

P.E.R.C. NO.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND
CIVIL SERVICE COMMISSION

In the Matter of

PENNY GRACIA et al.,
CAMDEN CITY POLICE
DEPARTMENT,

OAL Dkt No. CSV 7220-13
CSC Docket Nos.
2013-2016, 2013-2017, 2013-2018
2013-2019, 2013-2020, 2013-2021
2013-2022, 2013-2023, 2013-2024
2013-2025, 2013-2026, 2013-2027
2013-2028, 2013-2029, 2013-2030
2013-2031, 2013-2032, 2013-2033
2013-2034, 2013-2035, 2013-2036
2013-2037, 2013-2038, 2013-2039
2013-2040, 2013-2041, 2013-2042
2013-2043, 2013-2044, 2013-2045
2013-2046, 2013-2047, 2013-2048
2013-2049, 2013-2050, 2013-2051
2013-2052, 2013-2053, 2013-2054
2013-2055, 2013-2056

FOP LODGE 1,

Charging Party,

-and-

CITY OF CAMDEN AND
COUNTY OF CAMDEN,

Respondent.

PERC Docket Nos. CO-2013-094
CO-2014-106
(CONSOLIDATED)

Appearances:

For the Appellants/Charging Party, Caplan, Valenti & Murray, attorneys (Anthony Valenti, of counsel)

For the Respondent City of Camden Police Department, Jason Ascuncion, Assistant City Attorney

For the Respondent City of Camden, Brown and Connery, attorneys (Michael J. DiPiero, of counsel)

For the Respondent County of Camden, Office of the Camden County Counsel (Sherri L. Schweitzer, County Counsel; Howard L. Goldberg, First Assistant County Counsel)

DECISION

William Armstrong, Robert Babnew, Raul Beltran, Anthony Benson, Angel Camacho, Cheryl Campbell, Robert Chew, Mitzi Collins, Lawrence Cox, Melba Gracia, Penny Gracia, Steven Harlow, Jr., Michael Hendricks, Mark Hoopes, Erayna Hoskins, Keith James, Darryl Lofland, Madrid Matthews, Michael Mc Causland, Tyrone Mc Eady, Thomas Plotts, John Polcyn, Brian, Razzi, Isidoro Reyes, David Richman, Josph Rivera, Ella Roberts, Carmen Ruiz, Luis Ruiz, Luis Sanchez, Mark Saunders, Vincent Saunders, Bernardo Segarra, Orlando Segarra, Mashea Snyder, Jose Torres, Daniel Vause, Jr., Terrell Watkins, Craig Williams, Sr., Kathy Wilson, and Charles Zeigler, Jr. filed appeals of their layoff from the City of Camden Police Department with the Civil Service Commission (CSC). FOP Lodge 1 filed two unfair practice charges against the City of Camden and the City and County of Camden, respectively, with the Public Employment Relations Commission (PERC).

The first PERC charge alleges the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1), (3) and (5)^{1/} when it failed and/or refused to respond to the

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard
(continued...)

FOP's request to negotiate over matters associated with the City's plan to abolish its police force and its request for information related to the plan. The second charge, as amended, alleges the City and County violated section 5.4a(1), (2), (3), and (5) of the Act by imposing restrictions on applications from former City police officers to limit the number of FOP members hired by the new County force in an effort for the County to avoid the City's obligations under the FOP's CNA and union representation. The charge further alleges all Camden City police officers were laid off the day prior to the creation of the County force to avoid unions members' rights.

The CSC layoff appeals were forwarded to the Office of Administrative Law where they were consolidated for hearing. The Director of Unfair Practices consolidate the PERC charges and issued a single complaint on March 14, 2014. The Appellants filed a motion to consolidate the Civil Service appeals with the PERC charges and for a predominant interest determination. The City and County opposed the motion.

1/ (...continued)
to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. . . .
[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."

On July 8, 2014, Administrative Law Judge Joseph Lavery (ALJ) issued a decision and order consolidating the CSC and PERC cases before the OAL and determining that the CSC should have the predominant interest.

Having independently evaluated the record and considering the ALJ's Order, the CSC at its meeting on August 13, 2014 and the Chair of PERC, acting pursuant to the authority delegated to her by the full Commission, on August 1, 2014, determined that the cases should be consolidated consistent with both Commissions' approach in similar cases. PERC's unfair practice jurisdiction is exclusive. PERC shall have the predominant interest and the case should be processed in accordance with the following:

JOINT ORDER

The Civil Service layoff appeals and the Public Employment Relations Commission unfair practice complaint are consolidated for hearing before the Administrative Law Judge. The ALJ will first offer recommended findings of fact and conclusions of law to both PERC and the CSC disposing of all issues in controversy through a single initial decision under N.J.A.C. 1:1-17.8(a); and

Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to PERC to determine whether the City of Camden and County of Camden committed an

unfair practice under the New Jersey Employer-Employee Relations Act; and

PERC's decision and the complete record will then be sent to the CSC which will then determine whether the layoff was for legitimate business reasons and was otherwise warranted under Civil Service laws; and

If appropriate, the matter will be returned to PERC for its consideration of whether specialized relief is warranted under its Act.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
ON August 13, 2014



Robert M. Czech, Chairperson
Civil Service Commission

DECISION RENDERED BY THE CHAIR
OF THE PUBLIC EMPLOYMENT
RELATIONS COMMISSION ON
August 1, 2014



P. Kelly Hatfield, Chair
Public Employment Relations
Commission



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER OF CONSOLIDATION
AND PREDOMINANT INTEREST

**IN THE MATTER OF PENNY GRACIA,
ET AL., CAMDEN CITY POLICE
DEPARTMENT,**

And

CITY OF CAMDEN AND FOP LODGE 1

OAL DKT. NO. CSV 7220-13 et al.

PERC DKT. NOS. CO-2013-094 & CO-
2014-106

Anthony Valenti, Esq., for appellants (Caplan, Valenti and Murray, attorneys)

Jason Ascuncion, Assistant City Attorney, for respondent Camden City Police
Department

Michael J. DiPiero, Esq., for City of Camden (Brown and Connery, attorneys)
(PERC Action)

Howard L. Goldberg, First Assistant County Counsel, for the County of Camden
(PERC Action) (Sherri L. Schweitzer, County Counsel)

BEFORE **JOSEPH LAVERY**, ALJ t/a:

This order (a) determines the question of whether the pending matters now before the Civil Service Commission and the Public Employee Relations Commission (PERC) should be consolidated for determination and (b) decides which of these agencies has the predominant interest in the determination of the dispute between these parties.

Today's ruling is: These two appeals should be consolidated, with predominant interest established in the Civil Service Commission. Where the interests of the Public Employment Relations Commission diverge, the respective agencies will apply the Acts they administer and reconcile their separate statutory obligations.

Background:

The background to appellants' motion for an order of consolidation and establishment of predominant interest is relevant to this motion:

In January of 2011, the City of Camden (the City), asserting a twenty-eight million-dollar budget shortfall, engaged in a city-wide layoff. Included in the overall separation of 400 employees were 168 police officers. Following the layoff, in August of that year, the City, the County of Camden (the County) and the Division of Local Government Services in the N.J. Department of Community Affairs (DCA) executed a Memorandum of Understanding (MOU), in which the City agreed to participate in a newly-formed, county-wide police force, available on a voluntary basis to all police departments in the county. In January of 2012, the Camden County Police Department (County PD) was created by resolution, pursuant to N.J.S. 40A:14-106.

In August of 2012, the County applied to the N.J. Civil Service Commission (the CSC) for approval of a pilot program encompassing the operation of its Camden City Metro Division and suspending certain civil service regulations for one year. In October, the CSC granted the request. Shortly after, in letters of November and December, the City petitioned the CSC to approve a plan which would allow more layoffs of City employees by April 30, 2013. Again, on December 27, 2012, the CSC approved the plan. Subsequently, the County offered to allot extra seniority significant for health benefit advantages for those City PD Officers who signed up for the new County PD Metro Division by January 31, 2013. On April 30, 2013, the layoff took effect, and included those PD Officers here involved. On the following day, May 1, 2013, by resolution, the City and the County approved a "Police Services Agreement" extending

those services to the City which by this resolution were now available through a Camden City Metro Division within the County PD.

Appeals followed.

Appellants thereafter petitioned for relief before the CSC alleging bad faith by the City in its layoff. The matter was forwarded to the Office of Administrative Law (OAL) for hearing. After prehearing and issuance of associated orders¹ in the CSC proceeding, appellants filed unfair practice complaints with PERC. That agency accepted the appeals (CO-2013-94; CO 2014-106). The subsequent issuance of a Complaint and Order Consolidating Cases by PERC on March 14, 2014, was followed on June 3, 2014 by oral argument in the OAL on the present motion, which had been brought earlier. Appellants sought to consolidate the petitions now before both agencies and to declare which agency has predominant interest.

Arguments of the Parties:

Appellants' motion:

Appellants² maintain in their briefs that civil service rules were violated because the City acted in "bad faith." It did not have economy and efficiency as its primary motive. Petitioners further contend before PERC that both the City and the County engaged in unfair practices in violation of various provisions of the New Jersey Employer-Employee Relations Act (NJEERA). In particular, they argue, this occurred through failing, prior to layoff, to engage in collective negotiations with the majority bargaining representative as NJEERA requires and through failing to honor a prior contractual agreement. Both the City and the County, the argument goes, orchestrated the layoffs to eliminate existing and future contractual employment and hiring obligations, and to evade the applicable provisions of the Shared Services Act. Thus, respondents' behavior as challenged in the Civil Service and PERC appeals is actually the underlying factual nexus for both.

¹ Including an order of October 29, 2013 consolidating appeals individually brought before the CSC.

² Hereinafter "petitioners" to avoid confusion over the different titles for those bringing appeals used by the CSC and PERC.

Consequently, petitioners insist, all the elements of the standard for consolidation and establishment of predominant interest, N.J.A.C. 1:1-17.3 and -17.5, have been satisfied. They point out that the identity of those parties complaining of unfair practices to PERC and those protesting to the CSC “bad faith” by the appointing authority in laying them off, is the same. Petitioners urge the notion that the two entities empowered to decide their complaints, the CSC and PERC, will also preside factually and legally within the same parameters of the overall controversy. Where dissimilar issues might arise, they can be managed within the discretion of the presiding administrative law judge in the OAL, who will be in a position to compile a record to resolve all disputes within a single proceeding.

As for predominant interest, petitioners contend that it lies in the Civil Service Commission. In their view, the entire controversy arises from the bad faith layoff, an issue which is entirely within the legal preserve of the CSC. As for their claims of unfair practices, these would fall within the concurrent jurisdiction of both the CSC and PERC. In petitioners’ view, the CSC could conceivably include findings of unfair practices within its confirmation of bad faith motivation underlying the layoffs.

The City of Camden’s reply:

The City argues in its briefs that the applicable rule here is N.J.A.C. 1:1-17.3(a)1 through 6, and that petitioners are not in compliance. First, it states, the individual petitioners in the CSC matter are not identical to FOP Lodge 1, the complainant in the PERC case. Second, the disparate issues before the CSC and PERC will create confusion and delay: the “bad faith” appeal deals with matters preceding layoff, while the unfair practice complaints address events such as County hiring after the decision to layoff had been made. Further, the issue of “bad faith” in a layoff as compared to retaliation and interference with a union’s entitlement to exercise its rights as a collective bargaining agent, are not questions which lend themselves to consolidation.

Additionally, the City construes petitioners' motion as inconsistent with a prior ruling in the present forum, which would result in the disruptive introduction of irrelevant issues. Finally, the City believes the motion is not ripe for review because preliminary administrative processes before PERC have not been completed.³

The County's position:

The County opposes the motion, taking the position that neither the facts nor applicable law favor combination of the separate appeals to the CSC and PERC. It relies on a list of clashing differences: The County was not the appointing authority of appellants, who never applied for employment with the Camden County PD. Further, the County was never a party to any collectively negotiated agreement with the City. Finally, no matter what the outcome of the Civil Service appeal, to which the County is not a party, petitioners legally could never be awarded employment with the County. Consolidating that appeal with the PERC matter would therefore be meaningless.

Turning to N.J.A.C. 1:1-17.3, which sets out the standard for consolidation, the County asserts that the rule is not satisfied. First there is no identity of parties, because the County is not in the CSC case. Second, the questions of fact and law in the two appeals are dissimilar. Neither the law nor the facts overlap. Only the City conducted the layoff. The County played no integral part. Any relief sought in PERC relates to a specious claim of right to be hired in the County, which provided exactly that opportunity to be undertaken by petitioners through applications to the County PD, with improved benefits. None of the petitioners applied. Third and fourth, the confusion, delay and undue prejudice inevitable after conflation of the two matters would only produce the unnecessary expense of futile litigation rather than cause savings. Fifth, disposition of such disparate factual assertions and legal theories in one proceeding is not appropriate. Unfair labor practices found under NJEERA, are not necessarily evidence of "bad faith" under the Civil Service Act.

³ Both the City and County originally contended the motion was not ripe for review because PERC had not yet acted definitively to accept the complaint. Since then, as noted herein above, PERC issued a Complaint and an Order Consolidating Cases, rendering these arguments moot.

LEGAL ANALYSIS

The controversies appealed under the Civil Service Act and NJEERA arise from the same gestational events complained of: the layoffs and disbandment of the City PD and the hiring practices arranged with the County PD which followed. Petitioners insist that certain of these actions violate several laws. Decisions on what aspects of these events should be selected as relevant and material from within the surrounding swirl of factual and legal assertions must abide plenary hearing. The applications, if any, of the Civil Service Act and NJEERA to the facts found thereafter will be finally decided by the separate agencies administering these statutes.

However, the question for resolution on this motion is more limited. It is whether or not one hearing should be held before a single hearer to compile a record for final mutual decisions by both agencies. The answer is that one proceeding should be so held, subject to the controlling sections of the Uniform Administrative Procedure Act (UAPR).

The controlling rules:

Two rules of the UAPR primarily apply : N.J.A.C. 1:1-17.3 and N.J.A.C. 1:1-17.5. For convenience, they are reprinted below:

§ 1:1-17.3 Standards for consolidation

(a) In ruling upon a motion to consolidate, the judge shall consider:

1. The identity of parties in each of the matters;
2. The nature of all the questions of fact and law respectively involved;
3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases;
4. To the extent that dissimilar questions of fact or law are present, the

danger of confusion, delay or undue prejudice to any party;

5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and

6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested.

N.J.A.C. 1:1-17.5 directs that an administrative law judge considering the issue of predominant interest must weigh the following factors:

§ 1:1-17.5 Multiple agency jurisdiction claims; standards for determining predominant interest

(a) When a motion to consolidate pertains to contested cases filed with two or more State agencies which are asserting jurisdiction, the judge shall determine which agency, if any, has the predominant interest in the conduct and outcome of the matter. In determining this question, the following factors shall be weighed:

1. Whether more than one agency asserting jurisdiction over a common issue has jurisdiction over the issue, and if more than one agency has jurisdiction, whether the jurisdiction is mandatory for one of the agencies;
2. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve to moot the remaining questions or to affect substantially their resolution;
3. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency;
4. Whether the claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency but not the other;
5. Whether the common issue is clearly severable from the balance of the controversy and thus will permit non-duplicative factual and legal determinations by each agency.

The rationale for consolidation under N.J.A.C. 1:1-17.3:

The cumulative elements of N.J.A.C. 1:1-17.3 argue for consolidation: The parties in all cases may not be identical in the narrow technical sense found within a caption, but both the City and the County are accused by petitioners of acting in concert, and unlawfully. Petitioners are attempting to present their charges as a seamless piece. They must be given that opportunity. The nature of their grievances of record before both agencies relies on the same history. The same facts ultimately found through one hearing will be sorted through by both agencies to determine whether their respective laws apply.

Logically, a single, holistic administrative hearing is the best medium for disposition of these appeals. This has also been settled law since before enactment of the above-quoted rules. Hackensack v. Winner, 82 N.J. 1, 27 (1980) To proceed otherwise through separate agency hearings risks confusion, added expense, and, most significantly, conflicting findings of fact. In the latter instance, the doctrine of comity would compel honoring those findings made by the agency first out of the gate with its decision, whether or not they conflict. This would be an unfair, not to mention untidy, result. The potential for undue prejudice to both sides is apparent. Our Supreme Court in Hackensack and judicial decisions which have followed it have rejected this wasteful approach. Ibid.

With appeals in both agencies now ripe for review, both cases should be consolidated for hearing before an administrative law judge in the OAL, or by a hearing officer from PERC specially appointed as an administrative law judge. N.J.S. 34:13A-5.4c

The rationale for establishing predominant interest in the CSC pursuant to N.J.A.C. 1:1-17.5:

The predominant interest is that of the CSC. N.J.S. 11A:8-1; Hackensack v. Winner, supra, 82 N.J. at 19. Both the trigger and the overall theme of the grievances expressed by petitioners is bound-up in the layoffs: how they happened, and how matters traceable to those events inflicted the injuries claimed.

Turning to the rule, first, mandatory jurisdiction over the “bad faith” challenge to the layoffs resides solely in the Civil Service Commission. The remaining issues appear concurrent as to jurisdiction. Ibid; N.J.S. 11A:8-1, et seq.⁴. That legal point is enhanced by the rule at N.J.A.C. 1:1-17.7(c). This sub-section makes plain that the agency heads are “encouraged to consult and coordinate with each other before issuing a final order.” Read together with the language of N.J.A.C. 1:1-17.5(a)4 adverting to “particularized relief” and the wording at N.J.A.C. 1:1-17.8(b) acknowledging second-agency treatment of “remaining issues,” these rules make conflict in final decisions unlikely. Rather, where claims are vindicated, the rules’ collective language anticipates particular agency primacy over issues which “would require specialized or particularized remedial relief available in one agency but not the other.”

Second, there is the possibility that resolution of the layoff dispute over “bad faith” could moot, or, at the least, substantially affect the remaining issues.

Third, the allegations do extend beyond the parties to engage the policies and purpose of both the Civil Service Act and NJEERA [See esp. public policy statements at N.J.S. 11A:1-2 and N.J.S. 34:13A-2]. Finally, the issue of “bad faith” underlying the layoff is severable from the unfair practice charges only to the extent that the two controlling statutes compel distinct analyses and relief. As the need may arise, the CSC and PERC should have no difficulty in mutually resolving the questions here on appeal.

⁴ But cf. 34:13A-5.4c. vesting exclusive power in PERC to prevent engaging in unfair practices enumerated in that section.

The answers will be found within the enabling statutory sections which they customarily administer in the exercise of their respective expertise.

This order may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** which by law are authorized to make a final decision in this matter. The **CIVIL SERVICE COMMISSION** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** are encouraged to consult and coordinate with each other before issuing a final order. If the **CIVIL SERVICE COMMISSION** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** do not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall be deemed adopted by the **CIVIL SERVICE COMMISSION** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**. If the agency heads determine that the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** has the predominant interest, and that agency wishes to have the case heard by its personnel, it should so state in the final order.



July 8, 2014

DATE

JOSEPH LAVERY, ALJ t/a

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