

H.E. NO. 2015-12

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-2013-252

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Charging Party's motion for summary judgment finding that the Respondent City of Newark violated 5.4a(1) and (5) of the Act. Specifically, the City refused to provide retroactive retiree health care benefits to a sergeant pursuant to a grievance settled at Step 5 by the Police Director. The Hearing Examiner rejected the City's contention that the Police Director had no apparent authority to settle the grievance pursuant to an internal policy requiring the Director to consult with the Business Administrator before resolving a grievance that would expose the City to "significant additional cost". The Hearing Examiner determined that the Director had actual authority pursuant to the parties' negotiated grievance procedure to resolve the grievance and that the policy was an internal matter between the Business Administrator and the Director to which the union was neither a party nor was there evidence that the union was aware of the policy.

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,
Anna P. Pereira, Corporation Counsel
(Alison Brown Jones, Assistant Corporation Counsel)

For the Charging Party,
John J. Chrystal, III, President of SOA

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT

On February 27, 2013, 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 provide retroactive retiree health care benefits to a sergeant pursuant to a grievance settled by then Police Director Samuel DeMaio at Step 5 of the parties' negotiated grievance procedure. The SOA asserts that the City's refusal to abide by the settlement of the grievance constitutes a violation of

5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On June 19, 2013, the Director of Unfair Practices issued a Complaint and assigned the matter to me for a hearing. On March 11, 2014, the SOA filed a motion for summary judgment pursuant to N.J.S.A. 19:14-4.8. On March 21, 2014, the City filed a response to the motion. The City argues in response to the motion for summary judgment that its Police Director lacked apparent authority to settle the grievance.

On April 3, 2014, the parties were notified that the motion for summary judgment had been referred to the Hearing Examiner. 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 make the following:

FINDINGS OF FACT

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

2. The City and SOA are parties to a collective negotiations agreement ("CNA") effective from January 1, 2009 through December 31, 2012. The parties are in negotiations for a successor agreement.

3. Article IV, entitled "Grievance Procedure and Arbitration", consists of six steps ending in binding arbitration. Step 5 states in pertinent part:

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.

Step 6 states in pertinent part:
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. . . .

4. This instant matter arises out of SOA Grievance 2009-24 regarding the denial of retiree health care benefits to Sergeant Bazyt Bergus.

5. On April 30, 2002, Sergeant Bergus was terminated from the Newark Police Department on grounds of fitness for duty after he failed a psychological evaluation. Sergeant Bergus appealed to the New Jersey Civil Service Commission, which denied the appeal and upheld the termination.

6. Sergeant Bergus also filed for a disability pension with the Police and Fire Retirement System ("PFRS"), and on April

14, 2009, PFRS granted Sergeant Bergus an ordinary disability retirement.

7. Upon being granted an ordinary disability retirement by PFRS, Sergeant Bergus applied for retiree health care benefits with the City of Newark pursuant to Article X, "Health and Life Insurance", section 9, of the CNA which states:

Effective December 31, 1985, any member covered by this Agreement who retired on or after January 1, 1985 on a disability retirement, with less than 25 years of service, shall be entitled to the same coverage set forth in Section 6 of this Article as provided to eligible retirees who retired from employment with 25 years of service or more.

8. The City's Office of Employee Benefits denied Sergeant Bergus' request for retiree health care benefits.

9. On September 21, 2009, the SOA filed Grievance 2009-24 on Sergeant Bergus' behalf. The grievance went unanswered, and the SOA demanded arbitration pursuant to the CNA.

10. An arbitration hearing was held on May 3 and June 7, 2012. The parties then entered into settlement discussions and held an in-person settlement meeting on August 29, 2012. At this meeting, Police Director DeMaio settled the grievance by amending Sergeant Bergus' personnel order from termination to retirement on disability pension, and granting Sergeant Bergus retroactive retiree health care benefits. The SOA prepared a written

settlement agreement that same day and e-mailed it to the City's Assistant Corporation Counsel. The City did not respond.

11. On February 27, 2013, after several unanswered requests by the SOA for the City to execute the settlement agreement, the SOA filed the instant unfair practice charge.

12. On June 19, 2013, a complaint was issued on the unfair practice charge.

13. On August 30, 2013, Police Director DeMaio and the SOA executed a Memorandum of Agreement settling the grievance, and on September 20, 2013, Police Director DeMaio issued an Addendum to Personnel Order No. 2002-211, which rescinded Sergeant Bergus' termination effective April 20, 2002, and reflected that Sergeant Bergus retired on a disability pension. The Police Department also issued Sergeant Bergus a retired Newark Police Department Identification card. Subsequently, the City refused to provide Sergeant Bergus with retroactive retiree health care benefits.

14. The SOA's unfair practice charge seeks an order requiring the City to provide Sergeant Bergus with retroactive retiree health care benefits under the settled grievance. It also asks for a posting and a cease and desist order.

ANALYSIS

Summary judgement must be denied if material factual issues exist. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J.

67, 74-75 (1954). If the facts are not disputed however, and the movant is entitled to judgment as a matter of law, the motion must be granted. Brill, 142 N.J. at 529.

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.

The parties agree that the SOA filed a grievance on behalf of Sergeant Bergus, and that Police Director DeMaio settled the grievance, ordering the City to provide Sergeant Bergus with retroactive retiree health care benefits. The City has refused to provide retroactive retiree health care benefits pursuant to the Director's agreement to settle the grievance. Under these circumstances, I find that no genuine issue of material fact requires a plenary hearing.

The issue is whether the refusal of the City to abide by the Police Director's grievance settlement repudiates the parties' negotiated grievance procedure and, therefore, whether as a matter of law the City must provide Sergeant Bergus retroactive retiree health care benefits.

Our Act requires public employers to negotiate grievance procedures by which majority representatives or individual

employees "may appeal the interpretation, application or violation of policies, agreements, and administrative decisions."

N.J.S.A. 34:13A-5.3. The Act further provides that such negotiated grievance procedures be utilized for any dispute covered by the terms of the parties' collective negotiations agreement. Ibid. It is an unfair practice for a public employer 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).

Moreover, 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. As the Commission explained in Middletown Township, P.E.R.C. No. 2007-18, 32 NJPER 325, 327 (¶135 206), aff'd 34 NJPER 228 (¶79 2008):

If 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.

In Passaic Cty. (Preakness Hosp.), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985), the Commission determined that the employer violated the Act when it refused to negotiate in good faith by neither implementing the adverse directive at Step 3 of the parties' grievance procedure nor appealing that directive to

binding arbitration under that procedure. Preakness is applicable to the instant matter.

Here, the parties agreed that the Police Director was authorized by the negotiated grievance procedure at Step 5 to resolve grievances. The Director settled the grievance. The City refused to implement the Police Director's settlement of the grievance.

The City concedes that the grievance was settled but asserts that the Police Director DeMaio did not have the apparent authority to settle the grievance. In support of its argument, the City produced two documents. The first is a memorandum dated November 14, 1997 from the Business Administrator Glenn Grant to Police Director Joseph Santiago, Fire Director Stanley Kossup and Police Chief Thomas O'Reilly. The memorandum is headed "Restriction on Settlement of Grievances" and states in relevant part:

Please be advised that there shall be no settlement of any grievance filed by a labor union which will have the effect of incurring significant additional cost to the City of Newark, whether such cost is direct or indirect, or which will have the effect of changing the prevailing terms and conditions of employment, or otherwise bind the City via the past practice doctrine without prior consultation with the Business Administrator.

. . . The Police and Fire Directors are hereby responsible for consulting the Business Administrator before the city becomes bound to any settlement agreement which has the impact described above.

This directive does not abolish the goal of the City to settle all disputes at the lowest possible level. Rather, it is designed to address the binding effect of such settlements on the City.

Failure to adhere to the foregoing directive may result in disciplinary action.

The memorandum is copied to Corporation Counsel, Assistant Corporation Counsel and the City's Personnel Director.

The second document submitted by the City is a memorandum dated March 28, 2003 from former Personnel Director John K. D'Auria to former Police Director Robert Rankin and Fire Director Edward Dunham. The D'Auria memorandum reminded the directors to remain mindful of the November 14, 1997 memorandum from Business Administrator Glenn Grant which D'Auria attached. D'Auria's memorandum is copied to Business Administrator Richard Monteilh, Corporation Counsel and the City's Labor Relation and Compensation Officer.

At best, these documents may support that Police Director DeMaio violated an internal policy dating to 1997. The SOA was not a party to that policy nor is there any evidence that the SOA was notified of its existence. In any event, the policy does not abrogate the clear contract language of the parties' negotiated grievance procedure which designates the Police Director to review and resolve grievances at Step 5. Here, the Police Director exercised his authority to resolve the grievance, but

the City refused to provide Sergeant Bergus the retroactive retiree health care benefits ordered by DeMaio.

The City relies on Township of Edison, H.E. No. 96-21, 22 NJPER 231 (¶27120 1996), in support of its decision not to abide by DeMaio's settlement of the grievance, arguing that Police Director DeMaio had no authority to bind the City as to this grievance. In Edison, a hearing examiner dismissed a charge that the Township repudiated the parties' collective negotiations agreement, finding that the Charging Party failed to prove that the parties had reached agreement on a subject raised under the re-opener article of their contract. Moreover, she rejected the union's argument that it was entitled to rely on the apparent authority of the chief of staff to bind the Township, because the chief was a new employee under a newly-elected Mayor, and also because the chief never suggested that he possessed such authority. This case is inapposite.

First, there is no question here that the parties agreed on a grievance procedure that designates the Police Director to resolve grievances at Step 5. Also, the Police Director had actual authority to do so under the clear language of the negotiated procedure. This is not a case of apparent authority.

Additionally, the issue of the Police Director's authority to bind the City under these circumstances was resolved by the Commission in City of Newark, P.E.R.C. No. 2008-34, 33 NJPER 316

(¶120 2007), recon. den. P.E.R.C. 2008-53, 34 NJPER 71 (¶29 2008). There, in defense of its decision to unilaterally rescind a grievance determination, the City argued, as it does here, that the Police Director lacked the legal authority to resolve the grievance. The Commission rejected this argument and concluded the City's actions repudiated the grievance procedure and violated section 5.4a(5). See also City of Newark, H.E. No. 2015-8, 41 NJPER 454 (¶141 2015); City of Newark, H.E. No. 2014-1, 40 NJPER 124 (¶48 2013); City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013).

Based on the foregoing, the City's refusal to abide by the Police Director's settlement of the grievance 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.

CONCLUSIONS OF LAW

The City of Newark violated 5.4a(1) and (5) of the Act when it refused to provide Sergeant Bergus with retroactive retiree health care benefits pursuant to Grievance No. 2009-24 which was settled at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

RECOMMENDED ORDER

1. The SOA's motion is granted.
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 settlement of Grievance No. 2009-24 and provide Sergeant Bergus retroactive retiree health care benefits.

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 settle Grievance No. 2009-24 and provide Sergeant Bergus with retroactive retiree health care benefits.

B. Take the following action:

1.) Provide Sergeant Bergus retroactive retiree health care benefits pursuant to Grievance 2009-24 which was settled at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio pursuant to R. 4:42-11.

2.) 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,

3.) 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.

Marisa Koz
Hearing Examiner

DATED: June 18, 2015
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 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by June 29, 2015.



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 interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating the grievance procedure Grievance No. 2009-24 and provide Sergeant Bergus retroactive retiree health care benefits.

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 Grievance No. 2009-24 and provide Sergeant Bergus with retroactive retiree health care benefits.

WE WILL immediately provide Sergeant Bergus retroactive retiree health care benefits pursuant to Grievance 2009-24 which was settled at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio pursuant to R. 4:42-11.

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City of Newark
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372