P.E.R.C. NO. 2022-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-2016-038
CO-2016-196
CO-2020-092

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

CITY OF NEWARK

Respondent,

-and-

Docket Nos. CO-2020-063
CO-2020-065

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

In an unfair practice determination based on the parties' joint stipulation of facts and waiver of hearing, the Public Employment Relations Commission holds that the City violated subsections 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it implemented two General Orders and a disciplinary matrix that unilaterally modified negotiable disciplinary procedures and disciplinary penalty policies of FOP and SOA employees. The Commission finds that the City's voluntary Consent Decree with the Department of Justice does not supersede its collective negotiations agreements (CNAs) with the FOP and SOA or its obligations under the Act to collectively negotiate prior to implementing any changes. The Commission finds that the City's creation of a Civilian Complaint Review Board (CCRB) does not violate the Act, as its language recognizes the supremacy of any applicable laws, standing orders, and CNAs, and any due process challenge related to changes the CCRB might make to the FOP's and SOA's negotiated disciplinary procedures are premature.

The Commission orders the City to cease and desist from unilaterally changing negotiable terms and conditions of employment, and to restore the FOP's and SOA's disciplinary procedures.

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. 2022-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-2016-038
CO-2016-196
CO-2020-092

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

CITY OF NEWARK

Respondent,

-and-

Docket Nos. CO-2020-063
CO-2020-065

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION, INC.,

Charging Party.

Appearances:

For the Respondent, Carmagnola & Ritardi, LLC, attorneys (Sean P. Joyce, of counsel)

For the Charging Party - Fraternal Order of Police, Newark Lodge No. 12 - Markowitz & Richman, attorneys (Stephen C. Richman, of counsel and on the brief; Matthew D. Areman, on the brief)

For the Charging Party - Newark Police Superior Officers' Association, Inc. - John J. Chrystal, III, President, Newark Police SOA

DECISION

Procedural History

On September 28, 2015, the Fraternal Order of Police, Newark Lodge No. 12 (FOP) filed an unfair practice charge against the City of Newark (City). (Docket No. CO-2016-038). The charge alleges that the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] when it unilaterally promulgated a disciplinary matrix that revised the parties' negotiated disciplinary procedures as set forth in General Order 93-02 (GO 93-2). On March 28, 2016, the FOP filed an unfair practice charge alleging that the City violated subsections 5.4a(1) and (5) of the Act by passing an ordinance that implemented an external Civilian Complaint Review Board (CCRB) that would unilaterally change the parties' due process rights and pre-disciplinary processes. (Docket No. CO-2016-196). On June 14, 2016, the Director of Unfair Practices (Director) issued a consolidated complaint on the FOP's 5.4a(1) and (5) allegations.

On June 23, 2015 and March 11, 2016, the Newark Police Superior Officers' Association, Inc. (SOA) filed an unfair

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 employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . ."

practice charge, and amended charge, alleging that the City violated the Act by unilaterally changing terms and conditions of employment affecting investigations, interviews, interrogations, and discipline when it issued the Mayor's Executive Order MEO-0005 and subsequent ordinance implementing the CCRB. (Docket No. CO-2015-292). On March 7, 2016, the Director issued a complaint on the SOA's 5.4a(1) and (5) allegations.

On March 30, 2016, the SOA's application for interim relief in Docket No. CO-2015-292 was consolidated with the FOP's application for interim relief in Docket Nos. CO-2016-038 and CO-2016-196. On May 16, 2016, a Commission Designee denied the consolidated application for interim relief, finding that neither the CCRB nor the disciplinary matrix had yet been implemented, and that the effect of the City's Consent Decree with the United States Department of Justice (DOJ) on the City's ability to unilaterally implement a CCRB and disciplinary matrix appeared to be an issue of first impression for the Commission. I.R. No. 2016-7, 43 NJPER 81 (¶23 2016).[2/]

On September 12 and 24, 2019, the SOA filed an unfair practice charge and amended charge against the City alleging that on September 3, 2019, during negotiations for a successor

---

2/ We note that while the FOP's charges that were part of that consolidated interim relief decision are part of the instant case, the SOA's charge involved in that case (CO-2015-292) was withdrawn effective July 29, 2020.

collective negotiations agreement (CNA) to their 2013-2015 CNA and 2016-2017 memorandum of agreement, the City repudiated Article XXV, "Investigations," which incorporated General Order 05-04 (GO 5-4), by implementing General Order 18-25 (GO 18-25), "Complaint Intake and Investigation Process," which explicitly superseded GO 5-4. (Docket No. CO-2020-063). The charge alleges that the City's action violated the Act by unilaterally changing terms and conditions of employment regarding employee investigations and disciplinary review procedures.

On October 22, 2019, a Commission Designee granted, in large part, the SOA's request for interim relief in Docket No. CO-2020-063. I.R. No. 2020-3, 46 NJPER 167 (¶41 2019). The Designee's Order restrained the City from continuing to implement those portions of GO 18-25 that abrogate or change pre-disciplinary procedures and protections of SOA unit employees set forth in GO 5-4, and ordered the City to reinstate all such protections. On December 19, 2019, the Commission denied the City's motion for reconsideration of I.R. No. 2020-3. P.E.R.C. No. 2020-29, 46 NJPER 271 (¶65 2019). The Commission found that the Designee appropriately applied the interim relief standards in determining that the SOA demonstrated a substantial likelihood of success on its claim that the City repudiated the CNA and failed to negotiate in good faith before unilaterally changing mandatorily negotiable pre-disciplinary procedures. The Commission found

that the City's assertion that its Consent Decree with the DOJ relieves it of its obligation to negotiate over the changes is not supported by Commission and judicial precedent.

On January 8, 2020, the City filed with the New Jersey Superior Court, Appellate Division, a motion for leave to appeal both the Designee's interim relief decision in I.R. No. 2020-3 and the Commission's decision denying reconsideration (P.E.R.C. No. 2020-29). On February 3, 2020, the City filed with the Appellate Division a motion for leave to appeal the Designee's interim relief decision in I.R. No. 2020-7. The Court denied the City's motions for leave to appeal on February 21, 2020.

On September 13 and 20, 2019, the SOA filed an unfair practice charge and amended charge against the City alleging that on September 11, 2019, the City unilaterally implemented General Order 18-26 (GO 18-26), "Disciplinary Process and Matrix," which modified GO 93-2 "The Disciplinary Process" and implemented a discipline matrix. (Docket No. CO-2020-065). The charge alleges that the City's action violated the Act by unilaterally changing terms and conditions of employment regarding employee disciplinary review procedures and adding a discipline matrix during negotiations for a successor CNA.

On January 15, 2020, a Commission Designee granted the SOA's request for interim relief in Docket No. CO-2020-065. I.R. No. 2020-7, 46 NJPER 333 (¶82 2020). The Designee determined that

the SOA established a substantial likelihood of success on the merits of its allegation that the City unilaterally modified the parties' negotiated disciplinary review procedures, and that irreparable harm would result because the parties are in negotiations for a successor agreement. The Designee also found that the public interest was furthered by adhering to the Act and requiring good faith negotiations prior to changing a term and condition of employment. The Designee's Order restrained the City from continuing to implement those portions of GO 18-26 that abrogate or change the disciplinary procedures and protections of SOA unit employees set forth in GO 93-2, and ordered the City to reinstate all such procedures and protections in GO 93-2.

On October 10, 2019, the FOP filed an unfair practice charge against the City alleging that the City violated the Act by unilaterally changing negotiated disciplinary procedures by issuing GO 18-26. (Docket No. CO-2020-092). On September 29, 2020, the Director issued a complaint on the FOP's allegations in Docket No. CO-2020-092 and consolidated it with the FOP's complaints in Docket Nos. CO-2016-038 and CO-2016-196.

On April 19, 2021, the Director issued a complaint on the SOA's 5.4a(1) and (5) allegations in Docket No. CO-2020-065. On April 19, 2021, the Director consolidated the SOA's CO-2020-065 complaint with the FOP's CO-2016-038, CO-2016-196, and CO-2020-092 complaints. On June 23, 2021, the Director issued a

complaint on the SOA's allegations in Docket No. CO-2020-063. On June 23, 2021, the Director consolidated the SOA's CO-2020-063 complaint with the consolidated complaint that already included the SOA's CO-2020-065 complaint and the FOP's CO-2016-038, CO-2016-196, and CO-2020-092 complaints.

On December 14, 2021, the parties - i.e., the City, the FOP, and the SOA - filed a joint stipulation of facts and agreed, pursuant to N.J.A.C. 19:14-6.7, to waive a Hearing Examiner's Report and Recommended Decision and have the Commission issue a decision based on the stipulated record and the parties' legal arguments. On March 18, 2022, each party filed a brief. On March 28, 2022, the City filed a supplemental brief in opposition to the FOP's and SOA's briefs. On March 29, 2022, the FOP filed a letter objecting to, and responding to, the City's submission of a supplemental response brief.

Facts

The parties' joint stipulation of facts (JSOF) consists of 32 paragraphs, many of which recite elements of the procedural history of the consolidated unfair practice charges discussed above. The JSOF also contains references to 13 exhibits that accompanied the JSOF and are incorporated into the JSOF as though fully set forth therein.[3/]

3/ The joint exhibits are: 1) 2009-2012 CNA between the City and FOP; 2) 2013-2015 CNA between the City and SOA; 3) City (continued...)

We now summarize the JSOF facts that are not part of the procedural history before the Commission.

- Since October 18, 1994, the FOP has been the certified, exclusive negotiations representative of non-supervisory police officers employed by the City, pursuant to the Act.

- Since at least 1967, the SOA has been the certified, exclusive collective negotiations representative of police officers holding the ranks of sergeant, lieutenant, and captain employed by the City, pursuant to the Act.

- Newark is a municipal corporation, a political subdivision of New Jersey, and the employer as defined in N.J.S.A. 34:13A-3, of all police officers and superior officers represented by the FOP and SOA, respectively.

- The FOP and City are parties to a series of CNAs; the 2009-2012 Agreement is the pertinent agreement governing terms and conditions of employment for negotiations unit employees during the time period in question.

- The SOA and City are parties to a series of CNAs; the 2013-2015 Agreement is the pertinent agreement governing terms and conditions of employment for negotiations unit employees during the time period in question.

- In 1993, the City agreed with the collective negotiations representatives at the time upon disciplinary review procedures for members of the Newark Police Department (NPD), promulgated as "General Order 93-2 - The Disciplinary Process." GO 93-2 has been in effect since its inception.

3/ (...continued)
General Order 93-2; 4) City General Order 05-04; 5) October 30, 1998 Order by Judge Codey in Dkt. No. ESX-L-10117-98; 6) Mayor's Executive Order MEO-0005 establishing a CCRB; 7) City's June 24, 2015 "Disciplinary Matrix"; 8) City Council's March 16, 2016 CCRB Ordinance; 9) DOJ Complaint against City filed in federal court, Dkt. No. 2:16-cv-01731-MCA-MAH; 10) May 5, 2016 Consent Decree between City and DOJ; 11) July 19, 2016 re-issuance of General Order 05-04 regarding "Internal Affairs"; 12) City's General Order 18-25, issued August 29, 2019; 13) City's General Order 18-26.

- The FOP's CNA provides, at Article 28 "Investigations," a specific procedure for investigations of negotiations unit officers, to wit: "General Order 05-04 Internal Affairs and amendments are recognized as the guidelines for employees regarding official investigations. A copy of this Order shall be given to every employee."

- The SOA's CNA provides the same language at Article 25.

- General Order 05-04 (GO 5-4), referenced in these contractual provisions, expressly states that its purpose is to, inter alia, "improve the quality of law enforcement services" and be "responsive to the community by providing formal procedures for the processing of complaints from the public . . ." and goes on to state that it is intended to "ensure fairness and due process protection to citizens and officers alike."

- An Officer's procedural due process rights in disciplinary matters was the subject of an Order by Judge Codey in Docket No. ESX-L-10117-98.

- On or about April 30, 2015, the City's Mayor issued Executive Order MEO-0005 establishing a Civilian Complaint Review Board (CCRB) for the purpose of investigating and imposing discipline on members of the FOP and SOA units.

- On or about June 24, 2015, the City promulgated a "Disciplinary Matrix" unilaterally and without agreement or negotiations with the FOP or SOA, which imposed new levels of discipline and significantly modified the negotiated disciplinary procedure as set forth in GO 93-2.

- At the time of its promulgation of the CCRB and the Disciplinary Matrix in 2015, the City was in the midst of negotiations for a successor agreement with the FOP and the SOA, but never provided the FOP or the SOA notice or the opportunity to negotiate over these matters.

- On March 16, 2016, Newark's Municipal Council passed an ordinance establishing and implementing the CCRB.

- The DOJ filed a Complaint against the City and its police department in the United States District Court for the District of New Jersey.

- On May 5, 2016, in lieu of pursuing further litigation, the City entered into a Consent Decree with the DOJ to resolve the Complaint filed by the DOJ against the City.

- The FOP challenged the CCRB Ordinance in the Superior Court of New Jersey and on August 19, 2020, the New Jersey Supreme Court issued an opinion on the matter, which can be found at: Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75 (2020), cert. denied, 2021 U.S. LEXIS 2307 (May 3, 2021).

- On July 19, 2016, the City's Public Safety Director re-issued GO 5-4 regarding "Internal Affairs" to all negotiations unit employees represented by the FOP and SOA.

- On August 29, 2019, the City issued General Order 18-25.

- Among the many differences between GO 5-4 and GO 18-25 is the latter's inclusion of a provision for implementing a "Disciplinary Matrix."

- On September 9, 2019, the City issued Director's Memorandum 19-309, which announced the implementation of the department's "Disciplinary Process and Matrix; General Order 18-26" to take effect immediately. According to the document, GO 18-26 is intended to supersede GO 93-2.

Arguments

The FOP asserts that the City violated the Act by unilaterally changing mandatorily negotiable terms and conditions of employment concerning the penalties to be imposed for certain disciplinary infractions (disciplinary matrix), as well as disciplinary procedures related to the timeliness of charges, the holding of a hearing before a determination of guilt, the right to union representation during certain investigatory interviews, and being adequately informed of what actions might constitute a major offense. Specifically, it alleges that the CCRB Ordinance changed investigation procedures articulated in GO 5-4, GO 93-2,

the CNA, and Judge Codey's 1998 Order, because the due process guarantees contained therein are inapplicable to CCRB investigations. The FOP also alleges that the City's promulgation of a disciplinary matrix in 2015 and again through GO 18-25 and GO 18-26 unilaterally implemented a new progressive discipline system by designating certain penalties for each category of misconduct. It argues that the steps of such a disciplinary table are negotiable. The FOP asserts that GO 18-25 unilaterally changed the pre-disciplinary investigation procedures provided by GO 5-4 and incorporated into the CNA. The FOP asserts that the City's Consent Decree with the DOJ does not allow it to avoid its obligations under the Act to negotiate over changes to terms and conditions of employment.

The SOA's brief seeks a ruling from the Commission to maintain the interim relief orders in I.R. No. 2020-3 and I.R. No. 2020-7 that ordered the City rescind the portions of the CCRB, GO 18-25, and GO 18-26 that would modify GO 93-2 and GO 5-4 as they pertain to the negotiated pre-disciplinary procedures and investigations and interviews of SOA unit employees. The SOA asserts that the City violated the Act by unilaterally making such changes to negotiable pre-disciplinary procedures. The SOA specifically cites the omissions and changes made by GO 18-25 to GO 5-4 raised in the FOP's argument above and found by the Commission Designee in I.R. No. 2020-3. The SOA also asserts

that GO 18-26 unilaterally made certain changes to disciplinary procedures in GO 93-2 and unilaterally created a disciplinary matrix. The SOA asserts that the City's unilateral changes repudiated the "Investigations" clause of the CNA, as well as clauses concerning "Extra Contract Agreements," "Fully Bargained Provisions," and "Duration." The SOA argues that the City cannot by ordinance preempt mandatorily negotiable terms and conditions of employment. The SOA asserts that the City's Consent Decree with the DOJ does not permit it to unilaterally change terms and conditions of employment in violation of the Act.

The City does not contest that it unilaterally made the changes to disciplinary procedures that the FOP and SOA have alleged. The City has not asserted that any state or federal statutes preempt negotiations over the disciplinary procedures that it unilaterally changed. Nor has the City cited any state or federal court decisions ordering it to implement the changes regardless of any potential conflicts with the City's negotiated disciplinary procedures and its obligations under the Act.

The City asserts that General Orders 18-25 and 18-26 are not mandatorily negotiable because Article 22 of the FOP's CNA and Article 16 of the SOA's CNA give the City "unlimited authority over disciplinary action." The City argues that General Orders 18-25 and 18-26 fall within its managerial prerogative because they are consistent with the City's Consent Decree settlement

agreement with the DOJ. The City contends that public policy requires it to comply with the Consent Decree because the FOP's and SOA's CNAs cannot be used to contravene the protections of the U.S. Constitution. The City further argues that, under the terms of the Consent Decree, the federal court has jurisdiction over any disputes arising under it.

Analysis

N.J.S.A. 34:13A-5.3 defines when a public employer has a duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

The Commission and courts have thus held that changes in negotiable terms and conditions of employment must be achieved through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. See, e.g., Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 52 (1978). In Atlantic Cty., 230 N.J. 237, 252 (2017), the

Supreme Court of New Jersey reiterated this statutory duty to negotiate:

> Thus, employers are barred from "unilaterally altering . . . mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse." Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22, 675 A.2d 611 (1996) (citation omitted); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48, 393 A.2d 218 (1978) (finding Legislature, through enactment of EERA, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation").
>
> [Atlantic Cty., 230 N.J. at 252.]

A public employer's unilateral change to negotiable terms and conditions of employment may constitute an unfair practice in violation of subsection 5.4a(5) of the Act. City of Orange Tp., P.E.R.C. No. 2019-40, 45 NJPER 367 (¶96 2019), aff'd, 46 NJPER 557 (¶127 App. Div. 2020); State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985). For the Commission to find such a violation, the charging party must prove: (1) a change; (2) in a term or condition of employment; (3) without negotiations. Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985). An employer violates 5.4a(1) independently if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification and, derivatively, when an employer violates

another unfair practice provision. Lakehurst Bd. of Ed. and Lakehurst Ed. Ass'n, P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004), aff'd, 31 NJPER 290 (¶113 App. Div. 2005).

Here, the record establishes that the City's promulgation of a Disciplinary Matrix on June 24, 2015, and its implementation of GO 18-25 on August 29, 2019 and GO 18-26 on September 9, 2019, resulted in unilateral changes to disciplinary procedures for the FOP and SOA units that were established via contractual agreement and through the negotiated disciplinary and investigation procedures the parties had agreed to in GO 93-2 and GO 5-4. The City does not contest that it made these changes. Thus, the City will have violated its statutory obligation to negotiate if the subjects of its unilaterally implemented procedural changes are mandatorily negotiable.

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. 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). 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), the Charging Party must show that the dispute involves a change in a mandatorily negotiable, as opposed to a permissive,

subject. City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2018). Accordingly, the following standard for mandatorily negotiable items outlined in Paterson, which is consistent with the standard for non-police and fire employees set forth in Local 195, applies:

> 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.
>
> [Paterson, 87 N.J. at 92.]

"Employers can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate power, after complying with the negotiated procedures, to make a disciplinary determination." City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358, 361 (¶120 2009). The Commission and courts have held that procedural safeguards associated with discipline and investigations intimately and directly affect employees and do not significantly interfere with the ability of a public employer to impose discipline. See, e.g., N.J.I.T., P.E.R.C. No. 2003-9, 28 NJPER 343 (¶33120 2002), aff'd, 29 NJPER 415 (¶139 App. Div. 2003) (contractual right to legal representation during

due process hearing is arbitrable); Rutgers University, P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016), aff'd, 45 NJPER 45 (¶12 App. Div. 2018) (pre-disciplinary investigation procedures were arbitrable); City of Newark, P.E.R.C. No. 2012-19, 38 NJPER 191 (¶64 2011) (disciplinary procedures arbitrable); City of Newark, P.E.R.C. No. 2010-62, 36 NJPER 50 (¶23 2010) (disciplinary procedural claims were arbitrable); UMDNJ, P.E.R.C. No. 2010-45, 35 NJPER 461 (¶152 2009) (procedural protections such as reason for the action, opportunity to respond, and written charges prior to being placed on administrative leave do not significantly interfere with ability to impose major discipline); Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2005-28, 30 NJPER 444 (¶147 2004) (procedural protections including right to a prompt written complaint and right to union representation are arbitrable); and Rutgers University, P.E.R.C. No. 96-22, 21 NJPER 356 (¶26220 1995) (procedures including pre-termination hearing and union representation during investigational interview were arbitrable).

Here, the City's GO 18-25 omitted the following disciplinary procedures that had been contained in GO 5-4:

- Notifications to officers of complaints filed against them and notification of the outcome of the investigation (GO 5-4, p. 9, IV.B.12.c, d);
- Investigations for serious complaints shall include interviews of the complainant, all witnesses, and the subject officer (GO 5-4, p. 10, IV.D.2.);

- Right to consult with and have union representative present for the subject officer during criminal allegation interview (GO 5-4, p. 11, IV.D.5.b);

- Officer must be informed of differences between being a witness or subject of criminal investigation and a witness acknowledgment form must be completed (GO 5-4, p. 11, IV.D.6.a, c);

- Witness officer has right to union representative if he reasonably believes interview could lead to administrative charges (GO 5-4, p. 11, IV.D.6.e);

- Subject officer to an administrative allegation has a right to be accompanied by a union representative in an interview, whose participation is limited to observing; a right to be informed of the nature of the complaint, the investigator's name, names of those attending the interview, and whether it will be recorded, and the union representing the subject officer shall be informed of the interview a reasonable amount of time prior to it (GO 5-4, pp. 11-12, IV.D.7.b, c, d, e, and f);

- Witness in investigation of administrative allegation is obligated to cooperate and will be informed of difference between being a witness and subject, and will complete a witness acknowledgment form (GO 5-4, p. 12, IV.D.8.a, b);

- If administrative investigation witness during the interview becomes a suspect of a criminal act, the employee shall be so informed and the interview terminated (GO 5-4, p. 12, IV.D.8.d);

- If witness officer in administrative interview reasonably believes it could lead to administrative charges, the officer is entitled to union representation (GO 5-4, p. 12, IV.D.8.i);

- Subject officer to an administrative allegation must be provided a hearing date within a reasonable time, a discovery package from the Internal Affairs file, proper notification to all witnesses, and a copy of the decision (GO 5-4, p. 14, IV.E.1., 3., 5., 6.);

- Investigative files are to be maintained securely and confidentially for prescribed periods of time and only released under certain circumstances, and entries of investigation records into personnel files are limited to

> when the complaint is sustained and discipline imposed, except no portion of internal investigation report may be placed into the employee's personnel file (GO 5-4, pp. 27-29, XII., XIII.)

We find that all of these cited portions of GO 5-4 that were omitted from GO 18-25 are mandatorily negotiable pre-disciplinary procedures concerning due process issues such as time frames, informational and notice issues, evidence and witnesses during a hearing, and the right to different levels of union representation under certain circumstances. As such, the City violated the Act by unilaterally implementing these changes.

Other differences between GO 18-25 and GO 5-4 include changes to the definitions of: major offense; minor offense; the 45-day rule for filing disciplinary charges; the 30-day rule for a trial or disciplinary conference date after preliminary notice of disciplinary action; and "Divisional Policy." GO 18-25 also created a new "Disciplinary Matrix" section and definition, while GO 5-4 does not include or define disciplinary matrix.

The City's definition of "major offense" added unspecified "serious violations of City Ordinances or Motor Vehicle violations." The City's definition of "Division Policy," the violation of which can constitute the basis for minor or major discipline, changed from a list including rules, regulations, and general orders, to the Division's general and unspecified "goals and objectives" concerning officer's interactions with people. Informing employees of what actions may result in discipline is

negotiable. State of New Jersey and Division of Criminal Justice NCOA, SOA and FOP Lodge No. 91, P.E.R.C. No. 2014-50, 40 NJPER 346 (¶126 2014), aff'd, 42 NJPER 165 (¶41 App. Div. 2015). Thus, to the extent the changes to these definitions fail to inform employees of which offenses or violations will result in discipline, they are mandatorily negotiable.

Next, we find that the City unilaterally changed the 45-day rule language of GO 5-4 to omit the procedure that suspends the time limit pending a criminal investigation. Contract clauses that address procedures for the timeliness of discipline charges for police officers are mandatorily negotiable so long as the clauses do not conflict with the procedures established by N.J.S.A. 40A:14-147. See, e.g., Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd, NJPER Supp.2d 290 (¶231 App. Div. 1992); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993). The version of the 45-day rule contained in GO 5-4 incorporates language consistent with N.J.S.A. 40A:14-147 that suspends the 45-day time limit during a concurrent criminal investigation. We also find that the City unilaterally eliminated the 30-day rule procedural language in GO 5-4 providing that a trial or disciplinary conference must be set no less than 5 days and no more than 30 days after the employee receives a preliminary notice of disciplinary action.

We concur with the Designee's finding in I.R. No. 2020-3 that there are no substantive procedural changes requiring negotiations in the modified definition of "minor offense." We also concur with his finding that the addition of a definition of "Disciplinary Matrix" in GO 18-25 did not change any definitions from GO 5-4 and did not actually impose or set forth a specific disciplinary matrix, as that issue is the subject of GO 18-26.

We now consider whether the City's promulgation of a disciplinary matrix and GO 18-26 unilaterally changed negotiable disciplinary procedures. GO 18-26 states that it supersedes GO 93-2. GO 93-2 does not include a disciplinary matrix or fixed penalties for specific offenses. GO 93-2 provides that a recommended penalty be selected from the following list of sanctions:

1. Oral Reprimand
2. Warning Notice
3. Written Reprimand
4. Suspension
5. Fine
6. Reduction in Rank
7. Discharge/Termination

[GO 93-2, p.3, II.T.]

GO 18-26 implements a Disciplinary Matrix that provides: "The Matrix will be used in all sentencing decisions and shall be the basis of all sanctions imposed for both Minor and Major discipline rendered at a Disciplinary Conference or Trial Board." (GO 18-26, p. 15, XIII.) GO 18-26 provides: "Upon a finding of

guilt, the Hearing Officer or Chair of the Police Trial Board shall rely upon the Disciplinary Matrix to determine the appropriate level of penalty." (GO 18-26, p. 19, XVI.A.) The Disciplinary Matrix is a table split into 15 Sections of different categories of misconduct with specific lists of violations within each category. (GO 18-26, pp. 19-24). The Matrix then defines four degrees of penalty ranges for each category of misconduct and for the specific violations within each category. (GO 18-26, pp. 25-27). Those penalty ranges refer to the different "levels of discipline" that are itemized by letter in the Matrix and defined as follows:

> A. Oral Reprimand or Warning notice
> B. Written Reprimand
> C. Suspension 1-3 days
> D. Suspension 3-5 days
> E. Suspension 6-30 days
> F. Suspension 30-90 days
> G. Suspension 90-180 days, may include demotion
> H. Demotion
> I. Termination
>
> [GO 18-26, p. 25, XVI.C.1.]

GO 18-26 provides that "any action or deviation from the Matrix will only be taken under extraordinary circumstances, which shall be properly documented." (GO 18-26, p. 27, XVI.E.)

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. 2019-21, 45 NJPER 211 (¶55 2018). 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. Id. The Commission and courts have held that both the general concept of progressive discipline and the specific steps of a progressive discipline system are negotiable. Roselle Park Bor., P.E.R.C. No. 2006-85, 32 NJPER 162 (¶72 2006); Morris Cty. College Staff Ass'n v. Morris Cty. College, 100 N.J. 383 (1985); City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000); UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995). Accordingly, we find that the City's unilateral imposition of a Disciplinary Matrix in GO 18-26 changed the recommended penalty policy in GO 93-2 and violated the Act. We similarly find that the City's June 24, 2015 unilateral promulgation of a disciplinary matrix violated the Act. Like the Disciplinary Matrix in GO 18-26, the 2015 matrix changed the sanctions table from that in GO 93-2 and set forth tables of categories of misconduct and levels offenses corresponding to certain penalty levels for the City's decision makers to use when determining discipline. (Stipulated Exhibit 7).

GO 18-26 also unilaterally created a monetary restitution obligation for officers as a penalty for damages to or losses of specified police property, such as the motor patrol vehicle. (GO

18-26, p. 27, XVI.F.) Like the Disciplinary Matrix, this restitution penalty for such offenses is a mandatorily negotiable issue. The Commission has previously found that the City has an obligation to negotiate with the SOA before imposing a reimbursement obligation as a penalty for replacement costs or repairs for damages to motor vehicles as a result of willful misuse or unjustifiable neglect. City of Newark, P.E.R.C. No. 2019-21, supra. Thus, the City violated the Act by unilaterally setting such a penalty for the items specified in GO 18-26.

Finally, GO 18-26 also unilaterally changed certain definitions from GO 93-2 in ways very similar to how GO 18-25 changed definitions from GO 5-4. For the same reasons as discussed above pertaining to GO 18-25, we find that the City violated the Act in GO 18-26 by unilaterally changing the definitions of "major offense" and the "45-Day Rule." (GO 18-26, pp. 4-5, VI.Q.; GO 18-26, p. 7, VI.HH.) However, we find that the City's changes to the definition of "Minor Offense" and its definition of the "New Jersey Administrative Code" do not constitute substantive procedural changes requiring negotiations. (GO 18-26, p. 5, VI.R. and S.)

We turn to the City's arguments in defense of its unilateral changes. First, the City asserts a contractual defenses that Article 22 of the FOP's CNA and Article 16 of the SOA's CNA are managerial prerogative clauses that allow the City to

unilaterally change otherwise negotiable disciplinary procedures. These contractual clauses provide:

> The City hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the laws and Constitution of the State of New Jersey and of the United States, including, but without limiting the generality of the foregoing, the following rights:
>
> a) To the executive management and administrative control of the City government and its properties and facilities, and the activities of its employees;
>
> b) To hire all employees and, subject to the provisions of law, to determine their qualifications and conditions for continued employment, or assignment and promote and transfer employees;
>
> c) To suspend, demote, discharge or take other disciplinary action for good and just cause according to law;
>
> d) To the executive management of the Police Department by economical and efficient selection, utilization, deployment and disposition of equipment, notwithstanding any other provisions of the Agreement.

The City has not identified any language within this management rights clause that specifically addresses disciplinary procedures or provides that the City may unilaterally change negotiated disciplinary procedures. Paragraph C recognizes the City's right to take "disciplinary action for good and just cause according to law." That general right of the City to take disciplinary

action, subject to review according to the parties' negotiated procedures and applicable law, does not speak at all to the negotiable disciplinary procedures at issue in this matter. By contrast, GO 93-2 and GO 5-4 (incorporated into the CNAs), set forth detailed negotiated disciplinary and investigation procedures that were unilaterally changed by GO 18-25 and 18-26.

We next address the City's chief defense of its unilateral changes to negotiable disciplinary procedures: that its Consent Decree with the DOJ requires it to implement the changes and that the Consent Decree effectively supersedes the parties' CNAs and the Commission's unfair practice jurisdiction. Contrary to the City's assertion, the Consent Decree does not supersede applicable state law, e.g., the New Jersey Employer-Employee Relations Act, or abrogate the City's contractual obligations pursuant to its collective negotiations agreements with the FOP and SOA. Indeed, the Consent Decree explicitly states:

> This decree shall not be deemed to confer on the civilian oversight entity any powers beyond those permitted by law, including by civil service rules and collective bargaining agreements.
>
> [Consent Decree, ¶13.]

Thus, the CCRB created by the City pursuant to the Consent Decree may not unilaterally impose any changes to the parties' negotiated disciplinary procedures in violation of the Act. Furthermore, the Consent Decree recognizes that collective

negotiations may affect its terms and requires only notification and consultation regarding such potential conflicts:

> The City and NPD will promptly notify DOJ if any term of this Agreement becomes subject to collective bargaining and consult with DOJ in a timely manner regarding the position the City and NPD will take in any collective bargaining consultation connected with this Agreement.
>
> [Consent Decree, ¶220.]

More significantly, regardless of whether the Consent Decree's terms acknowledge that it cannot be utilized to override state law or labor agreements, both Commission and federal judicial precedent have held that there is no managerial prerogative to unilaterally change negotiable terms and conditions of employment in order to settle civil litigation such as discrimination, civil rights, or constitutional claims. In Town of West New York, P.E.R.C. No. 99-110, 25 NJPER 332 (¶30143 1999), the Commission found that the employer's settlement of a political discrimination lawsuit did not permit it to violate the terms of the collective negotiations agreement without the union's consent. We held:

> A municipality must act within its lawful authority when it enters into agreements to settle litigation. See Carlin v. Newark, 36 N.J. Super. 74 (Law. Div. 1955); Edelstein v. Asbury Park, 51 N.J. Super. 368 (App. Div. 1958). Cf. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) (agreement on subject that is beyond authority of public employer may not be enforced). The Town's lawful authority to

> compensate new police officers was limited by the duty to negotiate imposed by section 5.3 before changing the practice regarding initial salary placement. No agreement or promise addressing Betancourt's working conditions could supersede the PBA's exclusive right to negotiate over the terms and conditions of employment of the officers it represents.
>
> [West New York, 25 NJPER at 334; emphasis added.]

Similarly, in City of Hackensack, P.E.R.C. No. 2018-54, 45 NJPER 18 (¶5 2018), the Commission found that the public employer violated the Act when it unilaterally implemented salary increases for certain employees pursuant to a settlement of a federal political discrimination claim under 42 U.S.C. §1983. We held:

> [A] public employer's interest in settling litigation does not outweigh a union's interests in maintaining its right to collectively negotiate over otherwise mandatorily negotiable terms and conditions of employment.
>
> [Hackensack, 45 NJPER at 22.]

The Commission's holding in Hackensack was supported by the United State Supreme Court's decision in W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757 (1983).

In W.R. Grace, the Supreme Court found that the employer's settlement of a federal employment discrimination lawsuit via a "conciliation agreement" with the Equal Employment Opportunity

Commission could not legally conflict with its seniority layoff obligations pursuant to its collective bargaining agreement with the union. The Court held:

> In this case, although the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent. Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored. Although the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights.
>
> [W.R. Grace, 461 U.S. at 771; internal citations omitted; emphasis added.]

W.R. Grace is clear that an employer's voluntary settlement agreement with a third-party (including a government entity) may not unilaterally change the provisions of a labor agreement.

Moreover, the U.S. Courts of Appeals have specifically applied W.R. Grace to hold that even Consent Decrees agreed to by public employers to settle federal civil rights lawsuits may not conflict with a union's right to collectively negotiate over changes in terms and conditions of employment. In United States v. City of Hialeah, 140 F.3d 968 (11th Cir. 1998), the Eleventh

Circuit found that it could not approve the portions of a federal civil rights Consent Decree between the DOJ and employer that would alter the employees' contractual rights and benefits, because they would violate the employees' state law collective bargaining rights. The Eleventh Circuit held:

> One party to a collective bargaining agreement cannot use the device of a nonconsensual consent decree to avoid its obligations, which the other party negotiated and bargained to obtain. . . . If the City wants to alter the manner in which competitive benefits are allocated, it must do so at a bargaining table at which the unions are present. Or, that must be done pursuant to a decree entered after a trial at which all affected parties have had the opportunity to participate.
>
> [City of Hialeah, 140 F.3d 968, 983; internal quotes and citations omitted; emphasis added.]

Similarly, in United States v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002), the Ninth Circuit found that the Consent Decree between the City and the DOJ to settle a lawsuit alleging deprivation of federal constitutional rights could not alter the police union's right to negotiate changes to its terms or conditions of employment. The Ninth Circuit held:

> The Police League has state-law rights to negotiate about the terms and conditions of its members' employment as LAPD officers and to rely on the collective bargaining agreement that is a result of those negotiations. . . . Except as part of court-ordered relief after a judicial determination of liability, an employer cannot unilaterally change a collective

> bargaining agreement as a means of settling a dispute over whether the employer has engaged in constitutional violations.
>
> [City of Los Angeles, 288 F.3d 391, 399-400; internal citations omitted; emphasis added.]

See also People Who Care v. Rockford Bd. of Educ., 961 F.2d 1335, 1337 (7th Cir. 1992) (school desegregation Consent Decree may not alter CNA provisions or disregard statutory duty to negotiate).

Consistent with W.R. Grace, City of Hialeah, City of Los Angeles, and People Who Care, we find that the City's interest in settling litigation concerning alleged constitutional violations by its police department via a Consent Decree with the DOJ does not outweigh the FOP's and SOA's statutory rights to collectively negotiate over mandatorily negotiable terms and conditions of employment. The City cannot, through the Consent Decree, shield itself from a finding, pursuant to New Jersey state law, that its disciplinary matrix and General Orders 18-25 and 18-26 violated the Act by unilaterally changing mandatorily negotiable disciplinary procedures in the parties' CNAs. The City's settlement with the DOJ was voluntary, without the consent of the FOP and SOA, who have through these unfair practice charges raised substantive objections to certain procedures implemented by the City pursuant to the Consent Decree. We also reiterate that the Consent Decree, by its terms, is subject to the parties' collective negotiations agreements and applicable law.

Accordingly, we hold that the City's unilateral implementation of the disciplinary procedures and disciplinary matrix outlined above breached its statutory obligation under N.J.S.A. 34:13-5.3 to negotiate with the FOP and SOA over "proposed new rules or modifications of existing rules" as well as "disciplinary disputes," and therefore violated subsection 5.4a(5) of the Act and, derivatively, 5.4a(1).[4/]

Moreover, we find that GO 18-25 and GO 18-26 made unilateral changes to negotiable terms and conditions of employment during pending contract negotiations, which is destabilizing to the employment relationship and contrary to the principles of our Act. See Atlantic County, 230 N.J. at 252. Such unilateral changes create a chilling effect on negotiations for a successor contract and constitute a refusal to negotiate. See Galloway, 78 N.J. at 49; City of East Orange, P.E.R.C. No. 2021-50, 47 NJPER 530 (¶124 2021), aff'd, App. Div. Dkt. No. A-2786-20 (May 4, 2022). The City has not demonstrated a legal right, through either state or federal statutes, regulations, or judicial

---

4/ We note that the parties have also incorporated prohibitions on unilateral changes during and after their agreements into their "Fully Bargained Provisions" and "Duration" clauses, which provide that the agreement "shall not be modified in whole or in part by the parties except by an instrument in writing only executed by both parties," that "The parties shall negotiate any change, modification or termination of this Agreement in accordance with applicable law," and that "The terms of this Agreement shall continue in effect during the negotiation between the parties." See FOP CNA Articles 34 and 35; SOA CNA Articles 29 and 30.

orders, to supersede its CNAs with the FOP and SOA or to abrogate its state law obligations under the Act to collectively negotiate and obtain the unions' consent prior to implementing any changes.

Finally, we address whether the City's passage of the CCRB Ordinance violated the Act by unilaterally changing negotiable disciplinary procedures. The CCRB Ordinance invests in the CCRB investigatory powers and oversight functions and generally describes the investigatory powers of the CCRB as:

> The Board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public (including, but not limited to complaints made by other police officers or personnel) against uniformed and sworn personnel of the NPD that allege misconduct involving inappropriate behavior or actions, including but not limited to excessive use of force, abuse of authority, unlawful arrest, unlawful stop, unlawful searches, discourtesy or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, age, sexual orientation, gender identity or expression, and disability, theft, and any other categories protected under law. Any member of the public is intended to have the broadest possible meaning and interpretation."
>
> [CCRB Ordinance, III.i.]

On August 5, 2016, the FOP sued the City claiming that the CCRB Ordinance violates multiple state statutes and the state constitution. The FOP's claim did not involve the Employer-Employee Relations Act. The Appellate Division invalidated the portion of the Ordinance that made the CCRB's investigatory

findings of fact binding, absent clear error, finding that it interfered with the authority of the police chief and IA Department to administer the disciplinary process. Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 483, 491-492 (App. Div. 2019). The Supreme Court modified the Appellate Division's decision to further limit some of the investigatory and oversight functions of the CCRB. Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75 (2020), cert. denied, 2021 U.S. LEXIS 2307 (May 3, 2021). Specifically, the Court held that the CCRB cannot conduct a concurrent investigation while an IA investigation is underway, as it would interfere with the intent of N.J.S.A. 40A:14-181 that the City follow the Attorney General's IAPP (Internal Affairs Policy and Procedures) and would disrupt the police chief's authority over the IA investigatory process. FOP Lodge 12, 244 N.J. at 105-108. However, the Court generally upheld the CCRB's investigatory rights concerning police misconduct complaints that are not under IA review, stating:

> The investigatory power conferred on the CCRB by ordinance is valid and poses no conflict with existing statutory law when it is used to investigate a citizen complaint filed with it and for which no IA investigation is undertaken. In such settings, the CCRB can investigate, conduct its hearing, and make findings of fact and recommendations on the pursuit of discipline to the Public Safety Director.

> The Public Safety Director is ultimately in charge of the imposition of discipline; is the official designated to be "the appropriate authority" to set procedures for the police department and, specifically, for the disciplining of officers; and can direct the initiation of formal disciplinary charges against an officer. The chief of police is responsible to him, and we perceive no diminution in the chief of police's authority if the Public Safety Director directs the chief to initiate charges against a police officer after receiving the findings and recommendation of the CCRB, notwithstanding that the IA process was not commenced. . . . Once charges are issued, the statutory rights of the officer described heretofore would pertain.
>
> [FOP Lodge 12, 244 N.J. at 108-109.]

The Court explicitly avoided analysis of the union's rights under our Act, stating: "we make no comment here on any collective bargaining rights that relate to disciplining of police personnel." Id. at 108, n.15. The Court also held that the FOP's due process challenges are premature, noting that we do not yet know what the CCRB's procedures will be, and that "when the CCRB conducts an initial investigation - and there is no IA investigation - the statutory protections trigger if and when the Public Safety Director chooses to impose discipline." Id. at 113. Finally, the Supreme Court invalidated the Ordinance's conferral of subpoena power on the CCRB. Id. at 111-113.

We find that, while the Supreme Court decision invalidating or limiting certain portions of the CCRB Ordinance did not directly address the FOP's rights under our Act, it upheld the

CCRB's basic powers to conduct investigations under certain circumstances that result in findings of fact (that are no longer binding) and recommendations for discipline. The Supreme Court recognized that it is still up to the Public Safety Director to initiate discipline and that such internal disciplinary processes must conform to the law. Furthermore, the language of the CCRB Ordinance itself acknowledges the police officers' retention of all preexisting rights through law and/or collective negotiations. Section IV.d. provides, in pertinent part:

> Nor shall the provisions of this section be construed to limit the rights of members of the NPD with respect to disciplinary action, including, but not limited to, the right to notice and a hearing, which may be established by any provision of law or otherwise.

Section V.C.§1-11(a) provides:

> It is the intent of these Rules not to alter the rights afforded to police officers by the NPD in standing orders or other rules and procedures or in collective negotiations contracts with respect to interviews so as to diminish such rights, if any, including but not limited to any existing right to notice of an interview, the right to counsel, and the right not to be compelled to incriminate oneself.

Given these provisions of the CCRB Ordinance that recognize the supremacy of any applicable laws (i.e., the Employer-Employee Relations Act), standing orders (i.e., GO 5-4 and GO 93-2) and CNAs (i.e., the FOP's and SOA's CNAs) over the CCRB's investigation procedures, we concur with the Supreme Court's

determination that any due process challenges to the CCRB's procedures are premature. Similarly, we find that the portion of the Ordinance that directs the CCRB to use an "established discipline matrix and guidelines" developed by the Public Safety Director and unions in consultation with the CCRB does not presently establish a violation of the Act, as our earlier "Disciplinary Matrix" analysis clarifies that the development of a disciplinary matrix is mandatorily negotiable and the City's unilaterally implemented disciplinary matrix is rescinded.

Accordingly, we do not find that the City's unilateral establishment of the CCRB Ordinance violated the Act, because it is not yet clear if or how it might be utilized by the CCRB in ways that would change or violate the FOP's and SOA's negotiated disciplinary procedures. Should such a violation occur, the FOP and/or SOA may choose to file an unfair practice charge and/or grievance over the implementation of CCRB investigatory procedures that conflict with or repudiate the FOP's and SOA's mandatorily negotiable disciplinary procedures.

ORDER

The City of Newark shall:

A. Cease and desist from:

1. 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 FOP and

SOA concerning terms and conditions of employment, particularly by unilaterally modifying the terms and conditions of employment of employees by the FOP and SOA, specifically by:

a. implementing those portions of General Order 18-25, identified in this decision, that abrogate or change disciplinary procedures contained in General Oder 05-04;

b. implementing those portions of General Order 18-26, identified in this decision, including a new "Disciplinary Matrix" and a new property damage monetary restitution policy, that abrogate or change disciplinary procedures and the disciplinary penalty policy contained in General Order 93-2;

c. implementing a June 24, 2015 "Disciplinary Matrix" that changes the disciplinary penalty policy contained in General Order 93-2;

B. Take this action:

1. Rescind those portions of General Order 18-25 that abrogate or change disciplinary procedures contained in General Oder 05-04;

2. Restore the disciplinary procedures contained in General Order 05-04;

3. Rescind those portions of General Order 18-26 and the June 24, 2015 Disciplinary Matrix that abrogate or change disciplinary procedures and disciplinary penalty policies contained in General Order 93-2;

4. Restore the disciplinary procedures and disciplinary penalty policies contained in General Order 93-2;

5. Negotiate in good faith, and subject to the impasse resolution procedures of the New Jersey Employer-Employee Relations Act, with the FOP over any proposed changes to disciplinary procedures and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

6. Negotiate in good faith, and subject to the impasse resolution procedures of the New Jersey Employer-Employee Relations Act, with the SOA over any proposed changes to disciplinary procedures and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations;

7. 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 City'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

8. Notify the Chair of the Commission within twenty (20) days of receipt what steps the City has taken to comply with this Order.

BY ORDER OF THE COMMISSION

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

ISSUED: May 26, 2022

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 FOP and SOA concerning terms and conditions of employment, particularly by unilaterally modifying the terms and conditions of employment of employees by the FOP and SOA.

WE WILL cease and desist from implementing those portions of General Order 18-25 that abrogate or change disciplinary procedures contained in General Oder 05-04.

WE WILL cease and desist from implementing those portions of General Order 18-26, including a new "Disciplinary Matrix" and a new property damage monetary restitution policy, that abrogate or change disciplinary procedures and the disciplinary penalty policy contained in General Order 93-2.

WE WILL cease and desist from implementing a June 24, 2015 "Disciplinary Matrix" that changes the disciplinary penalty policy contained in General Order 93-2.

WE WILL immediately rescind those portions of General Order 18-25 that abrogate or change disciplinary procedures contained in General Order 05-04.

Docket No. CO-2016-038
CO-2016-196
CO-2020-092
CO-2020-063
CO-2020-065

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

APPENDIX "A"

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 restore the disciplinary procedures contained in General Order 05-04.

WE WILL immediately rescind those portions of General Order 18-26 and the June 24, 2015 Disciplinary Matrix that abrogate or change disciplinary procedures and disciplinary penalty policies contained in General Order 93-2.

WE WILL restore the disciplinary procedures and disciplinary penalty policies contained in General Order 93-2.

WE WILL negotiate in good faith, and subject to the impasse resolution procedures of the New Jersey Employer-Employee Relations Act, with the FOP over any proposed changes to disciplinary procedures and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations.

WE WILL negotiate in good faith, and subject to the impasse resolution procedures of the New Jersey Employer-Employee Relations Act, with the SOA over any proposed changes to disciplinary procedures and any other mandatorily negotiable terms and conditions of employment, and maintain the status quo during negotiations.

CO-2016-038
CO-2016-196
CO-2020-092
CO-2020-063

Docket No. CO-2020-065 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

APPENDIX "A"