

H.E. NO. 2018-3

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-2015-123

NEWARK DEPUTY CHIEFS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Charging Party's motion for summary judgment and dismisses Respondent's cross motion. She determined that the City of Newark violated 5.4a(5) of the Act when it refused to implement the Police Director's decision sustaining a grievance filed by the Deputy Chief's Association. Relying on numerous recent decisions involving the City of Newark, the Hearing Examiner rejected the City's arguments that the Commission lacked jurisdiction, that the Police Director acted beyond his scope of authority and that the grievance lacked merit.

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.

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Appearances:

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

For the Charging Party
Markowitz & Richman
(Matthew D. Areman, of counsel)

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

On November 26, 2014, the Newark Deputy Chiefs Association (Charging Party or Association) filed an unfair practice charge against the City of Newark (Respondent or City). The charge alleges that the City repudiated the parties' collective negotiations agreement by refusing to abide by the decision of its designated representative, the police director, sustaining a grievance. Specifically, on November 10, 2014, the police

director sustained the Association's grievance regarding the failure of the City to allow a deputy chief to use his accumulated leave time for City credit towards his retiree medical benefits. Despite repeated requests, it is alleged, the City has not complied with the police director's decision. These actions, the Association contends, violate 5.4a(3), (5) and (7) of the New Jersey Employer-Employee Relations Act (Act).

N.J.S.A. 34:13A-1 et seq.^{1/}

On April 19, 2016, the Director of Unfair Practices issued a Complaint and Notice of Pre-hearing determining that the 5.4a(5) allegations in the charge, if true, may constitute an unfair practice and dismissing the alleged violations of 5.4a(3) and (7) as not meeting the Commission's complaint issuance standards. The Director assigned the matter to me for hearing.

On May 9, 2016, the Respondent submitted its previously filed position statement as its Answer pursuant to N.J.A.C. 19:14-3.1. Respondent denies each allegation in the Complaint

^{1/} These provisions prohibit public employers, their representatives or agents from: "(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. (7) Violating any of the rules and regulations established by the commission."

and raises various affirmative defenses, including but not limited to, that the Public Employment Relations Commission lacks jurisdiction because the grievance raises a contract interpretation issue more appropriately before the Superior Court and that the City has not violated any provision of the parties' collective negotiations agreement. The City also asserts that the police director acted outside the scope of his authority and, thus, could not bind the City.

On July 19, 2017, the Association filed a motion for summary judgment together with a memorandum of law and a certification from Fraternal Order of Police (FOP) Labor Representative Sean Lavin as well as exhibits. On August 1, 2017, Respondent filed a response and cross motion for summary judgment together with a brief in opposition and support of its cross motion and a certification of Domenick Carmagnola, Esq. attesting that several attached exhibits were true and accurate. Other than the exhibits, Carmagnola's certification provides no additional facts. The City's exhibits were duplicates of the exhibits submitted with Lavin's certification with the exception of a letter memorandum dated September 17, 2014 from Police Director Eugene Venable to Assistant Business Administrator Michael Green. [exhibit 2, Carmagnola certification]

On August 28, 2017, the parties were notified that the motion and cross motion for summary judgement were referred to the Hearing Examiner pursuant to N.J.A.C. 19:14-4.8(a). 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 make the following:

FINDINGS OF FACT

1. The Association is affiliated with the FOP. The Association is the certified exclusive representative of all deputy chiefs employed by the City. Sean Lavin has been employed by the FOP since 2014 and provides labor representation services to the Association. [Lavin certification]

2. The City and Association are parties to a collective negotiations agreement (CNA) effective from January 1, 2009 through December 31, 2012. [exhibit A, Lavin certification; exhibit 1 of Carmagnola certification] The parties are currently in negotiations for a successor agreement. [Lavin certification]

3. Article III of the parties' CNA, entitled "Grievance Procedure and Arbitration," contains six sections entitled, respectively, (1) purpose, (2) definition, (3) procedure, (4) City grievances, (5) general provisions, and (6) disciplinary grievance. Section 2 defines a grievance as "any difference or dispute arising over application or interpretation of the terms

and conditions of this Agreement and may be raised by an individual, the Association on behalf of the individual or group of all individuals, or the City."

Section 3 of Article III sets out a four-step grievance procedure ending in binding arbitration. Step 1 allows for an aggrieved employee to institute a grievance within ten days of the occurrence after which the aggrieved employee and the police director will try to resolve the matter informally. At Step 2, if no settlement is reached at Step 1, within ten calendar days after Step 1, the grievance shall be reduced to writing and submitted to the police director. Next, at Step 3, if no acceptable agreement is reached within five calendar days after Step 2, the matter shall be submitted to the police director who shall have ten calendar days to submit his/her decision.

The grievance procedure allows for the parties by mutual agreement to waive steps prior to Step 3. Finally, at Step 4, within two weeks of the transmittal of the police director's written answer, "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." The arbitrator's decision is final and binding on the parties.

Finally, Section 4 of the grievance procedure permits the City to file a grievance with the Association and sets out permissible time frames. If the parties cannot reach a settlement, either party may file for binding arbitration.

4. At some point prior to September 2014, Deputy Chief Domingos Saldida was notified by the City that as the result of a reorganization in the police department he was to be demoted to the rank of captain on November 1, 2014. Saldida needed an additional four (4) months of service time with the City beyond November in order to meet the twenty-five year requirement to obtain health benefits in retirement. [Lavin certification]

5. On September 14, 2014, Police Director Venable wrote to Assistant Business Administrator Michael Greene as follows:

Deputy Chief Domingos Saldida is requesting to retire full service as of November 1, 2014. In 1990, he resigned from the Newark Police Department, causing a break in service. Ultimately, he returned to full duty as a Newark Police Officer four months later. He currently has approximately 280 days of accumulated time, which encompasses Compensatory, Holiday and Vacation time.

I am asking that the Finance Section of the Newark Police Department be permitted to deduct the time needed in an effort to allow Deputy Chief Saldida to effectively retire November 1, 2014. In 2013, retired Newark Police Lieutenant Carlos Figueroa was afforded a similar opportunity which allowed him to retire with full medical benefits,

upon conferring with Personnel Director Kecia Daniels. While I do understand that this is not the normal practice, this will ultimately be a cost savings measure for the City.
[exhibit 2, Carmagnola certification]

6. On October 29, 2014, Association President Keith Rubel filed a grievance with Police Director Venable entitled "Failure to Allow Use of Compensatory Time for City Credit Towards Retiree Medical Benefits". [exhibit B, Lavin certification] The grievance was filed on behalf of Deputy Chief Domingus Saldida.

The grievance stated in pertinent part:

In order for Deputy Chief Saldida to retire, in lieu of being demoted, November 1st, 2014 with 25 years of service with the City of Newark, he requested that the Personnel Director allow him to use four months of Compensatory [sic] time to make up for a four (4) month break he had with the City of Newark in 1990.

I have just been informed that the Personnel Director will not allow Deputy Chief Saldida to use his compensatory time for a four (4) month break in employment that he had with the City in 1990. However, he does have 25 years in the Police and Firemen's Retirement System (PFRS). Deputy Chief Saldida has sufficient time in his compensatory time to make this time up.

This has been done in the past with Lieutenant Carlos Figueroa, when he retired from the City and had to make up a break in service. This is a similar, if not identical situation that Deputy Chief Saldida is facing. [exhibit B, Lavin certification]

In the grievance, Rubel requests a meeting with Venable to discuss the matter, cites the articles of the CNA which he believed were being violated and requested as a remedy that Venable sustain the grievance and advise the Personnel Director to allow Saldida to use his accrued compensatory time towards his four month break in service "as has been done in the past."
[exhibit B, Lavin certification; exhibit 3, Carmagnola certification]

7. On November 10, 2014, Police Director Venable responded to the Association's grievance filed by Rubel. He wrote:

I have reviewed your grievance regarding the failure of the City to allow Deputy Chief Domingos Saldida to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits. This would allow Deputy Chief Saldida to retire with 25 years of service with the City as a Deputy Chief, in lieu of being demoted to Captain.

Although this is not the normal practice, I find merit in this grievance as this unique set of circumstances would also be a cost savings measure for the City, as the time would be deducted from his compensatory account in lieu of being paid in a lump sum.

Therefore, I will ask that Michael Greene, the Assistant Business Administrator, conduct a favorable review of this matter. [exhibit C, Lavin certification; exhibit 4, Carmagnola certification]

The City acknowledges that the November 10, 2014 Venable response sustained “. . . Deputy Chief Saldida’s grievance, allowing him to use four (4) months of his accrued compensatory time for credit towards the City’s retiree health care and medical benefits.” [City’s brief, counter-statement of undisputed material facts]

8. The City has failed or refused to abide by the November 10, 2014 decision of Police Director Venable. As a result, Saldida was unable to retire as a Deputy Chief and was demoted to the rank of Captain just before his retirement. Saldida lost value in his accrued time which was paid out at a Captain’s rate rather than a Deputy Chief’s, lost retirement credentials having retired as a Captain and, as a result, suffered losses to his pension benefits. [Lavin certification]

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).

Charging Party's legal argument contends that the City has refused to abide by the decision of its designated representative, the police director, who sustained its grievance at step 3 and has offered no legitimate justification for refusing to implement the police director's decision. Thus, it asserts, the City has repudiated the parties' collective negotiations agreement - its grievance procedure - violating 5.4a(5) of the Act.

The City asserts (1) that the Public Employment Relations Commission (Commission) lacks jurisdiction to address this matter since it is solely a matter of contract interpretation more appropriately considered by the Superior Court; (2) that the union did not abide by the time requirements set forth in steps 1 through 4 of the grievance procedure; and (3) that the police

director acted outside of the scope of his authority. These legal arguments have been raised by the City in numerous recent decisions nearly identical to the one before me and have been rejected by hearing examiners in final agency decisions as well as the Commission. City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013) (final agency decision) (City refused to implement settlement between SOA and Police Director regarding terminal leave payments); City of Newark, H.E. 2014-1, 40 NJPER 124 (¶48 2013) (final agency decision) (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) (final agency decision) (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. 2015-15-12, 42 NJPER 121 (¶35 2015) (final agency decision) (City violated Act by refusing to pay health benefits to retired officer pursuant to Police Director's grievance settlement). See also, City of Newark, I.R. No. 2015-1, 41 NJPER 287 (¶95 2014), app. disp. 42 NJPER 212 (¶59 App. Div. 2015); City of Newark, I.R. No. 2015-3, 41 NJPER 364 (¶115 2015); City of Newark, I.R. No. 2015-5, 41 NJPER 435 (¶136 2015). Accordingly, for the reasons set forth below, I grant the Charging Party's motion for summary judgement and deny the Respondent's cross motion.

First, as to Respondent's jurisdictional argument, our Act requires public employers to negotiate grievance procedures by which the majority representative or individuals "may appeal the interpretation, application or violation of policies, agreements, and administrative decisions." N.J.S.A. 34:13A-5.3. These negotiated grievance procedures are to be utilized for any disputes covered by the terms of the parties' collective negotiation agreements.

It is an unfair practice for a public employer 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). Specifically, the Commission has held that a refusal by the public employer to abide by a decision of its designated grievance representative constitutes a refusal to negotiate in good faith. Middletown Township, P.E.R.C. No. 2007-18, 32 NJPER 325, 327 (¶135 206), aff'd 34 NJPER 228 (¶179 2008).

Here, Charging Party asserts that the City repudiated its negotiated grievance procedure by not abiding by the Step 3 decision of Police Director Venable sustaining the Saldida grievance. Accordingly, the contractual merits of the grievance are not relevant to the issue of whether the City repudiated the parties' grievance procedure. Borough of Keansburg, P.E.R.C. No.

2004-29, 29 NJPER 506, 507 (¶160 2003). The Commission's jurisdiction under these circumstances is well established.

Next, the City argues that neither Charging Party nor Police Director Venable adhered to the time frames for filing a grievance and/or issuing a decision. Specifically, the City contends that there is no evidence to indicate when Saldida's September 2014 request to retire full service was denied by the City's personnel director or when the grievance was filed. Basically, it contends that there are facts in dispute as to whether the time frames of the grievance procedure were adhered to. These facts, however, are irrelevant. The parties' grievance procedure allows for the parties by mutual agreement to waive steps prior to Step 3. Therefore, Venable's response to the union's grievance at Step 3 acts as a waiver of any procedural time requirements attached to the prior steps.

Finally, the City asserts that the Police Director acted beyond the scope of his authority in sustaining the Saldida grievance, because Article XIV of the parties' collective agreement, entitled "Accrued Compensatory Time," provides for a lump sum payment upon retirement. The City essentially challenges the merits of Police Director Venable's grievance decision to deviate from the lump sum payment under the unique circumstances of Saldida's retirement.

As the Commission and Hearing Examiners have held in the numerous cases cited above, under the parties' grievance procedure, the Police Director is authorized to resolve grievances pursuant to the parties' grievance procedure.^{2/} 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), the Commission determined that the City's unilateral decision to rescind the police director's grievance determination was a violation of our Act. The Commission specifically rejected the City's argument that the Director lacked the authority to resolve the grievance.

Additionally, if the City had disagreed with Venable's decision, the mechanism to be employed is a request for review by an arbitrator. The City did not avail itself of this option.^{3/} Instead, Charging Party certifies that having sustained the Saldida grievance, the City has still not abided by Venable's

2/ Although the cases cited involved the Newark SOA, the Association's grievance procedure is identical to the SOA's in all material aspects. Moreover, the cases cited by Respondent pertaining to an agent's authority to bind a principal are inapposite.

3/ There is no fact demonstrated that the City filed for binding arbitration, as permitted by the parties' grievance procedure at step 4 if it objected to Police Director Venable's decision sustaining the Saldida grievance. Indeed, it is reasonable to infer that the City did not file for Step 4 arbitration because if it had, this matter would be before an arbitrator or a decision would have been rendered in that arbitration.

decision. Therefore, the City is foreclosed from challenging the Director's decision at this juncture by questioning the merits of the grievance and/or raising any procedural defects such as timing. Accordingly, the City's failure to implement the Police Director's decision is a violation of 5.4a(5).

CONCLUSIONS OF LAW

The City of Newark violated 5.4a(5) of the Act when it refused to implement the decision of Police Director Eugene Venable sustaining the Association's grievance regarding Deputy Chief Saldida's request to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits in order that Saldida retire with 25 years of service with the City as a Deputy Chief, in lieu of being demoted to Captain.

RECOMMENDED ORDER

1. The Newark Deputy Police Chiefs Association's motion is granted. The City of Newark's cross motion is denied.

2. The City is ordered to:

A. Cease and desist from:

1.) Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, particularly, by repudiating the parties' grievance procedure when the City failed to implement Police Director Eugene Venable's November 10, 2014 decision sustaining

the Association's grievance regarding Deputy Chief Saldida's request to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits in order to allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

B. Take the following action:

1.) Implement Police Director Venable's November 10, 2014 decision sustaining the Association's grievance and permit Deputy Chief Saldida to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits and thereby allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

2.) Make Saldida whole for any losses sustained as a result of the City's refusal to implement Police Director Venable's November 10, 2014 decision sustaining the Saldida grievance, including but not limited to, reimbursing Saldida for any related economic losses he incurred as a result of having to retire in the rank of captain in lieu of deputy chief.

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.

Wendy L. Young
Hearing Examiner

DATED: September 21, 2017
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 October 10, 2017.



RECOMMENDED



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 refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, particularly, by repudiating the parties' grievance procedure when the City failed to implement Police Director Eugene Venable's November 10, 2014 decision sustaining the Association's grievance regarding Deputy Chief Saldida's request to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits in order to allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

WE WILL implement Police Director Venable's November 10, 2014 decision sustaining the Association's grievance and permit Deputy Chief Saldida to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits and thereby allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

WE WILL make Saldida whole for any losses sustained as a result of the City's refusal to implement Police Director Venable's November 10, 2014 decision sustaining the Saldida grievance, including but not limited to, reimbursing Saldida for any related economic losses he incurred as a result of having to retire in the rank of captain in lieu of deputy chief.

Docket No. CO-2015-123

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) 984-7372