

I.R. NO. 2015-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2014-157

NEWARK POLICE SUPERIOR OFFICERS' ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Carmagnola & Ritardi, LLC (Domenick Carmagnola, of counsel)

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

INTERLOCUTORY DECISION

On January 16, 2014, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge, amended on February 5, 2015, 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,

^{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 representative.; and (7) Violating any of the rules and regulations established by the commission."

during collective negotiations, it unilaterally 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 Perez 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. Perez his accrued compensatory time or "lump sum" pay.

On February 18, 2015, I signed an Order to Respond directing the City to file answering papers by March 4, 2015, and notifying the parties that, pursuant to N.J.A.C. 19:14-9.2(d)4., I would be issuing a determination on the SOA's interim relief petition based on the pleadings and written response. After being granted an extension of time, the City filed its response on March 11, 2015. With its application, the SOA submitted a brief, exhibits, and the certification of its representative, Captain Chrystal. The City submitted a response brief, exhibits, and the certification of its counsel, Mr. Carmagnola, Esq.

Captain Chrystal's certification attests to the truth and accuracy of the SOA's exhibits, and to the truth and accuracy of all statements contained in the SOA's statement of facts to the best of his knowledge and recollection. Mr. Carmagnola's

certification attests to the truth and accuracy of the City's exhibits. 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. The parties are currently in negotiations for a successor agreement.

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.

Article XV of the 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.

On May 7, 2012, the City's Police Director approved of lump sum payment amounts to be made in connection with Lt. Perez's April 1, 2012 disability retirement, which totaled 196 days for the remainder of 2012, and 255 days for 2013 (SOA Exhibit C).

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 3; SOA Exhibit B):

On 4/01/2012, Lt. William Perez retired from the Newark Police Department. Lt. Perez is currently owed 255 days of pay, including longevity, plus \$10,341.98 of longevity, from the previous years payment.

Lt. Perez was not paid his first lump sum payment until 12/28/12, almost nine (9) months later. This payment did not include longevity on his compensatory time. As of the writing of this letter the City has failed to pay Lt. Perez his second lump sum payment. This second payment is suppose to be made in the first week of January of the subsequent year.

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 eight and one half (8 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 Official 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.

On November 8, 2013, Police Director DeMaio issued a letter to SOA President Chrystal sustaining the grievance as follows (City Exhibit 4; SOA Exhibit E):

Re: S.O.A. Grievance 13-16/S.O.A. 13-34;
Lt. William Perez (Ret.)
Failure To Pay Lump Sum Payment And Longevity

I have reviewed your grievance regarding the failure of the City to pay Lt. Perez his remaining lump sum payment and longevity on his first lump sum payment. I find your grievance is with merit and is sustained. According to your agreement, longevity should have been calculated on the first lump sum payment, for the 92 days of overtime compensation. Also, according to the collective bargaining agreement, Lt. Perez was entitled to be paid his remaining lump sum payment in the first two weeks of January of this year. Therefore, I will direct the Darlene Tate, Director of the Office of Management and Budget, to pay Lt. Perez longevity pay for his 2012 lump sum payment totaling \$10,341.98, and to pay the remaining balance as listed below, including longevity, immediately.

217 Overtime Compensatory Days
38 Service Days
255 days total (including longevity)

The City does not deny refusing to pay Lt. Perez his remaining lump sum payment, and 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.

On September 15, 2014, as part of collective negotiations, the City submitted a Memorandum of Agreement to the SOA

containing proposed changes to the CNA (SOA Exhibit F). 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. Perez 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 5) 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 asserts that there is no irreparable harm because the allegations can be adequately remedied by money damages, and that granting interim relief will cause injury to the public if its grievance procedure interpretation is not enforced and it is required to pay monetary damages in a manner contrary to its normal payment procedures.

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....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 the City's policies purportedly

limiting the Director's discretion are not part of the grievance procedure and therefore not binding on the SOA. In City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013), the City's Police Director settled a grievance at Step 5 regarding the City's failure to pay accrued compensatory time upon an officer's retirement. Citing the same policy memoranda (City Exhibit 5) submitted in this case, the City refused to implement the settlement 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]

Most recently, in City of Newark, H.E. No. 2015-8, 2015 NJ PERC LEXIS 6, the City was found to have violated the Act by failing to implement the Police Director's decision to sustain SOA grievances pertaining to failure to make the contractually required lump sum payments upon retirement to multiple grievants. Even though the SOA had already proceeded to Step 6 of the grievance procedure by filing for arbitration of the grievances, and arbitration hearings had begun, the Hearing Examiner found that the Police Director still retained authority to settle the

matters prior to the issuance of arbitration awards. Citing the Newark cases discussed above, the Hearing Examiner found:

No provision in the parties' negotiated Grievance Procedure limits the Police Director's authority to resolve grievances at any point, nor does the Police Director require approval to settle grievances....There is no dispute that the Police Director met with the SOA, reviewed information, sustained the Grievance and executed Agreements confirming same. This action by the Police Director is consistent with the Grievance Procedure at Steps 5 and 6, its stated Purpose in Section 1, and the line of City of Newark cases, supra....

Step 5 of the Grievance Procedure states the Director shall have ten calendar days to submit a decision. It is undisputed that the grievance was settled at Step 6 of the parties' grievance procedure by the Police Director during the pendency of an ongoing arbitration hearing.

...While the City's proposition is correct that only the arbitrator shall have the authority to issue a final decision at Step 6, a decision was not rendered. To the contrary, the Grievance was voluntarily sustained by the Police Director, settling the matter. I take administrative notice that grievance arbitrations may be settled by the parties prior to an arbitration decision. The Police Director, an authorized agent of the City, sustained the grievances during the pendency of the arbitration hearing.

[Newark, 2015 NJ PERC LEXIS 6; footnotes omitted]

The precedential authority of Newark, H.E. No. 2015-8, Newark, H.E. No. 2014-1, Newark, H.E. No. 2013-14, and Newark, P.E.R.C. No. 2008-34 is directly applicable here. This line of Newark cases interprets the exact same grievance procedure

language as in the instant case, concluding that the Police Director has discretion and authority to settle or sustain grievances at Steps 5 and 6 of the grievance procedure, and the City's refusal to abide by such decisions of its designated grievance representative is an unfair practice in violation of the Act. Accordingly, I find that the SOA has established a substantial likelihood of success in a final Commission decision.

It is well settled that after a contract expires, existing terms and conditions of employment must continue until the negotiations obligation is satisfied. 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.^{2/}

2/ See 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

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).

Consonant with the prohibition on unilateral changes to negotiable terms and conditions of employment after the expiration of an agreement, Commission designees have regularly issued interim relief awards requiring monetary relief under such circumstances.^{3/} The irreparable harm in these cases is not the

2/ (...continued)
 2013), app. pending; N. Hudson Reg. Fire, P.E.R.C. No. 2014-2, 40 NJPER 139 (¶52 2013); and Franklin Tp., P.E.R.C. No. 2012-10, 38 NJPER 148 (¶41 2011).

3/ See, e.g., City of Newark, I.R. No. 2015-3, 2015 NJ PERC LEXIS 9; City of Newark, I.R. No. 2015-1, 2014 NJ PERC LEXIS 137; Butler Bd. of Ed., I.R. No. 2011-24, 36 NJPER 464 (¶181 (continued...))

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 here 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

3/ (...continued)
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).

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 letter sustaining the grievance. This case will proceed through the normal unfair practice processing mechanism.

ORDER

The City is hereby ordered to abide by Police Director DeMaio's November 8, 2013 letter sustaining the grievance which awarded Lt. William Perez (ret.) \$10,341.98 in longevity pay for his 2012 lump sum payment, and the following accrued leave days for 2013 to be paid, including longevity, in a lump sum payment: 217 overtime compensatory days; and 38 service days.



Frank C. Kanther, Esq.
Commission Designee

DATED: March 30, 2015
Trenton, New Jersey