

H.E. NO. 2016-8

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2015-052

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Charging Party's Motion for Summary Judgment finding that the Respondent City of Newark violated 5.4a(1) and (5) of the Act. Specifically, the City failed to timely provide relevant information requested by the Association to carry out its representational duties. Moreover, the City unilaterally altered a negotiable term and condition of employment, military leave compensation and benefits, during negotiations for a successor agreement.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2016-8

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2015-052

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

Appearances:

For the Respondent
Kenneth Calhoun, Section Chief

For the Charging Party
Markowitz and Richman, attorneys
(Matthew D. Areman, Esquire)

**HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION**

The Fraternal Order of Police, Newark Lodge No. 12 (FOP) filed an unfair practice charge against the City of Newark on September 12, 2014. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),^{1/} imposing unilateral

^{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
(continued...)

changes to its military leave policy resulting in reduced compensation and benefits for employees on active duty, and by failing to provide the FOP with information related to the issue of military leave compensation and benefits.

On March 3, 2015, a Complaint and Notice of Hearing issued. The City filed an answer by letter dated March 12, 2015, generally denying each and every allegation in the complaint. A prehearing conference was conducted on April 2, 2015. A follow-up conference was held on May 6, 2012. Thereafter the case was scheduled for hearing on September 17, 2015.

On September 11, 2015, the FOP filed a motion for summary judgment and brief, and a request for a stay of the hearing pending disposition of the within motion. The stay was granted on September 14, 2015.

On September 14, 2015, the Commission case administrator advised the City that it may file an answering brief and any cross-motion for summary judgment by September 21, 2015. The City did not respond or file any papers.

On October 15, 2015, the Chair referred the motion to me for disposition. N.J.S.A. 34:13A-4.8.

1/ (...continued)
conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The FOP presents the following undisputed facts:

The FOP is the majority representative of the police officers employed by the City. The FOP and the City have been parties to a series of collective negotiations agreements. The FOP and City are parties to a collective negotiations agreement effective January 1, 2009 through December 31, 2012. The FOP and the City are currently engaged in collective negotiations for a successor agreement.

Since November of 2001, bargaining unit employees have received compensation and benefits while on military leave pursuant to an Executive Order of the Mayor which provides:

- i. City of Newark municipal employees who are called to active duty during Operations Enduring Freedom, Noble Eagle and other such operations precipitated by the September 11, 2001 attacks, shall be granted a leave of absence from their respective positions for up to three months beyond their termination of active duty, and shall be entitled, upon termination of active duty, to return to municipal employment (within the timeframe specified) with full seniority and benefits consistent with state and federal military reemployment and seniority rights.
- ii. During active duty for a total of up to 24 consecutive months, these municipal employees shall be entitled to receive a salary equal to the differential between the employee's municipal salary inclusive of base pay and longevity and the employee's military pay following the extension of statutory entitlements to full pay.

- iii. These municipal employees shall be entitled to health benefits and pension coverage during active duty service for which they receive differential salary as prescribed in this order (i.e., for a total of up to 24 months) as if they were on a paid leave of absence.
- iv. This order shall take effective immediately, and shall apply retroactively to all City of Newark employees who were placed on federal or state active duty on or after September 11, 2001.

Compensation and benefits were conferred under this order until August of 2014. Then, on or about August 21, 2014, the City issued Director's Memorandum (No. 14-237) and General Order (No. 14-01) purportedly to establish a "standardized policy for the reporting, recording and utilization of military leave," the effect of which was to unilaterally implement reduced levels of compensation and benefits for employees on military leave. The City's promulgation of a new military leave policy, which served to modify the prior policy and practice specifically with regard to the compensation and benefits for employees called to active duty, was done unilaterally, without notice to the FOP and without an opportunity to bargain over the changes.

In response to the unilaterally implemented military leave policy the FOP demanded to bargain over the changes; filed a grievance objecting to the changes; and requested certain information relative to the changes. Among other provisions, the FOP collective negotiations agreement contains a "Maintenance of

Standards" provision which prohibits the City from unilaterally modifying employees' existing rights, privileges and benefits.

In its information request, the FOP specifically requested:

- 1) The names of all bargaining unit members currently serving in the military who would be impacted by this [No. 14-237] Director's memorandum; and
- 2) The names of any bargaining unit members who have lost pay or medical coverage as a result of this unilateral change of policy.

Having received no response to its demand to negotiate and no response to its information request, the FOP filed the instant charge on or about September 12, 2014.

In the interim, the City issued a second Director's Memorandum, dated September 16, 2014, rescinding Director's Memorandum No. 14-237 and General Order No. 14-01, and specifically reinstating all of the recently terminated military leave benefits, stating "The Newark Police Department will continue to conform to past practice and custom which provides a leave of absence with pay to members on military leave."

Thereafter, again without notice to the FOP and without the opportunity to negotiate, the City unilaterally modified its policy and practice concerning military leave, proclaiming in an Executive Order that "Effective January 9, 2015, City of Newark Executive Order No. 'ML-01-001,' dated 11/14/01, is hereby rescinded in its entirety. The City shall continue to comport

with all applicable federal and state statutory parameters that govern military leave as further specified under the City of Newark's Personnel & Procedures Policy, to wit: 'PDP-24.'

In a letter dated May 11, 2015, some eight (8) months after the FOP's grievance was filed, the City provided a response to the FOP's information request, indicating the dates of military leave and nature of benefits for Police Officer Evandro Saramago. The City's May 11, 2015 letter indicates that as a result of the unilaterally implemented changes to the military leave policy, and contrary to the terms of the November 11, 2001 Executive Order No. ML-01-0001, Officer Saramago's compensation ceased on the date that his active duty/leave of absence began. Moreover, upon his return from military leave in January of 2015, he faces the possibility of ineligibility for health coverage until the next open enrollment period.

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). In determining whether summary judgment is appropriate, we must view the evidence submitted in connection with the motion in the light most favorable to the party opposing the motion. The summary judgment procedure is not to be used as

a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER (¶16 2006).

N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

Based upon the foregoing, the City's refusal to timely provide requested information and its unilateral change related to military leave without negotiations violated 5.4a(1) and (5), and movant is entitled to the relief requested as a matter of law. Consequently, I grant the FOP's motion for summary judgment.

Information Request

The FOP requested information about members impacted by the unilateral change in the military leave policy. The City failed to provide the information requested until May 11, 2015, eight (8) months after the FOP filed its grievance. The issue is whether the FOP is entitled to the requested documents as a matter of law. To answer this question, a threshold determination must be made regarding the relevancy of the information requested.

An employer must supply information to a majority representative if there is a probability that the information is potentially relevant and that it will be of use to the union in carrying out its representational duties and contract administration, which includes grievance processing. State of N.J. (OER) and CWA, P.E.R.C. No. 88-27, 18 NJPER 752 (¶18284 1987) recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1997) aff'd NJPER Supp. 2d 198 (¶177 App. Div. 1988); Shrewsbury Bor. Bd. of Educ. and Shrewsbury Bor. Teachers Ass'n, P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶12105 1981). Relevance is liberally construed. Morris Cty. and Morris Coun. No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), aff'd 371 N.J. Super. 246 (App. Div. 2004), certif. den. 182 N.J. 427 (2005). The information need only be related to the union's function as the collective negotiations representative and appear reasonably necessary for the performance of this function. Id., 371 N.J. Super. at 256. Relevance is determined through a discovery-type standard; a broad range of potentially useful information is allowed to the union for effectuation of the negotiations process. See NLRB v. Acme Indus. Co., 385 U.S. 432, 437 (1967); Proctor & Gamble Mfg. Co. v. NLRB, 603 F.2d 1310, 1316 (8th Cir. 1979). A refusal to supply potentially relevant information may constitute a refusal to negotiate in good faith and violate 5.4a(5) and derivatively a(1) of the Act. See In re

Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996); Burlington Cty. Bd. of Chosen Freeholders and CWA, P.E.R.C. No. 88-101, 14 NJPER 327 (¶19121 1988), aff'd NJPER Supp. 2d 208 (¶183 App. Div. 1989).

Moreover, an employer must timely provide information, as addressed in City of Newark, 39 NJPER 165 (¶51 2012).

Employers have a duty to respond to relevant requests for information in a timely manner or to adequately explain why the information will not be furnished. Regency Service Carts, Inc. and Shopmen's Local Union No. 455, 345 NLRB 671, 673 (2005). An unfair practice may occur if an employer does not provide the requested information "reasonably" promptly. NLRB v. John S. Swift Co., 277 F.2d 641, 645 (7th Cir. 1960). While a per se rule cannot be defined, a good faith effort on the part of the employer is expected in responding to an information request as promptly as circumstances allow, considering the extent of the information sought, the availability of the information, and any difficulty in retrieving it. West Penn Power Co., 339 NLRB 585, 587 (2003), enf'd in part 394 F.3d 233 (4th Cir. 2005). [35 NJPER 299] Id. (Footnote omitted)

The FOP's information request is relevant on its face as it is information directly related to its grievance over the City's unilateral change in military leave benefits. Similar to City of Newark, 41 NJPER 44 (¶138 2015), the City has not challenged the FOP's entitlement to the information, nor has it asserted confidentiality or privilege. Here, the City has not even claimed any bureaucratic delay resulting in its untimely

production. Under 5.4a(1) and (5) of the Act, the City had a duty to timely provide the requested information to the FOP for the purpose of processing the grievances. Therefore, its failure to timely produce the disputed documents violated 5.4a(1) and (5) of the Act.

Military Leave Benefits

The FOP's undisputed facts establish that since November of 2001, bargaining unit employees have received salary and benefits while on military leave pursuant to an Executive Order of the Mayor, which provided for up to twenty-four (24) consecutive months of salary equal to the differential between the employee's municipal salary inclusive of base pay and longevity and the employee's military pay as well as health benefits and pension coverage for that same period (*i.e.*, up to twenty-four (24) months). Those benefits were unilaterally reduced on or about August 21, 2014, by the promulgation of Director's Memorandum (No. 14-237) and General Order (No. 14-01). The City, on September 16, 2014, rescinded Director's Memorandum No. 14-237 and General Order No. 14-01, and it specifically acknowledged that all prior compensations and benefits would be reinstated.

On January 9, 2015, the City, again without notice to the FOP and without an opportunity to negotiate, modified the policy and practice concerning military leave benefits. The City issued

an Executive Order that stated: "Effective January 9, 2015, City of Newark Executive Order No. 'ML-01-001,' dated 11/14/01, is hereby rescinded in its entirety. The City shall continue to comport with all applicable federal and state statutory parameters that govern military leave as further specified under the City of Newark's Personnel & Procedures Policy, to wit: 'PDP-24.'"

By letter dated May 11, 2015, in response to the FOP's information request, the City acknowledged that as a result of the unilaterally implemented changes to the military leave policy (and contrary to the terms of the November 11, 2001 Executive Order No ML-01-0001), Officer Saramago's salary ceased on the date that his active duty/leave of absence began on July 22, 2014 and his medical benefits ceased three (3) months after his active duty/leave of absence began. Moreover, since his return from military leave in January of 2015, he remains without health coverage until the next open enrollment period. Had the City not unilaterally implemented these reductions in compensation and benefits, Officer Saramago would have received differential compensation during his entire period of activity (i.e., from July 22, 2014 through January of 2015) and, further, would not be without employer health coverage until the next open enrollment period.

Paid and unpaid leaves of absence are, in general, mandatorily negotiable unless a statute or regulation preempts negotiations. Burlington Cty. College Faculty Ass'n v. Burlington Cty. College Bd. of Trustees, 64 N.J. 10, 14 (1973); State of New Jersey (DOC) v. CWA, 240 N.J. Super. 26 (App. Div. 1990). The Commission has held paid military leave to be mandatorily negotiable unless preempted. Freehold Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-26, 17 NJPER 427 (¶22206 1991). In FOP Lodge 200, 30 NJPER 442 (¶146 2000), the Commission determined that a public employer's discretion to confer compensation and benefits for employees on military leave in excess of the statutory minimums constitutes a mandatory subject of bargaining exercised through negotiations. Moreover, the Commission has determined that the matter is not pre-empted by the various military leave statutes/regulations which provide for a paid compensation differential.

The City unilaterally implemented changes to the military leave policy, and contrary to the terms of the November 11, 2001 Executive Order No. ML-01-0001, Officer Saramago's salary ceased on the date that his active duty/leave of absence began on July 22, 2014 and his medical benefits ceased three (3) months after his active duty/leave of absence began. Moreover, since his

return from military leave in January of 2015, he remains ineligible for health coverage until the open enrollment period. Had the City not unilaterally implemented these drastic reductions in compensation and benefits, Officer Saramago would have received differential compensation during his entire period of active duty (i.e., from July 22, 2014 through January of 2015) and, further, would be without employer health coverage until the next open enrollment period.

Based upon the foregoing, I find the City violated a(1) and (5) of the Act when it unilaterally modified the compensation and benefits associated with military leave without negotiations.

Unilateral Change During Negotiations

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. An employer's unilateral alteration of existing terms and conditions of employment during negotiations constitutes a refusal to negotiate in good faith in violation of subsections 5.4a(1) and (5) of the Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). As discussed above, military leave compensation and benefits are a mandatorily negotiable term and condition of employment. Thus, the City's unilateral changes to

military leave benefits are an unfair practice in violation of subsections 5.4a(1) and (5) of the Act. Accordingly, I find that the City violated a(1) and (5) of the Act when it unilaterally modified the compensation and benefits associated with military leave during negotiations for a successor agreement.

CONCLUSIONS OF LAW

The City of Newark violated 5.4a(1) and (5) of the Act when it failed to timely produce, upon demand by the FOP, relevant information.

The City of Newark violated 5.4a(1) and (5) of the Act when it unilaterally modified compensation and benefits related to military leave.

The City of Newark violated 5.4a(1) and (5) of the Act when it made a unilateral change to negotiable terms and conditions of employment while in negotiations for a successor agreement.

RECOMMENDED ORDER

The FOP's motion is granted.

The City is ordered 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, particularly by failing to timely provide relevant information requested by the FOP, and by unilaterally modifying the compensation and benefits related to military leave, and

unilaterally changing terms and conditions of employment while in negotiations for a successor contract.

2) Refusing to negotiate in good faith with the FOP concerning terms and conditions of employment of employees in its unit, particularly, by failing to timely provide relevant information upon request by the FOP, by unilaterally modifying the compensation and benefits related to military leave, and unilaterally changing terms and conditions of employment while in negotiations for a successor contract.

B. Take the following action:

1) Make whole any and all employees who were denied compensation and benefits because of the City's unilateral change to its military leave policy as established by Executive Order of the Mayor in 2001.

2) Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such, on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and,

3) Within twenty (20) days of receipt of this order, notify the Chair of the Commission what steps the Respondent has taken to comply with this Order.

/s/Deirdre K. Hartman
Hearing Examiner

DATED: November 16, 2015
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 30, 2015.



NOTICE TO EMPLOYEES

**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to timely provide relevant information requested by the FOP, and by unilaterally modifying the compensation and benefits related to military leave, and unilaterally changing terms and conditions of employment while in negotiations for a successor contract.

WE WILL cease and desist from refusing to negotiate in good faith with the FOP concerning terms and conditions of employment of employees in its unit, particularly, by failing to timely provide relevant information upon request by the FOP, by unilaterally modifying the compensation and benefits related to military leave, and unilaterally changing terms and conditions of employment while in negotiations for a successor contract.

WE WILL make whole any and all employees who were denied compensation and benefits because of the City's unilateral change to its military leave policy as established by Executive Order of the Mayor in 2001.

Docket No. _____

(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372