

I.R. NO. 2015-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2014-154

NEWARK POLICE SUPERIOR OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants interim relief and orders the employer to abide by the decision of its Police Director at Step 5 of the grievance procedure which sustained a grievance related to a lump sum payment of accrued benefits. The Designee found that the union demonstrated a substantial likelihood of success on the merits, namely, that the employer unilaterally repudiated the grievance procedure, and that irreparable harm would result because the parties are in negotiations for a successor agreement. Balancing the public interest and the relative hardship to the parties, the Designee found that the public interest was furthered by adhering to the tenets of the Act, requiring good faith negotiations prior to changing a term and condition of employment, and respect for the negotiations process.

ORIGINAL

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STATE OF NEW JERSEY
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In the Matter of

CITY OF NEWARK,

Respondent,

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NEWARK POLICE SUPERIOR OFFICERS' ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Carmagnola & Ritardi, LLC (Barbara J. Stanton, of counsel)

For the Charging Party, John J. Chrystal III, President

INTERLOCUTORY DECISION

On January 15, 2014, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge, amended on December 21, 2014, with the Public Employment Relations Commission alleging that the City of Newark (City) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4(a)(1), (3), (5), and (7)^{1/} when, during collective negotiations, it unilaterally

^{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, or refusing to process grievances presented by the majority
(continued...)

repudiated Articles IV and XV of the parties' collective negotiations agreement (CNA) by failing to honor a Step 5 grievance decision of its Police Director and refusing to pay Lieutenant Ingold his accrued benefits in a lump sum on his day of separation. The amended charge was accompanied by an application for interim relief filed pursuant to N.J.A.C. 19:14-9.1 et seq. The SOA requests that the City be ordered to abide by the CNA's grievance procedure regarding a sustained grievance requiring the City to pay Lt. Ingold his accrued compensatory time or "lump sum" pay.

On December 29, 2014, I signed an Order to Show Cause directing the Respondent to file answering papers by January 9, 2015, and establishing a return date for oral argument on January 13. Subsequently, the parties agreed to an adjournment of the return date; the matter was rescheduled to January 16. On that date, I conducted a hearing via telephone conference, having been delegated the authority to act upon such requests for interim relief on behalf of the full Commission. The parties submitted briefs, certifications and exhibits in support of their respective positions and argued orally on the return date.

The City submitted the certification of its counsel, Barbara J. Stanton, Esq., attesting to the truth and accuracy of the

1/ (...continued)
representative.; and (7) Violating any of the rules and regulations established by the commission."

City's four submitted exhibits. The SOA submitted the certification of its representative, SOA President John J. Chrystal III, attesting to his professional background, to the truth and accuracy of the SOA's seven submitted exhibits, and to the truth and accuracy of all statements contained in the SOA's statement of facts based on his personal knowledge of the events leading up to this matter.

The following facts appear:

The SOA represents all superior officers in the ranks of sergeant, lieutenant, and captain. The City and SOA are parties to a CNA effective from January 1, 2009 through December 31, 2012 (City Exhibit 1 provides the CNA; SOA Exhibit A provides a link to the public sector contracts section of the Commission's website).

Article XV of the expired CNA contains the following pertinent language in Section 3:

Each employee covered by this Agreement may, at his/her option, upon separation from the Police Department, receive wages and other benefits due him/her in a lump sum equal to the cost to the City for such wages and other benefits had the employee remained on the payroll to receive them. Base salary, longevity, holiday pay, overtime, vacation allowance, clothing allowance, stress allowance, detective's allowance and accrued compensatory terminal leave time shall be considered benefits for the purpose of this section and shall be computed for the length of time due the separated employee.

The aforesaid lump sum payment shall be made on the day of separation. In the event an employee who elects the lump sum option is entitled to wages and

other benefits during two fiscal years, two lump sum payments shall be made. The first such payment shall be in an amount equal to the wages and benefits to which the employee would have been entitled for the year in which separation occurs and the second payment shall be in an amount equal to the wages and benefits to which the employee would have been entitled for the year immediately following separation had he/she remained on the payroll.

The first payment shall be made upon separation and the second payment shall be made in the second week of January of the subsequent year.

Article IV of the CNA is entitled "Grievance Procedure and Arbitration" and Section 1 defines its purpose as follows:

Purpose:

The purpose of this procedure is to secure, at the lowest possible level, an equitable solution to problems which may arise affecting the terms and conditions of this Agreement. The parties agree that this procedure will be kept as informal as may be appropriate.

Section 3 of Article IV delineates the steps of the grievance procedure. Steps 5 and 6 of that procedure provide:

Step 5:

Should no acceptable agreement be reached within five (5) calendar days after Step 4, then the matter shall be submitted to the Director of Police who shall have ten (10) calendar days to submit his/her decision....The parties may by mutual agreement, waive the steps prior to Step 4....

Step 6:

Arbitration:

Within two (2) weeks of the transmittal of the written answer by the Director, if the grievance is not settled to the satisfaction of both parties, either party to the Agreement may request that the grievance

be submitted to arbitration as hereinafter set forth....

Section 5 of Article IV contains general provisions applicable to the grievance procedure, including the following:

General Provisions:

...

(b) If the City fails to meet and/or answer any grievance within the prescribed time limits as herein before provided, such grievance shall be presumed to be denied may be processed to the next step.

On September 13, 2013, pursuant to Step 5 of the grievance procedure, SOA President Chrystal filed a written grievance directly with Police Director Samuel A. DeMaio. The grievance stated, in pertinent part (City Exhibit 2; SOA Exhibit B):

On 2/01/2013, Lt. Eric Ingold retired from the Newark Police Department. On 1/30/2013 you approved his retirement application. As of the writing of this letter Lt. Ingold has not been paid [sic]is accrued compensatory time and is currently owed 321 days of accrued compensatory time, including longevity.

According to the agreement, all members are suppose to be paid on the day of separation. If the member elects for the two (2) lump sum payments, the second payment is suppose to be made in the first week of January of the subsequent year. This matter has been at the Office of Management and Budget (OMB) for the last seven and one half (7 ½) months, sitting on Darlene Tate's desk.

...As a remedy to this matter, I respectfully request that you sustain the grievance and order the City Officials responsible for this matter to comply with our agreement, regarding payments on the day of separation

and first week in January of the subsequent year.

Please call me at your earliest convenience so we can discuss this matter or we can discuss it at our next scheduled grievance meeting.

On November 8, 2013, Police Director DeMaio issued a letter to SOA President Chrystal sustaining the grievance as follows (City Exhibit 3; SOA Exhibit C):

Re: **S.O.A. Grievance 13-15/S.O.A. 13-33; Lt. Eric Ingold (Ret.)
Failure To Pay Lump Sum Payment**

I have reviewed your grievance regarding the failure of the City to pay Lt. Ingold his lump sum payment on the day of separation. I have personally reviewed his time records and find that they are in order. I find that your grievance is with merit and is sustained. I will be directing Darlene Tate, Director of the Office of Management and Budget, to pay Lieutenant Ingold's below listed lump sum payment immediately. This payment shall include longevity and be paid at the 2013 rate of pay.

44 Vacation days
39 Holidays
202 Overtime Compensatory Days
36 Service Days
321 days total (including longevity)

The City does not deny refusing to pay Lt. Ingold his lump sum payment, either upon his day of separation or any time since. The City also does not deny that it has refused to implement the November 8, 2013 decision of Police Director DeMaio sustaining

the grievance. The City has not challenged the Director's decision through arbitration.

The parties are in negotiations for a successor CNA. On September 15, 2014, the City submitted a Memorandum of Agreement to the SOA containing proposed changes to the CNA (SOA Exhibit D). The City proposed the following changes to the lump sum payment of accumulated leave provision (Section 3. of Article XV):

Longevity premiums shall be specifically excluded from any calculations seeking remittance for overtime compensation as part of any request for lump sum payouts. References providing for retroactive pay adjustments to lump sum payments upon execution of a new bargaining agreement shall be deleted in its entirety.

Provided that all requisite auditing proofs required by the City for payment processing have been received, the aforesaid lump sum payment shall be made within 90 days of separation.

The City's proposed changes to the CNA's grievance procedure included the following proposal regarding grievance settlements:

...If any grievance filed by the Association results in any type of agreement, then said agreement is considered conditional, and it must then be submitted to the Corporation Counsel and Business Administrator for their respective review and written approval of all terms and condition contained within it....

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations

and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The SOA contends it is entitled to interim relief because the City has unilaterally changed terms and conditions of employment during negotiations for a successor agreement. It argues that the City's failure to pay Lt. Ingold has repudiated Articles IV "Grievance Procedure and Arbitration" and XV "Accrued Compensatory Time" of the CNA because Article XV requires the City to pay retiring unit members their lump sum benefits on the day of separation, and Article IV makes the Police Director the final step in the grievance procedure with authority to resolve grievances prior to binding arbitration. It asserts that these unilateral changes constitute irreparable harm because they have a chilling effect on negotiations.

The City asserts that the SOA has failed to establish a substantial likelihood of success because Police Director DeMaio did not submit his grievance decision within ten days pursuant to Step 5 of the grievance procedure, and therefore Article IV,

Section 5 applies to create the presumption that the grievance should be considered denied and processed to the next step (Step 6, arbitration). The City also argues that its Police Director acted outside of the scope of the CNA by approving the payment of longevity on accrued compensatory time, and that its Police Director violated City policies (City Exhibit 4) requiring Business Administrator consent prior to resolving grievances that will incur costs to the City or bind it via the past practice doctrine. The City next argues that the Commission does not have jurisdiction over this matter because there is insufficient evidence that the City violated the Act, because the SOA has not alleged failure to negotiate or process a grievance, and because the SOA's claim is not an unfair labor practice but is a claim to enforce a CNA. The City argues that there is no irreparable harm because the allegations can be adequately remedied by money damages. Finally, the City asserts that granting interim relief will cause injury to the public because it would then have to pay unsubstantiated lump sums of accrued benefits.

A public employer's refusal to honor the decision of its designated grievance representative at any step of the negotiated grievance procedure constitutes a refusal to negotiate in good faith in violation of subsection 5.4(a)(5) of the Act. Borough of Keansburg, P.E.R.C. 2004-29, 29 NJPER 506 (¶160 2003); Passaic Cty. (Preakness Hospital), P.E.R.C. No. 85-87, 11 NJPER 136

(¶16060 1985). In Preakness Hospital, the Commission rejected the employer's argument that its failure to implement the Step 3 grievance decision of its Special Counsel constituted a mere breach of contract claim rather than an unfair practice. In Keansburg, the Commission found an unfair practice where the Borough Manager disagreed with and disavowed the Police Chief's decisions at step 2 or those of his designee, who acted under express authority of the contractual grievance procedure. These cases are applicable to the instant matter.

In particular, the issue of whether the City of Newark's Police Director has the authority to issue grievance determinations at Step 5 of the grievance procedure has been previously settled by this Commission and confirmed several times after. In City of Newark, P.E.R.C. No. 2008-34, 33 NJPER 316 (¶120 2007), recon. den. P.E.R.C. No. 2008-53, 34 NJPER 71 (¶29 2008), involving these same parties and the same grievance procedure, the Police Director settled a grievance relating to vacation days, but the Police Chief refused to implement it. The Commission held:

The City argues that the vacation grievance settlement is void because the Director lacked the legal authority to change terms and conditions of employment set forth in the contract. We are not persuaded by this argument. In the labor relations context, an employer will be bound by its negotiated grievance procedure and the decisions of the agents it has authorized to represent it at each step. This grievance settlement

interprets what the City and SOA agree is ambiguous contract language and does not alter the terms and conditions of the collective negotiations agreement. The City cannot unilaterally rescind a grievance settlement reached by its Police Director under the negotiated grievance procedure. That rescission repudiates the grievance procedure and violates section 5.4a(5).

[Newark, 33 NJPER at 318]

Subsequent decisions by Commission Hearing Examiners, which became final agency decisions when the City did not file exceptions (N.J.A.C. 19:14-8.1(b)), followed the holding of Newark that the Police Director has authority to decide grievances at Step 5, and found that the City's policies purportedly limiting the Director's discretion are not part of the parties' negotiated grievance procedure and therefore not binding on the SOA. Of particular pertinence to the specific facts of this case, based on the nature of the underlying grievance and the proffered arguments, is City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013), in which the City's Police Director settled a grievance at Step 5 regarding the City's alleged failure to pay accrued compensatory time upon an officer's retirement. Citing the same three policy memoranda (City Exhibit 4) it has submitted in this case, the City refused to implement the settlement and pay the grievant because it claimed the Director did not have approval from the Business

Administrator to settle the grievance. Holding that the City violated the Act, the Hearing Examiner found:

Article IV, Steps 5 and 6, taken together, authorize the Director to decide or resolve grievances. The Business Administrator is not mentioned at any step in the grievance procedure. None of the provisions in the grievance procedure limit the Director's authority to resolve grievances, nor do any require further or prior approval of settlements by the Business Administrator. Where there is no language to the contrary contained in the settlement agreement, the SOA is entitled to assume that settlements made by the designated City representatives at the various steps of the procedure are final....Here, as in Newark, Preakness Hospital and Keansburg, the employer disregarded the decision of its own agent who acted in accordance with the express authority of the collective agreement.

[Newark, 39 NJPER at 413; footnote omitted]

In City of Newark, H.E. No. 2014-1, 40 NJPER 124 (¶48 2013), the City refused to pay a police officer for earned on-call compensation pursuant to a grievance sustained by its Police Director at Step 5 of the grievance procedure. Again rejecting the City's argument regarding the Police Director's authority to resolve grievances, a Commission Hearing Examiner held that the City violated the Act, finding:

At best, these documents may support that Police Director DeMaio violated an internal policy dating to 1997. The SOA was not a party to that policy nor is there any evidence that the SOA was notified of its existence. In any event, the policy does not abrogate the clear contract language of the

parties' negotiated grievance procedure which designates the Police Director to review and resolve grievances at Step 5. Additionally, the grievance procedure protects the City's interest as expressed in the 1997 policy directive by permitting the City to appeal any determination it disagrees with to binding arbitration at Step 6. Here, the City did not appeal, but simply refused to pay Gasavage the 208 hours ordered by DeMaio in resolution of the SOA grievance. [Newark, 40 NJPER at 126-127]

The precedential weight of Newark, P.E.R.C. No. 2008-34, Newark, H.E. No. 2013-14, and Newark, H.E. No. 2014-1, is directly applicable here, and, in conjunction with the City's repudiation of the grievance procedure during the course of collection negotiations, compels the granting of interim relief. Because the material facts are the same - the City has refused to abide by the decision of its designated Step 5 grievance representative - I am obliged to follow the Commission's prior decisions on this recurring dispute between these parties. In the instant matter the City raises an alleged contractual defense to repudiation by positing that the Police Director's grievance decision or settlement is null because it was rendered after 10 days from when it was presented to him. However, I cannot find that this defense constitutes a material factual dispute potentially making this case legally distinguishable from Newark, P.E.R.C. No. 2008-34, Newark, H.E. No. 2013-14, and Newark, H.E. No. 2014-1, because the Police Director's grievance decisions at Step 5 in all of those cases also occurred more than 10 days

after being presented to him.^{2/} The Commission and Hearing Examiners in Newark, P.E.R.C. No. 2008-34, Newark, H.E. No. 2013-14, and Newark, H.E. No. 2014-1, reading and interpreting the exact same grievance procedure language as in the instant case, all concluded that the Police Director's discretion and authority as the City's designated grievance decisionmaker do not extinguish until either party exercises its right under Step 6 of the grievance procedure to proceed to binding arbitration. Accordingly, I find that the SOA has established a substantial likelihood of success in a final Commission decision.

If the City was unsatisfied with the decision of its own representative's decision, one avenue of recourse it could have pursued was to submit the matter to arbitration per the negotiated grievance procedure. The City's other options, if it is not pleased with the decisions of its Police Directors at Step 5 of the grievance procedure, might have included internal personnel or training changes regarding how best to implement and effectuate its preferred grievance resolution policies. But the SOA is not a party to such policies and is not responsible for

^{2/} In Newark, P.E.R.C. No. 2008-34, the SOA's Step 5 grievance was filed on February 3, 2006; the first meeting with the Police Director was scheduled for February 27, 2006; and the grievance was resolved on June 29, 2006. In Newark, H.E. No. 2013-14, the SOA's Step 5 grievance was filed on January 11, 2011; and the Police Director settled the grievance on June 3, 2011. In Newark, H.E. No. 2014-1, the SOA's grievance Step 5 grievance was filed on September 11, 2012; and the Police Director sustained it on October 15, 2012.

who the City hires as Police Director and how such employees are trained or counseled regarding resolution of grievances which might surpass certain financial limits.

What the SOA is party to is the parties' ongoing collective negotiations for a successor agreement in which the City has proposed modifying the grievance procedure to reflect its preferred level of control over the Police Director's discretion and role in the resolution of grievances. The City is of course within its right to seek such amendments to the grievance procedure in order to restrict the Police Director's authority and place certain decisions in the hands of its Budget Director and/or Corporation Counsel as it prefers. However, such changes must be sought through collective negotiations or before an interest arbitrator, and cannot be unilaterally imposed.

It is well settled that after a contract expires, existing terms and conditions of employment must continue until the negotiations obligation is satisfied. N.J.S.A. 34:13A-33 provides, in relevant part:

34:13A-33. Terms, conditions of employment under expired agreements.

Notwithstanding the expiration of a collective negotiations agreement, ...no public employer...shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment...without specific agreement of the majority representative.

An employer's unilateral alteration of the status quo during negotiations for a successor agreement constitutes a refusal to

negotiate in good faith in violation of subsection 5.4(a)(5) of the Act and meets the irreparable harm portion of the interim relief standards because it has a chilling effect on negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); Rutgers, the State University and Rutgers University Coll. Teachers Ass'n, et al., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶79 App. Div. 1981); Clinton-Glen Gardner School Dist., I.R. No. 2014-1, 40 NJPER 121 (¶46 2013). The Commission requires maintenance of the static status quo. Bridgewater Tp., P.E.R.C. No. 2015-11, 41 NJPER 107 (¶38 2014), app. pending; Paterson State-Op. Sch. Dist., P.E.R.C. No. 2014-46, 40 NJPER 336 (¶122 2014), app. pending; Atlantic Cty, P.E.R.C. No. 2014-40, 40 NJPER 285 (¶109 2013), app. pending; N. Hudson Reg. Fire, P.E.R.C. No. 2014-2, 40 NJPER 139 (¶52 2013); Franklin Tp., P.E.R.C. No. 2012-10, 38 NJPER 148 (¶41 2011).

Here, the City's refusal to implement a settlement agreement under Article IV (which sustained the SOA's lump sum payment grievance under Article XV) is directly linked to the City's desired changes to the grievance procedure and the accrued compensatory time provision which it has proposed during collective negotiations. Under these circumstances, the repudiation of a grievance procedure which sustained a contractual economic benefit undermines the SOA's ability to

represent its unit and chills the employees' rights to negotiate collectively over both provisions. Such changes are unlawful and, where appropriate, will be rescinded if the standards for obtaining interim relief have been met. City of Passaic, P.E.R.C. 2004-21, 29 NJPER 483 (¶150 2003); Borough of Closter, P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001).

I reject the City's contention that there cannot be irreparable harm if only a financial remedy is ordered. Commission designees have regularly issued interim relief awards that require the payment of money when employers have unilaterally changed terms or conditions of employment during collective negotiations. See, e.g., Butler Bd. of Ed., I.R. No. 2011-24, 36 NJPER 464 (¶181 2010); City of Camden, I.R. No. 2010-12, 36 NJPER 59 (¶27 2010); Burlington Cty., I.R. No. 2001-13, 27 NJPER 263 (¶32093 2001); City of E. Orange, I.R. No. 2001-3, 26 NJPER 399 (¶31157 2000); N. Hudson Reg. Fire, I.R. No. 2000-7, 26 NJPER 108 (¶31044 2000); Island Hghts Bor., I.R. No. 97-23, 23 NJPER 412 (¶28188 1997); Fairview Bor., I.R. No. 97-13, 23 NJPER 155 (¶28076 1997), recon. den. P.E.R.C. No. 97-96, 23 NJPER 163 (¶28081 1997); Asbury Park Hous. Auth., I.R. No. 97-5, 22 NJPER 380 (¶27201 1996); Sussex Cty., I.R. No. 84-7, 10 NJPER 192 (¶15095 1984), recon. den. P.E.R.C. No. 84-115, 10 NJPER 260 (¶15125 1984).


The irreparable harm in these cases is not the monetary loss or delay per se, but rather the disruption to the collective negotiations process that can occur when unilateral changes are made which create undue financial pressure on a majority representative to accede to the employer's negotiating positions. Therefore, a monetary award is an appropriate remedy because complying with the Police Director's decision is the action which takes the parties back to the status quo ante, restoring the negotiations playing field without the coercive effect of delaying financial benefits owed to a unit member.

Finally, I find that the public interest is furthered by requiring adherence to the tenets expressed in the Act which require parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and thus promotes the public interest. Denying relief would harm the SOA in the negotiations process because the unilateral change of the grievance procedure places it in the position of having to negotiate back that contractual clause as well as the underlying lump sum benefit sought to be enforced through the grievance procedure, all while the City is proposing an end to lump sum payments upon retirement and an end to the Police Director's authority at Step 5 of the grievance procedure.

Based upon the above facts and analysis, I find that the Commission's interim relief standards have been met. I grant the SOA's requested remedy that the City abide by Police Director DeMaio's November 8, 2013 grievance settlement, but I decline to grant the SOA's requested interest on the settlement amount or its other requested orders. This case will proceed through the normal unfair practice processing mechanism, and the issues of interest and other orders or postings may be considered by the Hearing Examiner or Commission.

ORDER

The City is hereby ordered to abide by Police Director DeMaio's November 8, 2013 grievance settlement which awarded the grievant the following accrued leave days to be paid at the 2013 rate of pay, including longevity, in a lump sum payment: 44 vacation days; 39 holidays; 202 overtime compensatory days; and 36 service days.



Frank C. Kanther, Esq.
Commission Designee

DATED: February 3, 2015

Trenton, New Jersey