

D.U.P. NO. 2022-2

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2021-217

NEWARK POLICE SUPERIOR  
OFFICERS' ASSOCIATION,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge filed by the Newark Police Superior Officers' Association (SOA) against the City of Newark (City). The charge alleges the City violated section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act) when it failed to negotiate with the SOA over the use and/or payment of unit members' unused accumulated vacation days not taken as a result of Coronavirus disease-19 (COVID-19) pandemic. The Director finds that the use and/or payment of accumulated unused vacation time related to a state of emergency declared by the Governor is not mandatorily negotiable because it is preempted by statute, specifically, N.J.S.A. 11A:6-3(e).

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Appearances:

For the Respondent,  
(Hugh A. Thompson, Esq.)

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

**REFUSAL TO ISSUE COMPLAINT**

On April 12, 2021, Newark Police Superior Officers' Association (SOA) filed an unfair practice charge against the City of Newark (City). The charge alleges that in December, 2020, the City violated section 5.4a (1) (2) (3) (5) and (7)<sup>1/</sup> <sup>2/</sup>

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<sup>1/</sup> 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization.; (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 the act.; (5) Refusing to negotiate in good faith with a majority  
(continued...)

of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it failed to negotiate with the SOA over the use and/or payment of unit members' unused accumulated vacation days not taken as a result of Coronavirus disease-19 (COVID-19) pandemic.

On June 1, 2021, the City filed a response, contending that the issue of use and/or payment of unused accumulated vacation time is not "ripe" because it hasn't taken any adverse action pertaining to employees' unused accumulated vacation days. The City also argues that the use and/or payment of unused accumulated vacation days due under a "State of Emergency"

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- 1/ (...continued)  
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/ The filed unfair practice charge form alleges that the City violated section 5.4a (2), (3) and (7); however, the attached statement of the charge alleges violations of section 5.4a (1) and (5) only. The SOA has not alleged facts implicating section 5.4a (2), (3) and (7). Specifically, the SOA does not set forth facts indicating that the City dominated or interfered with the formation, existence or administration of any employee organization; the SOA does not set forth facts indicating that the City discriminated in regard to hire or tenure or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by this Act; and it does not identify which Commission rules or regulations the City allegedly violated. Accordingly, these alleged violations are dismissed.

declared by the Governor is not subject to collective negotiations.

The SOA contends that Passaic County Sheriff's Office, I.R. 2020-023, 46 NJPER 572 (¶131 2020) (interim relief was granted when the employer unilaterally rescinded full-time union release as a result of a State of Emergency declared by the Governor); and City of Newark, P.E.R.C. 2021-002, 47 NJPER 104 (¶25 2020) (failure to honor grievance decision concerning lump sum payouts for unused vacation days upon retirement) support its allegations.

The Commission has the authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act, N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 55 NJPER 356 (¶120 2012).

I find the following facts.

The SOA and the City signed a now-expired collective negotiations agreement (CNA) that extended from January 1, 2013 through December 31, 2015, covering employees holding the titles of captain, lieutenant and sergeant, excluding police officers.

The parties also signed a memorandum of agreement (MOA) that extended from January 1, 2016 through December 31, 2017. The parties are in negotiations for a successor agreement.

On March 9, 2020, in order to protect the health, safety and welfare of the people of the State of New Jersey, Governor Philip D. Murphy issued Executive Order (EO) No. 103, declaring a Public Health Emergency and State of Emergency in the State of New Jersey related to COVID-19.

On or about November 30, 2020, the City's then-Public Safety Director, Anthony F. Ambrose (Ambrose), sent a memo to unit members advising that, "[I]n light of the emerging second wave of COVID-19, the Department of Public Safety is once again forced to cancel vacations effective Friday, December 11, 2020 (until further notice)."

On or about December 2, 2020, the SOA sent a letter to the Ambrose regarding the cancellation of unit members' December 2020 vacations due to the COVID-19 pandemic. The SOA made several proposals to remedy unit members' loss of the vacation days.

On or about December 8, 2020, the City issued a memo informing employees, including members of the SOA, that 2019 accrued vacation time could not be carried over into 2021.

In response to the City's memo, on December 9, 2020, the SOA demanded negotiations over unused accumulated 2020 vacation days and deferred 2019 vacation days. Having received no response

from the City, the SOA followed-up on December 14, 2020 regarding its demand to negotiate over compensation for the cancellation of 2020 vacation days and deferred 2019 vacation days. The SOA also demanded to negotiate over the severable impact issues related to accumulated unused vacation days. The City failed to respond to the SOA's demands.

On or about April 6, 2021, the City's Department of Public Safety issued a memorandum requesting verification of employees' vacation days in order to assist with record keeping relative to the COVID-19 pandemic. Commanders were asked to supply the following information for all assigned personnel: number of current vacation days; number of vacation days carried over from 2020; number of vacation days carried over from 2019; number of vacation days specifically cancelled due to the COVID-19 pandemic; number of cancelled vacation days rescheduled and used; and the number of cancelled vacation days rescheduled and not used as of April 30, 2021. The City has taken no action with respect to employees' 2019 and 2020 unused accumulated vacation days.

On or about April 13, 2021, the SOA filed a grievance requesting compensation for unused accumulated vacation time due to the COVID-19 pandemic.

On June 4, 2021, Governor Murphy signed EO No. 244 ending the COVID-19 Public Health Emergency and State of Emergency.

**ANALYSIS**

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

The Commission has held that vacation, sick, and other leave, including compensation for unused leave allowances, are generally, mandatorily negotiable. See Southampton Tp., P.E.R.C. No. 2018-57, 45 NJPER 28 (¶8 2018); accord Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 2003-10, 28 NJPER 345 (¶33121 2002) (holding that “[t]he number of personal leave days and the reasons for allowing personal leave are negotiable”). However, negotiations will be preempted if a contract provision conflicts with a statute or regulation that expressly, specifically and comprehensively sets that term and condition of employment. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); Morris School Dist. Bd. of Ed. and The Ed. Ass'n of Morris, 310 N.J. Super. 332, 341-342 (App. Div. 1998), certif. den. 156 N.J. 407 (1998) (statutory sick leave sections provide only minimum standards). To be preemptive, such a statute or regulation must eliminate the employer's discretion to agree to grant the benefit sought.

The applicable statute pertaining to vacation leave, N.J.S.A. 11A:6-3(e), provides, in pertinent part:

Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only; except that vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor may accumulate at the discretion of the appointing authority until, pursuant to a plan established by the employee's appointing authority and approved by the commission, the leave is used or the employee is compensated for that leave, **which shall not be subject to**



**collective negotiation or collective bargaining** (emphasis added).

Additionally, N.J.A.C. 4A:6-1.2(g) provides, in pertinent part:

(g) Appointing authorities may establish procedures for the scheduling of vacation leave. Vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding year only and shall be scheduled to avoid loss of leave, provided, however, that:

3. In local service, vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor may accumulate at the discretion of the appointing authority until, pursuant to a plan established by the employee's appointing authority and approved by the Chairperson or designee, the leave is used or the employee is compensated for that leave.

The Commission has held that N.J.S.A. 11A:6-3(e) and N.J.A.C. 4A:6-2(g) preempt the carrying over of vacation leave not taken in a given year beyond the succeeding year, with the only exception to the limitation being vacation leave not taken in a given year because of duties related to a state of emergency declared by the Governor. Pt. Pleasant Beach Bor., P.E.R.C. NO. 2018-28, 44 NJPER 298 (¶83 2018). The Commission has also held that the issue of payment for unused accumulated vacation days is mandatorily negotiable, when the unused accumulated vacation days are not the result of a state of emergency declared by the Governor. Mount Holly Tp., P.E.R.C. No. 2011-41, 36 NJPER 423 (¶164 2010). In Mount Holly, an employee requested to carry over

vacation time that was not used due to a business necessity. The Commission found that although Civil Service regulations prohibit the accumulation of more than two years of vacation leave, they do "not expressly and specifically prohibit an employer from agreeing to give an employee the option of a cash payment for unused but still available vacation days instead." Id.; see also I.A.F.F. v. City of Hoboken, 2014 N.J. Super. Unpub. LEXIS 190 (App. Div. 2014).

Unlike the circumstances in Mount Holly, (where the unused vacation leave was the result of a business necessity), the SOA has demanded negotiations over unused accumulated vacation leave resulting from the State of Emergency declared by the Governor. N.J.S.A. 11A:6-3(e) expressly and specifically prohibits the SOA's right to negotiate over both the use and payment of accumulated unused vacation time which is the result of a state of emergency declared by the Governor. N.J.S.A. 11A:6-3(e) allows vacation time to accumulate while the employee's appointing authority, the City, establishes a plan, which is to be approved by Civil Service Commission. Pursuant to the plan, the vacation leave will continue to accumulate until it is either used or the employee is compensated. The statute is clear that the plan allowing for use or compensation of accumulated unused vacation leave is not subject to collective negotiations. Therefore, the use and/or payment of accumulated unused vacation

time related to a state of emergency declared by the Governor is not mandatorily negotiable because it is preempted by N.J.S.A. 11A:6-3(e)<sup>3/</sup>.

For the same reason that Mount Holly is distinguishable from this matter, the cases that the SOA contends are applicable, Passaic County Sheriff's Office and City of Newark, are also distinguishable. Neither Passaic County Sheriff's Office nor City of Newark involve or discuss unused vacation leave resulting from a state of emergency declared by the Governor. Therefore, the SOA's reliance on those matters is misplaced.

Although the City was not obligated to negotiate with the SOA over the use and payment of unused accumulated sick related to the State of Emergency declared by the Governor, it may be obligated to negotiate with the SOA, upon demand, over related severable impact issues. The SOA made a demand to "negotiate over the severable impact issues" in its December letters. Since June, 2021, when the Governor declared an end to the State of Emergency, the City hasn't yet established a plan, as it is so obligated by N.J.S.A. 11A:6-3(e). At this time, the SOA's

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3/ To the extent that N.J.A.C. 4A:6-1.2(g) conflicts with N.J.S.A. 11A:6-3(e) in that it does not expressly prohibit collective negotiations, the statutory language would supersede. See, e.g., State v. Fajardo-Santos, 199 N.J. 520, 529 (2009) ("Regulations may not trump the statutes that authorize them."); T.H. v. Division of Developmental Disabilities, 189 N.J. 478, 490-491 (2007) (agency regulations cannot "alter the terms of a legislative enactment or frustrate the policy embodied in the statute").

allegation that the City has failed to negotiate over the impact(s) of the plan may be premature. Even if the demand is ripe, the SOA has failed to identify the specific impacts over which it seeks negotiation. See State of New Jersey Judiciary and Probation Ass'n of New Jersey, P.E.R.C. No. 2008-12, 33 NJPER 225 (¶ 85 2007) ("A broad request to negotiate over the exercise of a managerial prerogative does not constitute a specific demand to negotiate over severable negotiable issues"). See also, City of Union City and PBA Local 8, P.E.R.C. No. 2006-77, 32 NJPER 116 (¶ 55 2006) (affirming dismissal of charge alleging that the City rejected PBA's demand to negotiate over changes in employment conditions and "the impact of any modification of the terms and conditions of employment or the impact of the exercise of any managerial prerogative").

Accordingly, I decline to issue a Complaint on the SOA's claimed violations of sections 5.4a(1) and (5) of Act. The complaint issuance standard has not been met and I dismiss the charge. N.J.A.C. 19:14-2.1.

**ORDER**

The unfair practice charge is dismissed.

/s/Jonathan Roth  
Jonathan Roth  
Director of Unfair Practices

DATED: September 13, 2021  
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to  
N.J.A.C. 19:14-2.3.**

**Any appeal is due by September 23, 2021.**