

H.E. NO. 2020-10

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-2014-234

NEWARK POLICE DEPARTMENT  
SUPERIOR OFFICER'S ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Newark Police Superior Officers' Association's motion for summary judgment, and denies the City of Newark's cross-motion in an unfair practice charge filed by the Superior Officers' Association (SOA). The charge alleged that the City repudiated the parties' negotiated grievance procedure when it refused to pay active SOA members longevity on their accrued compensatory time payouts pursuant to a grievance sustained by the Police Director at Step 5 of the parties' negotiated grievance procedure. The Hearing Examiner determines that the City's refusal to implement the Step 5 decision constitutes a refusal to negotiate in good faith in violation of subsection 5.4a(5), and derivatively a(1), of the Act.

H.E. NO. 2020-10

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-2014-234

NEWARK POLICE DEPARTMENT  
SUPERIOR OFFICER'S ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,  
Carmagnola & Ritardi LLC, attorneys  
(Sean P. Joyce, of counsel)

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

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

On March 31, 2014, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge against the City of Newark (City). The charge alleges that the City repudiated the parties' negotiated grievance procedure when it refused to pay SOA members longevity on their accrued compensatory time payouts pursuant to a grievance sustained by then Police Director Samuel DeMaio (DeMaio) at Step 5 of the parties' negotiated grievance procedure. The SOA asserts that the City's refusal to abide by the sustained grievance

constitutes a violation of 5.4a(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).<sup>1/</sup>

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

---

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

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.<sup>4/</sup>

On June 21, 2018, the SOA filed a motion for summary judgment, together with brief, certifications by SOA President John J. Crystal III, SOA Sergeant-At-Arms Victor M. Manama, and documents. On July 16, 2018, the City filed a brief and documents in opposition and cross-motion for summary judgment. The City's motion was not supported by certifications or affidavits. On July 25, 2018, the SOA filed a sur-reply to the City's cross-motion for summary judgment. On August 9, 2018, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8. I have 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.

---

<sup>4/</sup> 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.

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 May 30, 2013, Lieutenant Alexander Martinez, SOA Treasurer, filed a grievance with the City's then-Police Director DeMaio alleging that the City had incorrectly calculated the

amounts due to members for their 2010 accrued compensatory time payouts. The payouts did not include longevity.

6. On November 8, 2013, DeMaio sustained the grievance, determining "[w]hen active members receive their compensatory time payments, they are entitled to receive longevity as part of those payments." As such, DeMaio authorized Darlene Tate, Director of the Office of Management and Budget to "calculate longevity due on all past compensatory time payouts and include longevity on all future compensatory time payouts for all affected members."

7. The City did not file for arbitration pursuant to Step 6 of the grievance procedure over DeMaio's Step 5 grievance decision.

8. To date, the City has refused or failed to implement DeMaio's Step 5 decision referenced above and has not paid the compensatory time payouts the Director found were warranted.

9. On March 31, 2014, the SOA filed the subject unfair practice charge concerning the City's failure to comply with the Director's Step 5 decision. The charge seeks an order requiring the City to honor the sustained grievance decision and provide longevity on compensatory time payments to affected members retroactively and prospectively. 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 agree that the SOA filed a grievance on behalf of all of their affected members seeking retroactive and prospective longevity payments on compensatory time payouts, and that Police Director DeMaio sustained the grievance, ordering the

Office of Management and Budget to immediately pay the monies owed on all past compensatory time payouts and include longevity on all future compensatory time payouts. The City did not appeal the Director's decision by requesting binding arbitration as set forth in its negotiated grievance procedure and has refused to pay pursuant to the Director's determination. Under these circumstances, I find that no genuine issue of material fact requires a plenary hearing.

The City concedes that the grievance was sustained but asserts that Police Director DeMaio's finding was in violation of the parties' collective negotiations agreement (CNA) and provided the members payouts that they were not contractually entitled to receive. The City asserts that it is not refusing to negotiate in good faith or repudiating the grievance procedure because the affected SOA members are not entitled to longevity payments on retroactive and prospective compensatory time payouts pursuant to Articles V and VIII of the parties' CNA.

In response, the SOA asserts that the merits of the underlying grievance are irrelevant to whether the City repudiated the parties' negotiated grievance procedure by refusing to implement Director DeMaio's November 8, 2013 grievance decision; and that changing terms and conditions of employment during negotiations for a successor agreement by repudiating the grievance procedure is an unfair practice.



It is undisputed that the SOA's May 30, 2012 grievance regarding the inclusion of longevity pay on compensatory time payouts was sustained on November 8, 2013 by the City's designated grievance representative, Director DeMaio. 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").<sup>5/</sup>

---

<sup>5/</sup> As noted in City of Newark, H.E. No. 2018-3, 44 NJPER 136 (¶39 2017), the same legal argument has been raised by the City in numerous recent decisions that are nearly identical to the instant matter and have been rejected by hearing examiners in final agency decisions as well as the Commission. See, e.g., City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013) (City refused to implement settlement between SOA and police director regarding terminal leave

(continued...)

We reject the City's assertion that it is not refusing to negotiate in good faith nor repudiating the grievance procedure because the affected SOA members are not entitled to these longevity payments pursuant to the parties' CNA. 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 issue. 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 disagreed with the basis for Director DeMaio's November 8, 2013 grievance decision, it was

---

5/ (...continued)  
payments); City of Newark, H.E. No. 2014-1, 40 NJPER 124 (¶48 2013) (City's refusal to implement police director's decision regarding payment for compensatory time violated 5.4a(5)); City of Newark, H.E. No. 2015-8, 41 NJPER 454 (¶141 2015) (City violated 5.4a(5) when it refused to implement police director's decision sustaining grievances regarding accrued compensatory time and longevity for retired officers); City of Newark, H.E. No. 2015-12, 42 NJPER 121 (¶35 2015) (City violated Act by refusing to pay health benefits to retired officer pursuant to police director's grievance settlement); 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) (City's refusal to implement police director's decision allowing officer to use compensatory time for credits toward medical benefits so that he could retire with 25 years of service violated 5.4a(5)); City of Newark, I.R. No. 2015-1, 41 NJPER 287 (¶95 2014), app. disp. 42 NJPER 212 (¶59 App. Div. 2015).

incumbent upon the City to file a demand for arbitration in accordance with the parties' negotiated grievance procedure. See 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 the Police Director's grievance determination violated 5.4a(1) and (5), and movant is entitled to the relief requested as a matter of law. Consequently, I grant the SOA's motion for summary judgment.

Finally, aside from the conclusory allegations set forth in the unfair practice charge itself, 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 its affected members were engaged in protected activity, that the City was aware of it and was hostile toward them for that activity. Tp. of Bridgewater and Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). The SOA has not alleged any facts in this matter that show hostility of the City towards any of its members for their

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 5.4 a(1) and (5) of the Act when it refused to pay active SOA members retroactive and prospective longevity payments on their compensatory time payouts pursuant to Grievance No. 2012-13 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

**RECOMMENDED ORDER**

1. The Newark Police Superior Officers' Association's motion is granted. The City of Newark's cross-motion relating to 5.4a(1) and (5) is 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 when the City failed to implement the Police Director's decision to sustain Grievance No. 2012-13 and pay SOA members retroactive and prospective longevity payments on their compensatory time payouts.

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 when the City failed to implement the Police Director's decision to sustain Grievance No. 2012-13 and pay SOA members retroactive and prospective longevity payments on their compensatory time payouts.

B. Take the following action:

1. Implement Director DeMaio's November 8, 2013 decision sustaining the SOA's grievance and providing longevity payments due on all compensatory time payouts made to active SOA members from 2010 to the present and to include longevity on all future compensatory time payouts made to active SOA members. The Director of the Office of Management and Budget shall calculate the longevity due to each affected SOA member and the retroactive payment shall be made to them in one lump sum.

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

3. Notify the Chair of the Commission within twenty (20) days of receipt of this decision what steps the Respondent has taken to comply with this order.

/s/ Marisa Koz  
Marisa Koz  
Hearing Examiner

DATED: June 26, 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 July 6, 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 when the City failed to implement the Police Director's decision to sustain Grievance No. 2012-13 and pay SOA members retroactive and prospective longevity payments on their compensatory time payouts.

**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 when the City failed to implement the Police Director's decision to sustain Grievance No. 2012-13 and pay SOA members retroactive and prospective longevity payments on their compensatory time payouts.

**WE WILL** implement Director DeMaio's November 8, 2013 decision sustaining the SOA's grievance and providing longevity payments due on all compensatory time payouts made to active SOA members from 2010 to the present and to include longevity on all future compensatory time payouts made to active SOA members. The Director of the Office of Management and Budget shall calculate the longevity due to each affected SOA member and the retroactive payment shall be made to them in one lump sum.

Docket No. CO-2014-234

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