

P.E.R.C. NO. 2023-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Petitioner,

-and-

Docket No. CO-2021-269

AFSCME COUNCIL 63,
LOCAL 3724,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms a Hearing Examiner's decision, H.E. No. 2023-4, 49 NJPER 335 (¶81 2023), granting AFSCME's motion for summary judgment on its unfair practice charge and denying the City's cross-motion for summary judgment. The charge alleges that that the City violated subsections 5.4a(1), (5), and (7) of the Act by negotiating salary and other terms and conditions of employment directly with several AFSCME unit members. The Commission finds that the City directly negotiated salary and title changes with two employees prior to seeking negotiations over those changes and that the notification to AFSCME that the Department of Community Affairs had already approved of the salary and title changes appeared to be merely a formality, rather than an invitation to negotiate. The Commission also finds that that the City engaged in direct dealing with the grant-funded employee and provided no support for its argument that the terms and conditions of that position were controlled by the terms of the grant.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2023-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2021-269

AFSCME COUNCIL 63,
LOCAL 3724,

Charging Party.

Appearances:

For the Respondent, O'Toole Scrivo, LLC, attorneys
(Marlin G. Townes, III, of counsel)

For the Charging Party, AFSCME New Jersey Council 63,
Local 3724 (Seth Gollin, Staff Attorney)

This case is before the Commission on exceptions filed by the City of Paterson (City) to a Hearing Examiner's Report and Recommended Decision on a motion for summary judgment filed by AFSCME Council 63, Local 3724 (AFSCME) and the City's cross-motion for summary judgment. H.E. No. 2023-4, 49 NJPER 335 (¶81 2023) H.E. NO. 2021-5, 47 NJPER 355 (¶83 2021). The case involves AFSCME's June 24, 2021 unfair practice charge (UPC) alleging that the City violated subsections 5.4a(1), (5), and (7)^{1/} of the New Jersey Employer-Employee Relations Act (Act),

^{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
(continued...)

N.J.S.A. 34:13A-1 et seq., by negotiating salary and other terms and conditions of employment directly with several AFSCME unit members (Beltre, Green, and Thorpe.)^{2/}

On January 6, 2022, the Director of Unfair Practices (Director) issued a Complaint and Notice of Pre-Hearing with respect to AFSCME's 5.4a(1) and (5) allegations and declined to issue a Complaint with respect to AFSCME's 5.4a(7) allegations. On January 18, the City filed an Answer (in the form of a position statement) denying that it violated the Act. On July 22, AFSCME filed a motion for summary judgment, together with a brief, exhibits, and the certification of its President, Hazel D. Hughes (Hughes). On August 8, the City filed opposition to AFSCME's motion for summary judgment and a cross-motion for summary judgment, together with a brief, exhibits, and the certification of its Assistant Business Administrator, Jennifer Hirschmanner (Hirschmanner). On August 19, AFSCME filed a reply brief. On August 29, the City filed a sur-reply brief, exhibits, and a supplemental certification from Hirschmanner. On August

1/ (...continued)
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/ AFSCME's original UPC included five unit members, but the UPC was withdrawn with respect to two of the unit members.

30, the parties engaged in oral argument via a telephone conference call.

After settlement conferences on September 27 and December 6, 2022, along with the exchange of draft settlement agreements, which failed to resolve the dispute, the Hearing Examiner issued a decision on January 19, 2023, granting AFSCME's motion for summary judgment and denying the City's cross-motion for summary judgment. The Hearing Examiner found that the City violated subsection 5.4a(5), and derivatively 5.4a(1), of the Act when it negotiated directly with Beltre during the period of March-June 2021 and reached a verbal agreement about a title change, retroactive compensation, and a salary increase; when it unilaterally implemented a title change/salary increase for Green in excess of the parties' contractually-agreed amount in/about November 2021; and when it directly contacted Thorpe in May-June 2021 regarding terms and conditions of employment including a title change, salary increase, change from part-time to full-time status, and change from "just-cause" to "at-will" employment.

On February 10, 2023, the City filed a letter brief, together with another certification with exhibits from Hirschmanner, asserting the following exceptions to the Hearing Examiner's report and recommended decision:^{3/}

1. The Hearing Examiner erred by finding

^{3/} AFSCME did not file any opposition to the City's exceptions.

that the City's efforts to negotiate with the union insufficiently communicated an invitation to negotiate and that the union did not refuse to negotiate in good faith.

2. The Hearing Examiner erred by finding that the City was required to negotiate with the union regarding [Thorpe] and engaged in direct dealing.

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). We have reviewed the record, the Hearing Examiner's findings of fact and conclusions of law, and the parties' submissions. We adopt and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 5-23). We set forth the following material facts that are pertinent to our analysis:

1. The City is a Civil Service jurisdiction that the State of New Jersey (State) has determined to be a "transitional aid" municipality, and, therefore, eligible to receive State aid (since approximately fiscal year 2014) to balance its budget.
2. In order for the City to receive transitional aid, the State requires the City's governing body (i.e., City Council) to pass a resolution acknowledging a Memorandum of Understanding (MOU) with the State and, thereafter, for appropriate City officials to execute same.
3. AFSCME represents all white collar employees, all clerical

and white collar employees employed by the municipal court, and all civilian employees employed by the City's Public Safety Department, excluding all other employees, managerial executives, uniformed police, fire fighters, confidential employees, all employees represented in other bargaining units, and supervisors within the meaning of the Act.

4. The City and AFSCME are parties to an expired collective negotiations agreement (CNA) with a term of July 1, 2014 through June 30, 2019, which continues in effect while the parties continue negotiations for a successor agreement.
5. The parties CNA contains the following mandatorily negotiable terms and conditions, among others: Article V (Discharge and Discipline), Article XI (Hours of Work), and Article XIX (Salaries and Wages). However, the parties' CNA does not include a salary guide or salary ranges.
6. As of March 1, 2021, Beltre had a base salary of \$37,090 working in the title of Principal Cashier. Since March 1, 2021 and up to the present, Beltre has remained employed by the City with the same base salary and title. However, since June 24, 2021 and up to the present, Beltre has been working out-of-title as a Supervising Cashier and receiving out-of-title pay pursuant to the parties' CNA. It is undisputed that the titles Principal Cashier and Supervising Cashier are within AFSCME's unit.

7. As of March 1, 2021, Green had a base salary of \$30,090 working in the title of Keyboarding Clerk 1. In or about November 2021, Green's base salary had been increased by approximately \$10,000 to \$40,000 working in the title Clerk 2. Since November 2021 and up to the present, Green has remained employed by the City with the same base salary and title. It is undisputed that the titles Keyboarding Clerk 1 and Clerk 2 are within AFSCME's unit.
8. As of March 1, 2021, Thorpe had a base salary of \$16,078.36 working in the title of part-time Account Clerk. Effective June 30, 2022, Thorpe's employment with the City was terminated. It is undisputed that the titles Account Clerk (part-time), Account Clerk (full-time), and Clerk 2 are within AFSCME's unit.
9. On March 15, 2021, AFSCME's counsel sent an e-mail to Hirschmanner, copying Hughes (among others), that alerted Hirschmanner of instances where the City's Finance Director negotiated directly with AFSCME unit members in violation of the Act and City policy. That same day, Hirschmanner replied to AFSCME's counsel that she had e-mailed the Finance Director and had a formal conversation with him as well.
10. On June 2, 2021, Thorpe received an e-mail from the City's Program Manager for School-Based Youth Services Program that

provides:

Please see attached City of Paterson Memorandum requiring your signature for a temporary position for the City of Paterson. The salary is \$35,000.00 and you will be required to work 35 hours a week. Your signature is required to complete the process of hiring you for this position. Any questions please don't hesitate to contact me.

The referenced attachment is a June 1, 2021 letter to Thorpe from the City's Director of the Department of Health & Human Services that provides, in pertinent part:

This employment is an at-will employment that may be terminated without cause and without advance notice. Your salary will be \$35,000.00 and will work a 35 hour week to be compensated every two weeks.

[Emphasis added].

11. On June 4, 2021, Thorpe forwarded the June 2 e-mail to Hughes along with the following message:

I am forwarding you the letter from our conversation this morning about the change in title and change to full time. Currently, my title is Account Clerk part-time. It was initially suggested that it be kept the same and just changed to full time, by Lydia. My duties will stay the same, but also include some of the duties of the former Youth Aide. Now the title is to be changed to Clerk 2. My problem is the salary. There is a Clerk 2 position posted now at \$40,000 with 1 year experience. They want to pay me \$35,000 and I have 6 years experience with the City in the Account Clerk position, 1 year as a revenue collections clerk for the City and several years of accounting and clerical experience at other places. I also have a BS degree in Finance. I believe the salary should be in the higher range. It was suggested by Lydia in an earlier meeting that it should be at least \$42,900. I was

supposed to have signed this by yesterday, but I didn't get a response from a question that was supposed to be answered by the director, Castillo. Please advise.

12. On June 10, 2021, Hughes forwarded Thorpe's June 4 e-mail to Hirschmanner (among others) along with the following message: "The Union needs to know, why is Direct Dealing still going on?"
13. Hughes certifies that "[t]o the exclusion of [her] and any other union representative, the City negotiated with Thorpe about prospectively moving from a part-time position within the bargaining unit to a full-time position within the bargaining unit along with a title change and a salary increase"; "[t]he City prepared and sent Thorpe and requested [Thorpe] to sign an agreement dated June 1, 2021 indicating that she would be an 'at-will' employee and [that] she 'may be terminated without cause and without advance notice'"; and "[t]he City gave Thorpe until June 3, 2021 to sign the agreement for the prospective position."
14. Hirschmanner certifies that "[t]he City contracts with the New Jersey Department of Children and Families (NJDCF) to implement and operate the New Jersey School Based Youth Services Program (NJSBYSP)" and "NJSBYSP provides an operational manual as a guideline for the City to manage human resources services and the distribution of finances affecting the program." Hirschmanner also certifies that

"Thorpe's . . . position [was] paid through a federal[ly]-funded program issued through NJDCF" and that "[t]he State or federal government determine[d] the salary for Thorpe's position, not the City."

15. On July 8, 2021, AFSCME filed a grievance on behalf of Beltre that included the following written statement from Beltre dated June 30, 2021, which provides in pertinent part:

I want to file a grievance because what was agreed upon for my new position as head cashier/supervisor was not what was submitted to personnel. The verbal agreement that I made with the tax collector and the finance director was that I would start my new duties as of March 1, 2021 and that I would get retro pay for it because the person doing the job was going to be on medical leave for several months. Thereafter, once she retired on June 1, 2021 I would get her current salary. Also initially when I was offered the position and accepted it the tax collector told me that the position was due for a salary increase; so the tax collector asked me to give her a number of my desired salary. Then a few weeks into me performing my new duties she told me that the salary would stay the same as the current person doing the job. I've been an employee of the City of Paterson since 2004 and I have never complained about anything. Day in and day out I come to work with a smile and go above and beyond to perform my duties. So that's why at this time I am writing this complaint because I don't think it is fair for me to get a lower salary then the current salary of the person that was previously doing the job.

16. On November 18, 2021, Hirschmanner sent the following e-mails to Hughes regarding Beltre and Green:

Please be advised that the following employee is pending a title change and salary increase:

[Beltre] (Finance): The City wishes to change Ms. Beltre's title to Supervising Cashier with a salary increase to \$40,000. DCA approved the position via waiver #PAT21-107 (TBD). The position was posted on the City website, to which Ms. Beltre applied.

Please advise if you require any additional information.

* * *

Please be advised that the following employee is pending a title change and salary increase:

[Green] (Finance): The City wishes to change Ms. Green's title to Clerk 2 with a salary increase to \$40,000. DCA approved the position via waiver #PAT21-105 (TBD). The position was posted on the City website, to which Ms. Green applied.

Please advise if you require any additional information.

17. On November 22, 2021, Hughes responded to Hirschmanner's e-mails regarding Beltre and Green as follows:

The Union will not be approving the paperwork provided shows additional instances of the City not negotiating salaries with the Union before requesting approval from DCA and that these instances will be part of the pending [UPC].

18. Hughes certifies that "[p]rior to the City preparing [certain] documents (City's 3.80 Personnel Requisition Forms, Job Posting, and Attachment C form submitted to DCA), the City did not negotiate with [her] or any other

representative of the Union the salary increase for Beltre that was submitted to and approved by the New Jersey Department of Community Affairs (DCA)."

19. Hughes certifies that "[p]rior to the City preparing the Attachment C form submitted to and approved by DCA, the City did not negotiate with [her] or any other representative of the Union the salary increase for Green."

The City submitted an additional certification from Hirschmanner dated February 10, 2023 with its exceptions letter-brief, which provides the following:

20. In or about March 2021, the City and the AFSCME settled two unfair practice charges (CO-2019-015 and CO-2020-043) which involved allegations of direct dealing.
21. At that time of the settlement, the parties put a procedure in place where the City would submit copies of waivers for salary/title changes required by DCA to AFSCME for review, discussion, and approval. The waivers are a requirement imposed by DCA in connection with the City's MOU to receive transitional aid from the State. The intention of this submission of the waivers to AFSCME and subsequent discussions between the parties was to satisfy the parties' obligations to negotiate salary/title changes. Both parties agreed to this process.
22. Initially, the City submitted the draft waivers to AFSCME

prior to submitting them to DCA. As a part of the established procedure, Hirschmanner would e-mail Hughes a copy of the waiver(s) and would outline the changes to salary/title that the City was seeking. Hughes would then approve the waiver or we would engage in additional negotiations concerning the proposed changes. The City would then need to go to DCA for review and final approval of the waivers.

23. Subsequently, the City was directed by DCA to submit the waivers to DCA for approval and create job postings prior to submitting the waivers to the Union for review, discussion, and approval. As a result, Hirschmanner still sent Hughes e-mails with copies of the waivers and the salary/title changes that the City was seeking. However, the only change was that these e-mails were sent after receiving approval of the waivers from DCA and after the positions were posted. If any changes were necessary, the City would again need to go back to DCA for additional review and final approval of modified waivers.

24. As a result of the minor change in procedure, AFSCME rejected waivers for Beltre and Green that were submitted for review and alleged that the City was engaging in direct dealing because the waivers were not provided to the Union first. Hughes declined to engage in any negotiations

regarding the salary/titles being proposed. AFSCME then subsequently filed the instant UPC.

25. In or about November 23, 2021, after the filing of the instant UPC, there were instances where the Union did approve waivers that were submitted for review and approval after they were approved by DCA.

None of the above certified facts in the City's February 10 certification from Hirschmanner were included in the City's previous certifications nor were they presented to the Hearing Examiner, particularly the assertion that Hirschmanner's submission of waivers to Hughes, such as her November 18, 2022 notification e-mails regarding Beltre and Green, were intended to "to satisfy the parties' obligations to negotiate salary/title changes."^{4/}

STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . . , the agency head may reject or

^{4/} N.J.A.C. 19:14-8.1 provides that the Commission may reopen the record and receive further evidence in reviewing exceptions to a Hearing Examiner's decision.

modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

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(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.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. 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), certif. denied, 87 N.J. 388 (1981).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires that: "the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." "[U]nilateral imposition of working conditions is the antithesis of [the Legislature's] goal that the terms and conditions of public employment be established through bilateral negotiation." Atlantic Cty., 230 N.J. 237, 252 (2017), quoting Galloway Twp. Bd. of Educ., 78 N.J. 25, 48 (1978).

Public employers are prohibited from "[r]efusing 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." N.J.S.A. 34:13A-5.4a(5). Public employers are also prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). This provision will be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

The Commission has consistently held that “[b]ecause compensation is mandatorily negotiable, a public employer cannot unilaterally set or change salaries.” Camden Cty., P.E.R.C. No. 94-121, 20 NJPER 282, 283 (¶25143 1994). The Commission has also consistently held that “public employers violate subsection 5.4a(5) by negotiating directly with individual employees or groups of employees rather than with their majority representative over negotiable terms or conditions of employment, even where individual negotiations resulted in greater benefits.” City of Hackensack, P.E.R.C. No. 2018-54, 45 NJPER 18 (¶5 2018); see also City of Paterson & AFSCME Council 52, Local 3724, H.E. No. 2018-8, 44 NJPER 362 (¶102 2018) (where the same parties litigated a nearly identical direct dealing claim concerning numerous other employees, and the hearing examiner determined that the “City violated subsection 5.4a(5) of the Act by directly dealing with individual employees represented by AFSCME concerning compensation tied to promotion and/or additional duties”)

Regarding Beltre, the Hearing Examiner found that AFSCME provided un rebutted evidence that the City engaged in direct dealing with Beltre during the period of March-June 2021 and reached a verbal agreement about a title change, retroactive compensation, and a salary increase. Regarding Green, the Hearing Examiner found undisputed evidence that the City

implemented a title change/salary increase for Green in excess of the contractually-agreed amount of \$1,500.00 without negotiating with AFSCME. The Hearing Examiner found that Hirschmanner's November 18, 2021 e-mails to Hughes notifying her of Beltre and Green's pending title change and salary increase, which had already been approved by DCA, insufficiently communicated an invitation to negotiate and was not indicative of a genuine desire to engage in negotiations, but rather, the email appeared to be seeking AFSCME's approval as a mere formality.

In the City's exceptions brief, it does not dispute the Hearing Examiner's findings of fact, but instead, disputes the Hearing Examiner's conclusion of law, with respect to Beltre and Green, that the City's November 18 notifications to Hughes were an insufficient invitation to negotiate and that Hughes' response disapproving of the pending salary/title changes was not a refusal to negotiate. Citing Commission precedent, the City argues that the Hearing Examiner failed to analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate occurred. The City asserts that it made clear efforts to negotiate the salary/title changes in accordance with the procedure established by the parties following the settlement of AFSCME's two prior UPCs. The City maintains that AFSCME was aware that Hirschmanner's November 18 notices were a clear invitation to negotiate based on the parties prior conduct;

however, AFSCME refused to negotiate and simply disapproved of the salary/title changes. The City notes that the Hearing Examiner's decision stated that the City had no legal obligation to submit waivers to AFSCME prior to obtaining approval from DCA. The City asserts it was following the DCA's directive to submit the waivers for approval prior to submitting them to AFSCME for review and approval, and the City was obliged to comply with that directive given that millions of dollars of transitional aid were at stake. The City concludes that it did not violate the Act by engaging in direct dealing with Beltre and Green or refusing to negotiate with AFSCME, and thus, the Hearing Examiner's decision should be overturned.

Here, we agree with the Hearing Examiner's findings of fact and conclusions of law with respect to the City's direct dealing with Beltre and Green. As the Hearing Examiner noted, this case presents nearly identical issues to the prior UPC between these same parties in Paterson, H.E. No. 2018-8, and in that case the Hearing Examiner found the following, in pertinent part:

. . . AFSCME as the majority representative had the exclusive right to negotiate compensation such as salary increases tied to promotions and/or additional duties In none of the instances of the salary increases which were beyond the \$1,500 amount set forth in the parties' collective agreement did the City seek negotiations with AFSCME. Whether the City went first to DCA for approval of compensation increases and then "informed" the employee of its offer or the City went first to the employee and then

DCA, the City ignored its obligation to exclusively negotiate compensation for unit members with the majority representative.

As in that case, the City directly negotiated salary/title changes with Beltre and Green prior to seeking negotiations over those changes with AFSCME, the exclusive representative. We agree with the Hearing Examiner's conclusion that the notification to Hughes that the DCA had already approved of the salary/title changes appeared to be merely a formality, rather than an invitation to negotiate. Hirschmanner's November 18 notices to Hughes do not contain any clear or direct language that would indicate that the salary/title changes were open to change or negotiations. Hirschmanner's e-mails ask whether AFSCME required any additional information regarding the salary/title changes that had already been approved, but were devoid of any indicia that the pending changes were subject to negotiations and modification. Such indicia could have included an invitation for Hughes to provide any response, feedback, input, proposed changes, or counteroffers.

We do not find relevant or persuasive the City's newly certified facts regarding the change to the waiver approval process, namely that previously the City would submit the waivers to AFSCME for approval prior to submitting them to the DCA for approval, but then, based on the DCA's directive, the City began submitting the waivers to DCA prior to seeking approval from

AFSCME. As found in Paterson, supra, the order of operations regarding DCA approval matters less than the City's failure to first negotiate the salary/title changes with AFSCME. Given the City's prior history of direct dealing with AFSCME members and the unrebutted evidence of direct dealing in the instant matter, the Hearing Examiner correctly concluded, based on the totality of the parties' conduct, that the City failed to negotiate with AFSCME before directly contacting Beltre and Green about the salary/title changes. See Camden Cty., H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) ("[w]hen [an employer] met and dealt directly with employees . . . it undermined [the union's] representative status"; "[even if] negotiations between [employees] and the [employer] did not take place, the discussion and solicitation of suggestions about a mandatorily negotiable subject violate the Act").

Regarding Thorpe, the Hearing Examiner found that AFSCME provided unrebutted evidence that the City engaged in direct dealing by contacting Thorpe in May-June 2021 regarding terms and conditions of employment including a title change, salary increase, change from part-time to full-time status, and change from "just-cause" to "at-will" employment. The Hearing Examiner found that the City did not present any legal authority that would preempt negotiations over Thorpe's working conditions. Further, the Hearing Examiner found that even if the City could

not negotiate over Thorpe's salary because it was controlled by the State or Federal government, this did not preclude the City from negotiating over other mandatorily negotiable terms and conditions of employment such as changing from a part-time to full-time work schedule or from "just cause" to "at-will" employment status.

In its exceptions brief, the City reiterates its arguments below - namely that Thorpe was a non-permanent employee whose position was funded by a grant and whose salary was determined by the State. The City argues that negotiating terms and conditions of employment for employees in grant-funded positions would significantly interfere with its ability to avail itself of grant funds and to provide associated services. Thus, the City asserts that it did not violate the Act and the Hearing Examiner's decision should be overturned with respect to Thorpe.

Here, we agree with the Hearing Examiner's findings of fact and conclusions of law with respect to the City's direct dealing with Thorpe. The City maintains that it was simply notifying Thorpe of the conditions of her employment, which were controlled by the grant program and the State. However, the City did not provide any support or authority for its assertion that all or any of the terms and conditions of Thorpe's grant-funded position were controlled by the grant program and/or the State. The City relies on Gloucester Cty., H.E. No. 92-11, 17 NJPER 533 (¶22262

1991), however, that case is factually distinguishable. In Gloucester Cty., a charge was dismissed which contested an employee's exclusion in a unit because the employee did not work the requisite number of hours required to be in the unit pursuant to the terms of her grant-funded position. Again, here, the City has not provided any support or authority that all or any of the terms and conditions of Thorpe's grant-funded position are controlled by the grant program and/or the State. The City also relies on City of Newark, D.R. No. 85-24, 11 NJPER 344 (¶16126 1985), which involved a representation petition wherein the Director of Representation ordered an election of all white-collar employees, excluding grant-funded employees, because certain grant-funded employees were historically excluded from the unit. No such representation petition is at issue in the instant matter and exclusion of Thorpe from the bargaining unit was not raised to the Hearing Examiner. As such, the Hearing Examiner correctly concluded that the City violated the Act by directly dealing with Thorpe prior to negotiating with AFSCME regarding changes to her position.

For all the foregoing reasons, we reject the City's exceptions and affirm the Hearing Examiner's decision.

ORDER

We affirm and adopt the Hearing Examiner's Decision and Order in H.E. No. 2023-4, 49 NJPER 335 (¶81 2023) without

modification.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford recused himself.

ISSUED: April 27, 2023

Trenton, New Jersey