post-hearing brief. We also note that the City did not object to this exception on the basis that it was not raised before the Hearing Examiner. With that said, our Act directs us to determine the occurrence of an unfair practice "upon all the evidence taken," N.J.S.A. 34:13A-5.4c; while the rule governing the filing of exceptions and cross-exceptions, N.J.A.C. 19:14-7.3, does not expressly prohibit the raising of arguments that were not previously raised to the hearing examiner. See also, Irvington Bd. of Ed., P.E.R.C. No. 95-64, 21 NJPER 125 (¶26077 1995)(Commission considered and rejected on the merits charging party's statutory argument, first raised in exceptions, that the position of summer school principal was an extracurricular position as to which all aspects of assignment and compensation were mandatorily negotiable, over board's objection that union did not raise that factual allegation or legal argument before hearing examiner).

Thus, we will consider the FOA's new argument, given that the documentary record shows that the City unilaterally added the municipal police statute to the 2017 Rules governing the procedures for review of minor discipline, and the FOA presented testimony to the Hearing Examiner about the City's use of police terminology in the 2017 Rules that did not apply to fire

departments, and to which the FOA did not agree. (1T45:19-46:7).

In Fire Dist. 1 of Woodbridge v. Public Empl. Rels. Comm'n, et al, 2009 N.J. Super. Unpub. LEXIS 1687 (App. Div. 2009), the New Jersey Superior Court, Appellate Division, reversed and remanded a judgment of the Law Division enjoining and restraining the defendants from "prosecuting the PERC arbitration" of a grievance that challenged the imposition of minor discipline upon a fireman by the plaintiff employer. Id. at *8. The trial court relied on the employer's departmental rules and regulations, one of which (similarly to the City's 2017 Rules) subjected disciplinary appeals of firemen to the provisions of "Civil Service Law and N.J.S.A. 40A:14-147-151 inclusive." Id. at *5, *8. In reversing and remanding, the appellate court found that the rules' reference to N.J.S.A. 40A:14-147 to -151 was erroneous because those statutes, including their allowance of de novo review of discipline in the Superior Court, apply to municipal police departments, not fire departments. The reviewing court further held that the statutes that govern municipal fire departments, N.J.S.A. 40A:14-19 to -22, also would not apply to a Civil Service municipality, because those statutes specifically exempt Civil Service fire departments from de novo review of discipline by the Superior Court, and the Civil Service Act does not provide for review of minor discipline. Id. at *23-*24.

N.J.S.A. 34:13A-5.3 requires an employer to negotiate with

the majority representative before changing employees' working conditions, and specifically provides that disciplinary review procedures, including binding arbitration of disputes involving minor discipline, are mandatorily negotiable so long as they do not replace or are inconsistent with any alternate statutory appeal procedure. N.J. Transit Corp. (N.J. Transit Police Dept.), I.R. No. 2006-7, 31 NJPER 313 (¶122 2005), citing, inter alia, Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), aff'd sub nom. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997); Borough of Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995).

We find that the Hearing Examiner correctly determined that the City's designation of who will hear and impose discipline is not mandatorily negotiable. H.E. at 61. But it is plain from the record that the City established minor disciplinary review procedures by reference to N.J.S.A. 40A:14-147 and the Civil Service Act,[8/] without negotiation, and this violated subsection

8/ Although Fire Dist. 1, supra, is an unpublished decision and thus not precedential, we agree with the appellate court's conclusion therein that N.J.S.A. 40A:14-147 to 151 do not apply to municipal fire departments, and further that because the City is a Civil Service municipality, the statutes governing municipal fire departments, N.J.S.A. 40A:14-19 to -22, also afford no procedures for review of minor discipline. As such, we also agree with the FOA that these statutes cannot "establish properly negotiated procedures governing disciplinary review," (FOA Br. at 15), even if the record contained any evidence, which it does

(continued...)

5.4(a)(5) and, derivatively, 5.4(a)(1). We modify the Hearing Examiner's Decision accordingly.

Change of Time Requests (H.E. at 73; FOA Exception No. 6)

We reject FOA's Exception no. 6, and adopt the Hearing Examiner's conclusion that the City was not obligated to negotiate over a change to the Rules governing employee "change of time" requests, as it "only requires prior notice [to the employer], rather than [the employer's] prior approval, of shift changes." H.E. No. 2020-1, p. 74. We do not credit the FOA's argument that the 2017 Rules require the City's prior approval of a voluntary "change of time" agreement between two unit officers to swap or exchange shifts. The FOA's reliance on Article 14, Section 15 of the 2017 Rules is unfounded. That provision states:

> The request for and acceptance of a CHANGE of TIME is a privilege afforded to Fire Department personnel and is considered a binding contract. Any member who fails to appear for the scheduled shift of an agreed upon Change of Time will face the possibility of but not limited to the privilege being revoked for twelve (12) consecutive months. Failure to report for a Change of Time that results in acting or overtime pay being incurred may result in disciplinary action.
>
> [CP-9, p. 53; emphasis supplied.]

In context, it is apparent that the provision describes the

8/ (...continued)
not, that negotiation over these changes in fact occurred as it should have.

elements of the voluntary agreement, requiring one officer's "request" to a fellow officer for a change of time, together with the other officer's "acceptance" of that request. We do not find that the word "acceptance," in this context, connotes the City's prior approval.

We also find that the FOA fails to establish a negotiable "prior approval" condition by reference to Article 14, Section 17 of the 2017 Rules. That provision states, "All changes of times must be approved by the Captains and Tour Chiefs involved." (CP-9, p. 54). This requirement is unchanged from the 1998 Rules, which have identical language at Article 18, Section 17. (CP-7, p. 54). As there was no change to this provision, the City had no duty to negotiate over it.

Time Period for Permitted Wearing of Shorts (H.E. at 26, n.12; FOA Exception No. 7)[9/]

We reject FOA's Exception no. 7, which contends that the City unlawfully and unilaterally adopted a calendar period authorized for the wearing of shorts by uniformed officers. (FOA Br., pp. 17-18). The Hearing Examiner made a factual finding that this change was "not corroborated" by a comparison of the 1998 Rules and the 2017 Rules. H.E. at 25. n.12. However, the record reflects that the wearing of shorts by uniformed officers

9/ The Hearing Examiner dealt with this issue as a finding of fact, and therefore did not address it under a subheading within his legal analysis.

was not an issue addressed in any way in the 1998 Rules, but in the 2017 Rules a calendar period authorized for the wearing of shorts by uniformed officers was imposed by the City. (CP-7, Art. 19; CP-9, Art. 15(9)(k)). Thus, a new rule was imposed on this issue in the 2017 Rules. We modify the Hearing Examiner's findings of fact accordingly.

The determination of daily uniforms is not mandatorily negotiable unless related to the health or safety of officers. Essex County Sheriff's Dept., P.E.R.C. No. 2000-79, 26 NJPER 202 (¶31082 2000). The record here contains no facts establishing an alleged safety concern over the wearing of shorts. However, some uniform clauses are permissively negotiable. See Saddle Brook Tp., P.E.R.C. No. 91-95, 17 NJPER 250 (¶22114 1991) (provision stating that certain officers would not be required to buy leather jackets until their nylon jackets wore out is permissively negotiable); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981) (30-month phase-out for old uniforms permissively negotiable); Town of Kearny, P.E.R.C. No. 81-34, 6 NJPER 446 (¶11229 1980) (change from leather to nylon jackets is permissively negotiable). It is not an unfair practice for an employer to unilaterally set new permissively negotiable employment conditions. See Jackson Tp., P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982); Montclair Tp., P.E.R.C. No. 93-28, 19 NJPER 492 (¶23225 1992).

Consistent with this precedent, we find that the City's decision to allow the wearing of shorts by fire department members is not mandatorily negotiable, whereas the subject of the time period within which shorts may be worn is permissively negotiable. However, the City's unilateral adoption of the latter change was not an unfair practice since it concerns a newly imposed rule on a permissively negotiable issue.

Change to Leave Procedures (H.E. at 78; City Exception No. 1)

We reject the City's exception no. 1, which is premised on its argument that the Hearing Examiner "improperly concluded that investigators and other uniformed personnel came under the purview of the [disputed vacation, sick and personal leave] policy based on the CNA governing the Fire Captains and the testimony of the FOA's President, Ricardo Carter." (City's Br., p. 3). This exception challenges the Hearing Examiner's credibility and factual findings, specifically those set forth at pages 34-35 of his Decision, as to which we "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c).

In accordance with our precedent, "Absent compelling contrary evidence, we will not substitute our reading of the

transcripts for a Hearing Examiner's first-hand observations and judgments." West Orange Bd. of Ed., P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018), citing Ridgefield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER 488 (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd, 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den., 186 N.J. 609 (2006). We find that the Hearing Examiner's factual findings on this subject are amply supported by the record, and his credibility findings are entitled to deference.

Duty to Provide Information (H.E. at 80; City Exception No. 2)

We reject the City's exception no. 2, which contends the Hearing Examiner erred in finding that the City refused to provide information to the FOA. The City argues that because it did not "affirmatively refuse" to provide the information, and that it ultimately provided requested information in discovery for the unfair practice litigation, this merely qualifies as a "late response . . . not a refusal to provide information." (City's Br., p. 5). We disagree. The City cites no authority stating that an "affirmative refusal," as opposed to a refusal via inaction, is required to make it an unfair practice. With respect to its latter argument, the provision of information through discovery during unfair practice litigation neither qualifies as a "late response" nor renders an order requiring

compliance with our act "unnecessary and redundant." (City's Br., p. 6). In State of New Jersey (Dept. of Human Services), H.E. No. 2003-6, 28 NJPER 429 (¶33157 2002), adopted, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003), a hearing examiner addressing similar circumstances found as follows:

> The [requested] information was not provided as of the filing of the charge. The fact that it was later provided does not make the State's earlier conduct moot. The State offered no reason for not providing the information and no reason for believing that its conduct would not recur. Cf. Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 120 S. Ct. 722 (2000)(party asserting mootness must persuade court that challenged conduct cannot reasonably be expected to recur). The collective negotiations process can function effectively only with the proper exchange of relevant information. Hardin and Higgins, The Developing Labor Law, 856 (4th ed. 2001); Burlington Cty.; Morris Cty.; State of NJ (OER)."), aff'd, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

As noted supra, here the Hearing Examiner found "no indication in the record that the documents requested were provided to the FOA or that the City advised the FOA such documents did not exist or were otherwise unavailable." H.E. No. 2020-1, ¶ 24, pp. 24-25. The City's exceptions do not refute that finding. State of N.J. (Office of Employee Relations), P.E.R.C. No. 92-100, 18 NJPER 172 (¶23084 1992), the case relied upon by the City in support of this exception, is inapposite. There the employer initially failed to respond to an information request, but then responded fully to a renewed request. Here,

the City ignored repeated requests by the FOA for information until the FOA filed its unfair practice charge.

ORDER

The City of East Orange 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 this Act, particularly by:

a. issuing a November 9 directive unilaterally changing the procedures by which FOA unit officers may use personal and vacation leave;

b. creating a new schedule of disciplinary penalties that could be imposed by the Professional Standards Unit, without negotiating with the FOA;

c. changing disciplinary review procedures without negotiating with the FOA; and

d. refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by:

a. issuing a November 9 directive unilaterally

changing the procedures by which FOA unit officers may use personal and vacation leave;

b. creating a new schedule of disciplinary penalties that could be imposed by the Professional Standards Unit, without negotiating with the FOA;

c. changing disciplinary review procedures without negotiating with the FOA; and

d. refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

B. Take the following action:

1. Negotiate in good faith with the FOA over alterations to mandatorily negotiable terms and conditions of employment within proposed new or modified rules governing working conditions;

2. Rescind the November 9, 2017 directive concerning the use of personal leave immediately before and after holidays and rescind the requirement that FOA unit officers provide ten (10) days' notice to the City prior to using a planned vacation day;

3. Restore the status quo ante governing the use of personal and vacation leave by FOA unit officers that existed prior to the issuance of the November 9, 2017 directive;

4. Negotiate in good faith with the FOA over any

proposed changes to the use of personal and vacation leave, and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

5. Rescind the schedule of disciplinary penalties that could be imposed by the Professional Standards Unit;

6. Restore the status quo ante governing disciplinary penalties that could be imposed for minor or serious disciplinary action that existed prior to the City's adoption of the 2017 Rules;

7. Negotiate in good faith with the FOA over any proposed changes to the schedule of disciplinary penalties and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

8. Rescind the disciplinary review procedures set forth in the 2017 Rules;

9. Restore the status quo ante governing disciplinary review procedures that existed prior to the City's adoption of the 2017 Rules;

10. Negotiate in good faith with the FOA over any proposed changes to the disciplinary review procedures and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

11. Provide the FOA, in a reasonably prompt fashion, the information requested in items two (2) and (3) of the FOA's

May 31, 2017 request for information, and any other information requested by the FOA pursuant to the good-faith negotiations to be undertaken in compliance with this Order;

12. 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; and

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

C. The FOA's remaining claims are dismissed with prejudice.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: January 23, 2020

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 interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by: (a) issuing a November 9 directive unilaterally changing the procedures by which unit officers of the East Orange Fire Officers Association (FOA) may use personal and vacation leave; (b) creating a new schedule of disciplinary penalties that could be imposed by the Professional Standards Unit, without negotiating with the FOA; (c) changing disciplinary review procedures without negotiating with the FOA; and (d) refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by: (a) issuing a November 9 directive unilaterally changing the procedures by which unit officers of the East Orange Fire Officers Association (FOA) may use personal and vacation leave; (b) creating a new schedule of disciplinary penalties that could be imposed by the Professional Standards Unit, without negotiating with the FOA; (c) changing disciplinary review procedures without negotiating with the FOA; and (d) refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

WE WILL negotiate in good faith with the FOA over alterations to mandatorily negotiable terms and conditions of employment within proposed new or modified rules governing working conditions;

WE WILL rescind the November 9, 2017 directive concerning the use of personal leave immediately before and after holidays and rescind the requirement that FOA unit officers provide ten (10) days' notice to the City prior to using a planned vacation day;

Docket No. CO-2018-131 City of East Orange
(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

APPENDIX "A"

WE WILL restore the status quo ante governing the use of personal and vacation leave by FOA unit officers that existed prior to the issuance of the November 9, 2017 directive;

WE WILL negotiate in good faith with the FOA over any proposed changes to the use of personal and vacation leave, and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

WE WILL rescind the schedule of disciplinary penalties that could be imposed by the Professional Standards Unit;

WE WILL restore the status quo ante governing disciplinary penalties that could be imposed for minor or serious disciplinary action that existed prior to the City's adoption of the 2017 Rules;

WE WILL negotiate in good faith with the FOA over any proposed changes to the schedule of disciplinary penalties and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

WE WILL rescind the disciplinary review procedures set forth in the 2017 Rules;

WE WILL restore the status quo ante governing disciplinary review procedures that existed prior to the City's adoption of the 2017 Rules;

WE WILL negotiate in good faith with the FOA over any proposed changes to the disciplinary review procedures and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

WE WILL provide the FOA, in a reasonably prompt fashion, the information requested in items two (2) and (3) of the FOA's May 31, 2017 request for information, and any other information requested by the FOA pursuant to the good-faith negotiations to be undertaken in compliance with this Order.

Docket No. CO-2018-131 City of East Orange
(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

APPENDIX "A"