

H.E. NO. 2018-8

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2017-104

AFSCME COUNCIL 52, LOCAL 3724,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Respondent City of Paterson violated 5.4a(5) of the Act when it directly dealt with employees over salary increases tied to promotions and/or additional duties. She rejected the City's argument that because it received transitional aid from the State it was relieved of its duty to negotiate compensation. The Hearing Examiner also dismissed the City's defense that it never negotiated directly with the employees because it only informed them of the unilaterally set compensation after it was approved by the DCA. She determined that even if the City went first to the DCA and then to the employee with an offer, it violated the exclusive right of the Charging Party as majority representative to negotiate on behalf of its unit members.

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
Steven S. Glickman, Esq.

For the Charging Party
Seth Gollin, Organizer/Field Representative

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 10, 2016, AFSCME Council 52, Local 3724^{1/}
(Charging Party or AFSCME) filed an unfair practice charge
against the City of Paterson (Respondent or City). The charge
alleges the City violated the New Jersey Employer-Employee
Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically
5.4a(2),(5) and (7),^{2/} by directly dealing with specifically

^{1/} At the hearing, Charging Party corrected its name to add
Local 3724. The Complaint listed Charging Party as only
AFSCME Council 52.

^{2/} These provisions prohibit public employers, their
(continued...)

named and other unit employees regarding their compensation and/or title changes, thus by-passing AFSCME as the majority representative. AFSCME seeks as remedies an order finding a violation and requiring the City to negotiate with AFSCME.^{3/}

On June 5, 2017, Director of Unfair Practices Gayl R. Mazuco issued a Complaint and Notice of Pre-Hearing on the 5.4a(5) allegations and dismissing the alleged violations of 5.4a(2) and (7) finding that they did not meet the Commission's complaint issuance standards (C-1).^{4/}

On August 24, 2017, Respondent filed its Answer (C-2), generally denying that it violated the Act.

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- 2/ (...continued)
representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (7) Violating any of the rules and regulations established by the commission."
- 3/ The charge also requests as a remedy rescinding any terms and conditions of employment that were changed due to the direct dealing. However, at the hearing, Charging Party asserted that it is not seeking to have 26 named employees in J-2 returned to the status quo, namely the reduced salaries they received before the alleged direct dealing (T8-T9).
- 4/ "C" refers to Commission exhibits received into evidence at the hearing. "J" refers to joint exhibits. "T" refers to the transcript of the hearing.

A hearing was conducted on December 13, 2017. The parties examined witnesses and presented joint stipulations of facts together with attached exhibits (J-1; J-2).^{5/} The parties made oral closing arguments. Based on the record, I make the following:

FINDINGS OF FACT

Stipulated Facts Submitted by the Parties (J-1; J-2)^{6/}

1. The State of New Jersey (State) has determined the City of Paterson (City) to be a "transitional aid" municipality, eligible to receive State Aid [sic] since at least Fiscal year 2014 to balance its budget.

2. In order for the City to receive transitional aid, the State requires the City to sign a Memorandum of Understanding (MOU) and City Council to pass a resolution approving the MOU.

3. As an example, the City signed a MOU for Fiscal Year 2014 (Exhibit 1).

4. City Council passed Resolution No. 14:263 dated March 31, 2014, approved at the April 22, 2014 Council meeting, approving the MOU for Fiscal year 2014 (Exhibit 2).

^{5/} J-1 are stipulated facts submitted by the City and agreed to by AFSCME, while J-2 are stipulated facts submitted by AFSCME and agreed to by the City.

^{6/} J-1 is set forth in findings of fact nos. 1 through 5 above, while J-2 is set forth in findings of fact nos. 6 through 33.

5. By way of example, the MOU requires at the following paragraphs:

6. Promotions, Transfers, and Title Changes:

The Municipality shall not approve any promotions, transfers, and title changes resulting in a salary increase unless required to do so by contractual obligations.

7. Exceptions for Good Cause: The Director may authorize salary increases or promotions for good cause upon the Municipality's written request. Good cause may include salary increases or promotions that are part of a plan to restructure personnel or service delivery in a manner that is intended to achieve cost reductions.

6. As of December 31, 2014, former City employee Cynthia Cherry had a base salary of \$66,321.89 working in the title of Administrative Clerk; and as of 2016, Cynthia Cherry's base salary had been increased by \$15,000.00 to \$81,321.89 working in the title of Administrative Clerk Bilingual Spanish/English.

7. As of December 31, 2014, City employee Evette Figueroa-Williams had a base salary of \$39,441.97 working in the title of Receptionist Bilingual Spanish/English; and as of 2016, Evette Figueroa-Williams' base salary had been increased by \$6,500.00 to \$45,941.97 working in the title of Receptionist Bilingual Spanish/English.

8. As of December 31, 2014, City Employee Crystal Kline had a base salary of \$42,116.68 working in the title of Account Clerk; and as of 2017, Crystal Kline's base salary had been

increased by \$6,124.78 to \$48,241.46 working in the title of Account Clerk.

9. As of December 31, 2014, City employee Fitzgerald Arias had a base salary of \$36, 233.05 working in the title of Principal Account Clerk; and as of 2017, Fitzgerald Arias' base salary had been increased by \$4,547.37 to \$40,780.426 [sic] working in the title of Principal Account Clerk.

10. As of December 31, 2014, City employee Elvira Soto had a base salary of \$47,395.08 working in the title of Administrative Clerk Bilingual Spanish/English; and as of 2017, Elvira Soto's base salary had been increased by \$6,550.90 to \$53,945.98 working in the title of Administrative Clerk Bilingual Spanish/English.

11. As of December 31, 2014, City employee Debra Bracey had a base salary of \$33,341.16 working in the title of Identification Clerk; and as of 2017, Debra Bracey's base salary had been increased by \$11,606.18 to \$44,947.34 working in the title of Administrative Secretary.

12. As of December 31, 2014, City employee Theresa Suarez had a base salary of \$57,315.96 working in the title of Payroll Supervisor; and as of 2017, Theresa Suarez' base salary had been increased by \$7,785.76 to \$65,101.72 working in the title of Payroll Supervisor.

13. As of December 31, 2014, City employee Yesinia Bencosme had a base salary of \$44,827.23 working in the title of Economic Representative 4; and as of 2017, Yesinia Bencosme's base salary has been increased by \$22,422.51 to \$67,249.74 working in the title of Program Specialist 2.

14. As of December 31, 2014, City employee Andre Lewis had a base salary of \$26,211.92 working in the title of Mail Clerk; Andre Lewis' base salary had been increased by \$5,318.61 to \$31,530.53 working in the title of Mail Clerk.

15. As of December 31, 2014, City employee Joan Chisolm had a base salary of \$47,941.39 working in the title of Principal Account Clerk; and as of 2016, Joan Chisolm's base salary had been increased by \$2,058.61 to \$50,000.00 working in the title of Principal Account Clerk.

16. As of December 31, 2014, City employee Ana Cancel had a base salary of \$29,070.00 working in the title of Technical Assistant Office of Community Affairs; and as of 2016, Anacancel's base salary had been increased by \$5,930.00 to \$35,000.00 working in the title of Keyboarding Clerk 3.

17. As of December 31, 2014, City employee Dennis Rolon had a base salary of \$45,366.85 working in the title of Relocation Officer; and as of 2016, Dennis Rolon's base salary had been increased by \$5,930.00 to \$51,866.85 working in the title of Relocation Officer.

18. As of December 31, 2014, City employee John Carlucci had a base salary of \$34,110.55 working in the title of Program Monitor; and as of 2016, John Carlucci's base salary had been increased by \$10,000.00 to \$44,110.55 working in the title of Program Monitor.

19. As of December 31, 2014, City employee Sonia Espinal had a base salary of \$36,473.51 working in the title of Secretarial Assistant; and as of 2016, Sonia Espinal's base salary had been increased by \$10,526.49 to \$47,000.00 working in the title of Senior Account Clerk.

20. As of December 31, 2014, City employee Berys Peralta had a base salary of \$32,529.35 working in the title of Personnel Clerk Bilingual Spanish/English; and as of 2016, Berys Peralta's base salary had been increased by \$3,800.00 to \$36,329.35 working in the title of Payroll Clerk.

21. As of December 31, 2014, City employee Linda Curry had a base salary of \$27,419.78 working in the title of Payroll Clerk; and as of 2016, Linda Curry's base salary had been increased by \$9,723.08 to \$37,142.86 working in the title of Pension Fund Supervisor.

22. As of December 31, 2014, City employee Rosa Rosario had a base salary of \$35,000.00 working in the title of Accounting Assistant; and as of 2016, Rosa Rosario's base salary had been

increased by \$14,020.00 to \$49,020.00 working in the title of Accountant.

23. As of December 31, 2014, City employee Lisette Victoria had a base salary of \$34,960.36 working in the title of Principal Data Control Clerk; and as of 2016, Lisette Victoria's base salary had been increased by \$5,000.00 to \$39,960.36 working in the title of Principal Data Control Clerk.

24. As of December 31, 2014, City employee Jennifer Hirschmanner had a base salary of \$45,000.00 working in the title of Executive Assistant; and as of 2016, Jennifer Hirschmanner's base salary had been increased by \$7,144.80 to \$52,144.80 working in the title of Executive Assistant.

25. As of December 31, 2014, City employee Nancy Steward had a base salary of \$25,000.00 working in the title of Clerk Typist; and as of 2016, Nancy Steward's base salary had been increased by \$5,000.00 to \$30,000.00 working in the title of Deputy Municipal Court Administrator.

26. As of December 31, 2014, City employee Amanda Vazquez had a base salary of \$24,554.40 working in the title of Keyboarding Clerk 1; and as of 2016, Amanda Vazquez's base salary had been increased by \$13,554.40 to \$38,000.00 working in the title of Keyboarding Clerk 1.

27. As of December 31, 2014, City employee Aracelly Calero had a base salary of \$30,500.00 working in the title of Clerk;

and as of 2017, Aracelly Calero's base salary had been increased by \$8,250.00 to \$38,750.00 working in the title of Secretarial Assistant Bilingual Spanish/English.

28. As of December 31, 2014, City employee Leonor Cedeno had a base salary of \$25,000.00 working in the title of Clerk Typist; and as of 2016, Leonor Cedeno's base salary had been increased by \$5,000.00 to \$30,000.00 working in the title of Deputy Municipal Court Administrator.

29. As of December 31, 2014, City employee Loris Young had a base salary of \$30,000.00 working in the title of Clerk Typist; and as of 2016, Loris Young's base salary had been increased by \$2,500.00 to \$32,500.00 working in the title of Keyboarding Clerk 1.

30. As of 2016, City employee Felix Rivera had a base salary of \$35,000.00 working in the title of Computer Service Technician; and as of 2017, Felix Rivera's base salary had been increased by \$15,748.28 to \$52,748.28 working in the title of Computer Service Technician.

31. As of December 31, 2014, City employee Robert Payton had a base salary of \$30,000.00 working in the title of Fire Prevention Specialist; and as of 2016, Robert Payton's base salary had been increased by \$23,000.00 to \$53,000.00 working in the title of Fire Protection Inspector.

32. All of the employees listed in the numbered paragraphs 6 through 31^{7/} above were members of AFSCME Local 3724 bargaining unit from December 31, 2014 through the filing of the Complaint on November 10, 2016.

33. All of the base salary increases set forth in paragraphs 6 through 31 above are in excess of the applicable contractual salary increases, including both promotional salary increases and across-the-board wage increases.

Facts based on Witness Testimony

34. Hazel Hughes was the only witness to testify in the hearing. Hughes has been employed by the City for twenty-five (25) years and for the past fifteen (15) years has been AFSCME Local 3724 president (T14).

35. As local president, Hughes negotiates the collective negotiations agreement and enforces the terms of the agreement through the filing of grievances (T15, T20). The collective agreement sets forth compensation of \$1,500 for promotion and/or for additional duties (T14).

36. Hughes only learns about salary increases beyond the contractually negotiated compensation when members tell her about it (T15). For instance, Hughes learned that Finance Director

^{7/} I have renumbered the paragraphs referenced in J-2 in order to provide continuity to the parties' stipulations but the renumbering does not change the substance of the stipulated facts.

Mellow went directly to City employee Jennifer Foster and negotiated a \$4,000.00 increase in salary (T16, T30-T31). Hughes filed a grievance forcing the City to negotiate. As a result, the salary increase was reduced to \$1,500.00 (T16-T17, T30-T31).

37. In another instance, Hughes was handling a discipline for Onjean Baldwin when Hughes learned from Baldwin's supervisor that she had gotten a \$500.00 increase for additional duties. Baldwin complained that she had not yet received the promised extra compensation. According to Hughes, the additional \$500.00 was never negotiated with the union (T17-T18).

38. Unit member Berys Peralta came to Hughes to complain about a six-month probationary period for a promotion to become payroll clerk (T18). Hughes explained to her that the parties' collective agreement did not provide for a probationary period for the promotion (T18). Then Hughes learned that Peralta had been given a \$2,500.00 salary increase for the promotion which had never been negotiated with the union (T18). After the union filed an unfair practice charge, the City decided to take back the increase, but the matter was eventually settled by the parties when the City agreed to negotiate Peralta's salary (T19).

39. Similarly, Eugenia Byfield's \$4,800.00 salary increase for additional duties was not negotiated with the union (T21). Hughes learned about it from Byfield. After filing a charge for failure to negotiate, the City decided to rescind the increase.

Just as with Peralta, the City agreed to negotiate after the unfair practice charge was filed (T20-T21).

40. After reviewing J-2, Hughes confirms that none of the listed salary increases were negotiated with AFSCME. She learned of some of the increases from the members and others after she requested the City's register listing all employees by name, salary and title and comparing the salaries for 2014, 2016 and 2017 (T22-T23).

41. According to Hughes, in each instance, the City either went to the Department of Community Affairs (DCA) first for approval of the salary increase and then approached the employee or went first to the employee to establish an acceptable salary increase and then sought approval from DCA, but in either circumstance the City never sought to negotiate with the union any of the salary increases which were outside the increases set forth in the parties' collective agreement (T26-T29). Any negotiations that took place occurred after the union filed a grievance and/or an unfair practice charge (T16-T17, T19-T21, T27).

ANALYSIS

Charging Party asserts in its closing argument that the City has consistently by-passed its obligation to negotiate terms and conditions of employment with AFSCME as majority representative and dealt directly with unit members over compensation tied to

promotion and/or additional duties. It contends that the City's agreement with the DCA for transitional aid does not relieve it of its obligations to negotiate exclusively with the majority representative (T32-T33).

The City counters that since under its agreement with DCA to receive transitional aid, the City is required to get approval for any outside-the-contract additional salary increases, its actions do not constitute direct dealing. Specifically, the City suggests that it never negotiated with individual employees. It merely went to the DCA to find out what salary increase would be approved and then informed the employee of the salary increase. This, the City argues, does not constitute negotiating with the employee.

Neither party cited case law in their closing statements.

N.J.S.A. 34:13A-5.3 provides, in pertinent part:

Representatives designated or selected by public employees for the purposes of collective negotiations by the majority of the employees in the unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the Commission as authorized by the Act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit.

Thus, the exclusive right to negotiate terms and conditions of employment for unit members is vested not in the individual employee or group of employees but in the majority

representative. The Commission refers to this as the exclusivity principal and has consistently held that it is the cornerstone of the Act which regulates the relationship between public employers and public employees. Lullo v. Internat'l Assn. of Fire Fighters, 55 N.J. 409, 426 (1970).

It follows that since the duty to negotiate in good faith runs between the majority representative and the employer, the employer violates 5.4a(5) if it negotiates directly with individual employees rather than with their majority representative over employment conditions and enters into agreements with them setting those conditions. Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005); Town of West New York, P.E.R.C. No. 99-110, 25 NJPER 332 (¶30143 1999). Our Supreme Court has recognized that compensation is a negotiable term and condition of employment. Woodstone-Pilesgrove Reg. Bd. of Ed. Ass'n, 88 N.J. 582 (1980).

In applying the law to the facts in the matter before me, AFSCME as the majority representative had the exclusive right to negotiate compensation such as salary increases tied to promotions and/or additional duties in all the instances supported by the stipulations in J-2 and the testimony of Local 3724 President Hughes. 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. The City had no unilateral right to set that term and condition of employment without doing so.

The City's argues, that because it had to get DCA approval for any salary increases above what the parties' negotiated in the collective agreement, it was relieved of its negotiations obligation under our Act. This argument is illogical. Only if its actions were preempted by statute or other regulation would the City's failure to negotiate be sanctioned. See generally, Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982) (in order to preempt, a statute must be express, specific and comprehensive). The City has presented no support for a preemption argument. In this instance, the DCA's pre-approval, if any, for a salary increase not covered by the parties' collective agreement is at most a condition precedent for receiving future aid not a release from the duty to negotiate presently.^{8/}

^{8/} This pre-condition is akin to the post-condition of ratification after the parties negotiate a successor agreement. Such pre- or post-approval requirements do not preempt the employer's duty to negotiate.

Indeed, the memorandum of understanding between the City and the State setting forth conditions for receiving transitional aid contemplates that the parties will negotiate compensation. It provides, under subheading "Individual and Collective Negotiations Agreements," at paragraph 4, the following:

The Municipality acknowledges that the State will not provide Transition Aid in cases where the Municipality allows or approves compensation increases that are not sustainable. **The municipality understands that if it approves any individual employment contract or any collective negotiation agreement that increases annual compensation for the employee or group of employees by more than 2% annually, on average during the term of the agreement, the Municipality may become ineligible for future aid.** [emphasis added]

This paragraph specifically provides that if the collectively negotiated compensation exceeds a certain average annual percentage, the City risks receiving future aid. Such a stricture does not allow the City to deal directly with employees to the exclusion of the majority representative.

For the foregoing reasons, I recommend that Respondent City of Paterson violated 5.4a(5) of the Act regarding the allegation of directly dealing with individual employees over compensation for promotion and/or for additional duties.

CONCLUSIONS OF LAW

Respondent City of Paterson violated 5.4a(1) of the Act by directly dealing with individual employees represented by AFSCME

concerning compensation tied to promotion and/or additional duties between 2014 and 2017 as set forth in J-2.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the City of Paterson cease and desist from:

1. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by directly dealing with individual employees represented by AFSCME concerning compensation tied to promotion and/or additional duties between 2014 and 2017 as set forth in J-2.

B. Take the following affirmative action:

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

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

/s/Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: April 19, 2018
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 April 30. 2018.



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 majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by directly dealing with individual employees represented by AFSCME concerning compensation tied to promotion and/or additional duties between 2014 and 2017 as set forth in J-2.

Docket No. CO-2017-104

City of Paterson
(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