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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2993-21

CITY OF NEWARK,

Respondent-Appellant,

v.

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party-Respondent,

and

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION, INC.,

Charging Party-Respondent.

Submitted September 12, 2023 – Decided October 3, 2023

Before Judges Summers and Perez Friscia.

On appeal from the New Jersey Public Employment
Relations Commission, PERC Nos. 2016-038, 2016-
196, 2020-063, 2020-065, and 2020-092.

Carmagnola & Ritardi, LLC, attorneys for appellant (Sean P. Joyce, of counsel and on the brief; Stephanie Torres, on the brief).

Markowitz and Richman, attorneys for respondents Fraternal Order of Police, Newark Lodge No. 12 and Newark Police Superior Officers' Association, Inc. (Matthew D. Areman, on the brief).

Christine Lucarelli, General Counsel, attorney for respondent New Jersey Public Employment Relations Commission (Frank C. Kanther, Deputy General Counsel, on the statement in lieu of brief).

PER CURIAM

The City of Newark (City) issued two General Orders 18-25 and 18-26 (collectively "the General Orders") unilaterally changing predecessor general orders pertaining to disciplinary procedures, safeguards, sanctions, and penalties for members of the Fraternal Order of Police, Newark Lodge No. 12 (FOP) and the Newark Police Superior Officers' Association, Inc. (SOA) (collectively "the Unions"). The Unions filed unfair practice charges with Public Employees Relations Commission (PERC) against the City to rescind the General Orders. PERC subsequently issued a final agency decision that the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 to -64, and its collective negotiations agreements (CNAs) with the Unions because unlike

the predecessor general orders, the terms and conditions of employment set forth in the General Orders were not collectively bargained.

The City challenges PERC's decision, contending: (1) its duty to bargain with the Unions is exempted because the General Orders were in furtherance of a consent decree entered between the City and the United States Department of Justice (DOJ) approved by the United States District Court for the District of New Jersey; (2) the changes and additions in the General Orders do not pertain to subjects of mandatory negotiation; (3) the Unions waived their right to negotiation by failing to intervene during the federal litigation and General Orders' rule-making process; (4) public policy weighs against PERC's determination; and (5) the consent decree compels federal jurisdiction over the matter. We disagree and affirm substantially for the reasons expressed by PERC in its cogent final agency decision.

I

To provide a historical context to this dispute, we hark back to 1993 when the City's Police Department and the Unions agreed to General Order 93-2, modifying the disciplinary process for the Unions' members. Several years later, the City's directive to unilaterally change the disciplinary procedures in General Order 93-2 were rescinded by PERC. See City of Newark, I.R. No. 99-5, 24

N.J.P.E.R. ¶ 29228, 1998 NJ PERC LEXIS 267, at *9-11 (1998), reconsideration denied, P.E.R.C. No. 99-37, 24 N.J.P.E.R. ¶ 29240, 1998 NJ PERC LEXIS 199 (1998) (holding the City's Office of the Police Director's Memorandum 98-919, which unilaterally implemented changes to discipline and hearing procedures, violated the CNA to negotiate certain mandatorily negotiable subjects).

In April 2015, the City's mayor issued Executive Order MEO-0005, creating the Civilian Complaint Review Board (CCRB) in response to an investigation report by the DOJ, initiated by a petition from the American Civil Liberties Union of New Jersey regarding police misconduct.¹ Two months later, in June 2015, the City unilaterally promulgated a disciplinary matrix significantly modifying the disciplinary procedures set forth in General Order 93-2. The Unions separately filed unfair practice charges with PERC challenging the implementation of the CCRB² and the changes to their

¹ The City's Municipal Council passed an ordinance establishing and implementing the CCRB on March 16, 2016.

² In Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 80 (2020), our Supreme Court held the CCRB was permissible under state law as long as it complied "with current legislative enactments." The Court further ruled the CCRB could not issue subpoenas; "can investigate citizen complaints alleging police misconduct," which "may result in recommendations to . . . discipline . . . a police officer," but "cannot exercise its investigatory

disciplinary processes outside of the collective bargaining process required under the Act.

In February 2016, collective bargaining negotiations led to the issuance of General Order 05-04, intending to "improve the quality of law enforcement services," to be "responsive to the community by providing formal procedures for the processing of complaints from the public," and to preserve the due process rights of officers under investigation. The order set forth specific investigation procedures regarding allegations of police officers' misconduct.³

In March 2016, the DOJ, as a result of its investigation report, filed a complaint in the District Court against the City, seeking declaratory or equitable relief "to remedy a pattern or practice of conduct by the Newark Police Division . . . , the law enforcement agency of the City of Newark, New Jersey, that has deprived persons of rights, privileges, and immunities secured and protected by

powers when a concurrent investigation is conducted by the Newark Police Department's Internal Affairs [] unit." Id. at 81.

³ General Order 05-04 outlined an employee's right to notice of the complaint, General Order IV.B.12(c); granted union representation for administrative charges, id. IV.D.8(i); mandated that administrative charges be held in abeyance pending a criminal investigation involving the same facts and events, id. IV.D.8(d); and granted officers under investigation the right to their investigative file and the right to cross examine witnesses, id. IV.E.3, 5.

the Constitution and laws of the United States." A month later, the parties resolved the complaint through a seventy-seven-page consent decree, which among other things, required the City and the police department to improve the quality of policing through training; increase community outreach and oversight; develop new policies and procedures for internal affairs complaint intake and investigations; and develop consistent disciplinary procedures for officers.

In 2019, the City promulgated the General Orders, which, effective immediately, superseded General Orders 05-04 and 93-2, respectively, and implemented a new disciplinary process for the Unions' members. The Unions again separately filed unfair practice charges with PERC challenging the unilateral promulgation of the General Orders on the basis that they violated the Act and the CNAs.

Because they are fully detailed in PERC's final agency decision, we incorporate by reference the extensive procedural history culminating in PERC's issuance and consolidation of unfair practice complaints against the City based on the Unions' charges. PERC's final agency decision ordered the City to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the

Act 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 O[r]der 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 O[r]der 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 . . . 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 . . . 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 [PERC] within twenty (20) days of receipt what steps the City has taken to comply with this Order.

II

On appeal, the City reiterates the arguments PERC rejected. Before addressing them, we are mindful that PERC has "the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations." N.J.S.A. 34:13A-5.4(d); City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 567-68 (1998) (quoting N.J.S.A. 34:13A-5.4(d)). In making a scope of negotiations determination, PERC decides the "limited" issue of whether "the subject matter in dispute [is] within the scope of collective negotiations." Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978) (quoting In re Hillside Bd. of Educ., P.E.R.C. No. 76-11, 1 N.J.P.E.R. at 57 (1975)).

In our review of a PERC ruling, we give deference to the agency's interpretation of the Act "unless its interpretations are plainly unreasonable, contrary to the language of the Act, or subversive of the Legislature's intent." N.J. Tpk. Auth. v. AFSCME, Council 73, 150 N.J. 331, 352 (1997) (citations omitted). Said another way, an agency's determination "is entitled to affirmance so long as [it] is not arbitrary, capricious, or unreasonable, which includes examination into whether the decision lacks sufficient support in the record or

involves an erroneous interpretation of law." Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 241 N.J. 31, 40 (2020). However, where a legal question of statutory interpretation arises, we review de novo. Libertarians for Transparent Gov't v. Cumberland Cnty., 250 N.J. 46, 55 (2022).

A. Managerial Prerogative

The City contends that it properly exercised its managerial prerogative altering the discipline process matrix through the General Orders without having to negotiate with the Unions. This contention is unpersuasive.

Our Supreme Court has defined a mandatorily negotiable subject when "(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy." In re Loc. 195, IFPTE, 88 N.J. 393, 404 (1982). Based on these guidelines, PERC recognized that its prior rulings as well as our "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."

PERC determined that "all of the[] cited portions of [General Order] 05-04 that were omitted from [General Order] 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."

PERC further determined:

the City's unilateral imposition of a [d]isciplinary [m]atrix in [General Order] 18-26 changed the recommended penalty policy in [General Order] 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 [d]isciplinary [m]atrix in [General Order] 18-26, the 2015 matrix changed the sanctions table from that in [General Order] 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.

[General Order] 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. ([General Order] 18-26, p. 27, XVI.F.) Like the [d]isciplinary [m]atrix, this restitution penalty for such offenses is a mandatorily negotiable issue. . . .

Finally, [General Order] 18-26 also unilaterally changed certain definitions from [General Order] 93-2 in ways very similar to how [General Order] 18-25 changed definitions from [General Order] [05-04]. For the same reasons as discussed above pertaining to

[General Order] 18-25, we find that the City violated the Act in [General Order] 18-26 by unilaterally changing the definitions of "major offense" and the "45-Day Rule." ([General Order] 18-26, pp. 4-5, VI.Q.; [General Order] 18-26, p. 7, VI.HH.).⁴

We agree with PERC that the disciplinary procedures detailed in the General Orders involve matters subject to mandatory negotiation. The City has not shown the disciplinary procedures implemented in General Orders 18-25 and 18-26 are fully or partially preempted from collective bargaining by statute or regulation. See In re Loc. 195, 88 N.J. at 405-06. Nor has the City shown that negotiation of these procedures would significantly interfere with the determination of governmental policy. See id. at 407-08.

B. Union Intervention

The City contends the Unions waived their rights to negotiate the disciplinary process set forth in the General Orders by failing to intervene during the federal litigation culminating in the consent decree or voice objection at a community hearing regarding the General Orders. Based upon our review of the record, the contention was not raised before PERC. We therefore would not

⁴ PERC, however, determined "the City's changes to the definition of 'Minor Offense' and its definition of the 'New Jersey Administrative Code' d[id] not constitute substantive procedural changes requiring negotiations. ([General Order] 18-26, p. 5, VI.R. and S.)."

normally consider the contention because it neither addresses the court's jurisdiction nor substantially implicates the public interest. See R. 2:10-2; Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citation omitted). Nonetheless, we conclude there is no merit for the contention.

Neither the DOJ's complaint nor the consent decree addressed the disciplinary process for the Unions' membership. The Unions therefore had no reason, let alone, basis to intervene. Furthermore, we are unaware of any caselaw, statute, or PERC decision exempting a public employer from its collective bargaining obligations simply because a collective bargaining unit failed to object to the public employer's pronouncement to unilaterally change employees' terms and conditions. Accordingly, the Unions did not waive their rights to challenge the General Orders by not intervening in the consent decree process or voicing objection at a community hearing regarding the General Orders.

C. The Consent Decree's Impact

The City argues the changes implemented by the General Orders were not mandatorily negotiable because they were authorized by the consent decree. The consent decree's terms expressly contradict the City's argument, stating: "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." PERC held "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." See e.g., W.R. Grace & Co. v. Loc. Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 771 (1983) (holding 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 (citations omitted)); United States v. City of Los Angeles, 288 F.3d 391, 399-400 (9th Cir. 2002) (ruling a consent decree between the City of Los Angeles 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 (citations omitted)); Town of West New York, P.E.R.C. No. 99-110, 25 N.J.P.E.R. ¶ 30143, at 334, 1999 NJ PERC LEXIS 50, at *11 (1999) (holding "[n]o agreement or promise addressing [an employee's] working conditions could supersede the [collective bargaining unit's] exclusive right to

negotiate over the terms and conditions of employment of the officers it represents"). Thus, PERC properly held "[c]ontrary to the City's assertion, the [c]onsent [d]ecree does not supersede applicable state law . . . or abrogate the City's contractual obligations pursuant to its [CNAs]."

The City also contends the consent decree "lead[s] to the inescapable conclusions that PERC does not have jurisdiction to address the issues raised by [defendants] and [that] the matter must be dismissed." In support, the City points to the consent decree's provisions requiring: (1) the parties to notify each other if the agreement "is challenged in any other court other than the [District Court]" (§ 219); and (2) "the City and [the police department] 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 [the police department] will take in any collective bargaining consultation connected with this Agreement" (§ 220). We disagree.

Neither consent decree provision states nor implies the Unions' unfair practice charge must be before a federal court. Paragraph 219 governs challenges to the consent decree. The Unions are not challenging the consent decree but the City's compliance with the Act. Paragraph 220 compels notice to the DOJ should the City and the Unions enter into a CNA affecting the consent

decree. The City is challenging collectively bargained employment terms and conditions predating the City's agreement to the consent decree in May 2016. The consent decree did not—nor could it—invalidate those terms and conditions. Even if the within dispute pertained to a new CNAs, paragraph 220 merely compels notice to the DOJ, not mandate federal jurisdiction over the collective bargaining process.

To the extent we have not specifically addressed any argument raised by the City, it is because we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In sum, the consent decree sought to resolve significant and legitimate concerns over the City's police department's practice of violating individuals' constitutional and federal law rights. The agreement did not authorize the City to unilaterally impose disciplinary procedures and sanctions against the Unions' members and sidestep its collective bargaining obligations under the Act. Consequently, PERC's final agency decision rescinding provisions of the General Orders and restoring prior negotiated disciplinary processes and penalties is not arbitrary, capricious, or unreasonable, and is supported by the credible evidence in the record.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION