

H.E. NO. 2020-8

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-2014-169
CO-2014-170

NEWARK POLICE DEPARTMENT
SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Newark Police Superior Officers' Association's motions for summary judgment, and denies the City of Newark's cross-motions, in two unfair practice charges filed by the SOA alleging that the City repudiated the parties' negotiated grievance procedure by refusing to abide by the Police Director's Step 5 decisions to sustain two grievances. The Hearing Examiner determines that the City's refusal to implement the Police Director's decisions constitutes a refusal to negotiate in good faith in violation of subsection 5.4a(5), and derivatively a(1), of the Act.

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Charging Party.

Appearances:

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

For the Charging Party,
John J. Chrystal, III,
(President, Newark Police SOA)

**HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY JUDGMENT**

On January 28, 2014, the Newark Police Superior Officers' Association (SOA or Union) filed two unfair practice charges, Docket Nos. CO-2014-169 and CO-2014-170, respectively, with the Public Employment Relations Commission (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,
(continued...)

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 then Police Director, Samuel A. DeMaio (DeMaio).

Specifically, the charge docketed as CO-2014-169 alleges the City refused or failed to implement DeMaio's decision to pay retired Captain Mark Whitley forty-three (43) vacation days, including longevity, at the 2013 rate of pay. The charge docketed CO-2014-170 alleges the City refused or failed to implement DeMaio's decision to pay retired Captain William Whitley twenty-nine (29) vacation days, including longevity, at the 2013 rate of pay.

On January 7, 2015, a Complaint and Notice of Pre-Hearing and an Order Consolidating Cases^{2/} issued on allegations the City violated 5.4a (1) (3) and (5) of the Act.^{3/} On January 15, 2015,

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act.; (3) Discriminating in regard 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.; (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."

2/ Pursuant to this Order, charges docketed as CO-2014-157, CO-2014-169, CO-2014-170, CO-2014-211, and CO-2014-234 were consolidated for hearing.

3/ The Director of Unfair Practices dismissed the Union's
(continued...)

the City filed an Answer, relying on its previously filed position statement. The City denies it refused to negotiate in good faith and asserts the charges are untimely, fail to state claims on which relief may be granted and should be dismissed on waiver or estoppel grounds. The City also asserts the Commission does not have jurisdiction over the allegations in the charges.

Upon request by the SOA, the charges were stayed pending a determination on SOA's application for interim relief on a related unfair practice charge, CO-2014-157. A pre-hearing conference was held on July 31, 2018.^{4/}

On July 13, 2018, the SOA filed motions for summary judgment in both CO-2014-169 and CO-2014-170, together with briefs, certifications by SOA President John J. Chrystal III, SOA Sergeant-At-Arms Victor M. Manata, and documents. On July 26, 2018, the City filed briefs in opposition and cross-motions for summary judgment, together with a briefs and documents. The City's motions were not supported by certifications or affidavits. On August 9, 2018, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8. I have

3/ (...continued)
alleged violation of section 5.4a(7) of the Act, noting it did not meet the Complaint issuance standard.

4/ A pre-hearing conference was not immediately rescheduled subsequent to the Commission's decision in CO-2014-157 (IR-2015-005) in light of the parties' ongoing attempts to amicably resolve the matters.

conducted an independent review of the parties' briefs and supporting documents submitted in this matter. The following material facts are not disputed by the parties. Based upon the record, I find the following:

FINDINGS OF FACT

1. The City and SOA are, respectively, public employer and public employee representative within the meaning of the Act.

2. The SOA represents all superior officers employed by the City in the ranks of sergeant, lieutenant, and captain.

3. The City and the SOA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2013 through December 31, 2015. The grievance procedure ends in binding arbitration. The parties are in negotiations for a successor agreement.

4. Article IV, entitled "Grievance Procedure and Arbitration", consists of six steps ending in binding arbitration. It provides, in pertinent part:

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 aggrieved employee has a right to representation by an official of the Association in Steps 1, 2, 3, 4 and 5 above. The parties may by mutual agreement, waive the steps prior to step 4. If a grievance arises as a result of action taken by the Chief of Police, Police Director or a city official, the grievance shall be filed with the Chief of Police.

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.

5. On August 5, 2011, the SOA President filed a grievance with the City's then-Police Director DeMaio on behalf of retired Captain Mark Whitley (Grievance 11-12) regarding the City's improper lump sum vacation payout of Mark Whitley, alleging he was owed forty-three (43) vacation days.

6. On September 13, 2011, the SOA President filed a grievance with DeMaio on behalf of retired Captain William Whitley (Grievance 11-15) regarding the City's improper lump sum vacation payout of William Whitley, alleging he was owed twenty-nine (29) vacation days.

7. On November 8, 2013, DeMaio sustained Grievance 11-12, determining "Captain Mark Whitley is entitled to receive 43 vacation days that were deducted from his total lump sum. I will be directing Darlene Tate, Director of Office Management and Budget, to pay Captain Mark Whitley his 43 vacation days, including longevity, at the 2013 rate of pay, immediately."

8. On November 8, 2013, Police Director DeMaio sustained Grievance 11-15, determining "Captain William Whitley is entitled to receive 29 vacation days that were deducted from his total lump sum. I will be directing Darlene Tate, Director of Office Management and Budget, to pay Captain William Whitley his 29

vacation days, including longevity, at the 2013 rate of pay, immediately.”

9. The City did not file for arbitration pursuant to Step 6 of the grievance procedure over either of the above grievance decisions.

10. To date, the City has refused or failed to implement DeMaio’s Step 5 decisions referenced above and has not paid the amounts the Director found were warranted.

11. On January 28, 2014, the SOA filed two unfair practice charges concerning the City’s failure to comply with the Director’s decisions concerning Captain Mark Whitley (CO-2014-169) and Captain William Whitley (CO-2014-070). The charges seek an order requiring the City to honor the sustained grievance decisions and provide both retired captains the payments specified therein. It also asks for a posting and a cease and desist order.

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).

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

In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill; Judson. The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006, 32 NJPER 12 (¶6 2006).

The parties do not dispute that the SOA filed separate grievances on behalf of retired Captains William and Mark Whitley, and Police Director DeMaio sustained both grievances at Step 5, ordering the City to provide both Captains with lump sum payments for their unused vacation days, including longevity, at the 2013 rate of pay. It is also undisputed that the City did not file for arbitration pursuant to Step 6 of the grievance procedure over either of the above grievance decisions, but also has failed to implement the decisions. Under these circumstances, I find that no genuine issue of material fact requires a plenary hearing.

The SOA asserts that by refusing to abide by the decision of its designated representative, the police director, who sustained both grievances at Step 5, the City has repudiated the parties' collective negotiations agreement violating 5.4a (1) and (5) of the Act.

The City concedes that the grievances were upheld by Demaio, but asserts that those decisions violate statutory regulations regarding carryover and accumulation of vacation leave, specifically N.J.S.A. 11A:6-3^{5/} and N.J.A.C. 4A:6-1.2(f)^{6/} and therefore cannot be enforced.

Our Act requires public employers to negotiate grievance procedures by which majority representatives or individual employees "may appeal the interpretation, application or violation of policies, agreements, and administrative decisions." N.J.S.A. 34:13A-5.3. The Act further provides that such negotiated grievance procedures be utilized for any dispute covered by the terms of the parties' collective negotiations agreement. Ibid. It is an unfair practice for a public employer

^{5/} N.J.S.A. 11A:6-3, entitled Vacation leave; full-time political subdivision employees states, in relevant part ". . . [v]acation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only . . ."

^{6/} N.J.A.C. 4A:6-1.2(f) states: "In State service, vacation leave may be granted and shall be recorded and tracked in hours."

to refuse to negotiate in good faith with the majority representative or to refuse to process grievances presented by the majority representative. N.J.S.A. 34:13A-5.4a(5).

The Commission has held that an employer's refusal to abide by a decision of its designated grievance representative constitutes a refusal to negotiate in good faith in violation of subsection 5.4a(5) of the Act. City of Newark, H.E. No. 2018-3, 44 NJPER 136 (¶39 2017), adopted P.E.R.C. No. 2018-40, 44 NJPER 387 (¶109 2018); see also Middletown Tp. and PBA Local 124, P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), aff'd 34 NJPER 228 (¶79 2008) (holding that "[i]f the parties are not bound by the results of the intermediate steps of a grievance procedure they intended to be binding, then the procedure will be ineffective in quickly and inexpensively resolving disputes"); 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) (holding that "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 asserts that it is not refusing to negotiate in good faith nor repudiating the grievance procedure because Captains Mark and William Whitley are not statutorily entitled to the remedies provided by DeMaio in his Step 5 decisions. However, the Commission's role is not to substitute its judgment

for the judgment of the City's designated grievance representative who evaluated the substantive and procedural merits of the underlying issues. City of Newark, H.E. No. 2016-11, 42 NJPER 384 (¶109 2015). Moreover, the Commission has held that the contractual merits of a grievance are not relevant to the issue of whether an employer repudiated an applicable grievance procedure. Keansburg Bor., P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003). Accordingly, if the City deemed DeMaio's November 8, 2013 grievance decisions contrary to statute or regulation, it was incumbent upon the City to file a demand for arbitration in accordance with the parties' negotiated grievance procedure. See City of Newark, P.E.R.C. No. 2019-2, 45 NJPER 76 (¶19 2018); City of Newark, 44 NJPER 387; accord Burlington Cty., P.E.R.C. No. 2018-41, 44 NJPER 391 (¶110 2018) (finding that the county "made no attempt to utilize the grievance procedure to challenge the decision of its hearing officer in grievance arbitration" and instead "repudiated the grievance procedure by unilaterally imposing . . . [a] bidding schedule[] that . . . [conflicted with] its own hearing officer's decision").

Based on the foregoing, the City's refusal to abide by DeMaio's Step 5 determinations is a violation of 5.4a(5) and derivatively a(1), of the Act.

Finally, aside from the conclusory allegations set forth in the unfair practice charges themselves, the record is devoid of

any evidence demonstrating that the City's actions violated subsection 5.4a(3) of the Act. In order to prove a violation of subsection 5.4a(3), the SOA must show that Mark and/or William Whitley were engaged in protected activity, that the City was aware of it and was hostile toward them for that activity. Op. of Bridgewater and Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). The SOA has not alleged any facts that show hostility of the City towards either Mark or William Whitley for protected activity. Id. Accordingly, I find no violation of subsection a(3) and that allegation is dismissed.

CONCLUSIONS OF LAW

The City of Newark violated 5.4a(1) and (5) of the Act when it refused to implement the decision of Police Director DeMaio sustaining the SOA's grievances regarding payments due to Captain William Whitley and Captain Mark Whitley for unpaid vacation time upon retirement.

RECOMMENDED ORDER

1. The Newark Police Superior Officers' Association's motions are granted. The City of Newark's cross motions relating to 5.4a(1) and (5) are denied; and the 5.4a(3) charge is dismissed.

2. 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 repudiating the grievance procedure by refusing to provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement pursuant to Grievance Nos. 2011-12 and 2011-15 which were both sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

2.) Refusing to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its unit, particularly by repudiating the grievance procedure by failing to implement the Police Director's decision to sustain Grievance Nos. 2011-12 and 2011-15 and provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement.

B. Take the following action:

1.) Provide retired Captain Mark Whitley payment for forty-three (43) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-12 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

2.) Provide retired Captain William Whitley payment for twenty-nine (29) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-15 which was

sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

3.) 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,

4.) 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/ Marisa Koz
Marisa Koz
Hearing Examiner

DATED: May 8, 2020
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 May 18, 2020.



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 repudiating the grievance procedure by refusing to provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement pursuant to Grievance Nos. 2011-12 and 2011-15 which were both sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

WE WILL cease and desist from refusing to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its unit, particularly by repudiating the grievance procedure by failing to implement the Police Director's decision to sustain Grievance Nos. 2011-12 and 2011-15 and provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement.

WE WILL provide retired Captain Mark Whitley payment for forty-three (43) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-12 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

WE WILL provide retired Captain William Whitley payment for twenty-nine (29) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-15 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

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CITY OF NEWARK
(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) 292-9830