

H.E. NO. 2014-1

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-2013-098

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 pay on-call pay to a sergeant for 2010 and 2011 pursuant to a grievance sustained 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 extra 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  
(Allison Brown-Jones, Assistant Corporation Counsel)

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

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

On October 15, 2012, 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 pay Sergeant Gasavage for on-call compensation earned in 2010 and 2011 pursuant to a grievance sustained 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 sustained grievance constitutes a violation of

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

On January 17, 2013, the Director of Unfair Practices issued a Complaint and assigned the matter to me for hearing. On February 8, 2013, the City filed an Answer to the Complaint, asserting that the grievance had no merit, namely that Sergeant Gasavage was not entitled to on-call pay as her assignment to the Outside Employment Unit did not fall within the units delineated for such pay under Article V of the collective negotiations agreement.

On May 13, 2013, the SOA filed a motion for summary judgment pursuant to N.J.A.C. 19:14-4.8. On July 3, 2013, the City filed a late response to the motion. It now argues in response to the motion for summary judgment, that its Police Director lacked apparent authority to settle the grievance.

On July 2, 2013, 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

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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."

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.

2. The City and SOA are parties' to a collective negotiations agreement 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. Article V, entitled "Hours of Work and Overtime", states in pertinent part at Section 14:

All compensatory time, including on-call time, accrued on or after a/1/2010 by

employees shall be used or paid within 24 months of accrual, paid at the current rate of pay at the time of payment.

5. On April 17, 2012, Police Director DeMaio authorized Sergeant Gasavage to receive on-call time for duties performed in the Outside Employment Unit for years 2010 and 2011. Subsequently, Director of the Office of Management and Budget Darlene Tate refused payment to Gasavage.

6. On September 11, 2012, SOA President Captain John Chrystal filed a grievance on Gasavage's behalf. Thereafter, on October 15, 2012, at Step 5 of the grievance procedure, Police Director DeMaio wrote:

I am in receipt of Superior Officers' Association Grievance 2012-22, regarding the denial of the City of Newark to pay Sergeant Catherine Gasavage her 2010 and 2011 on-call time.

I have reviewed the grievance and I find it is with merit. As per the S.O.A. [collective negotiations] agreement, Sergeant Gasavage is entitled to be paid for 208 hours of compensatory time, which I approved. Therefore, the grievance is sustained.

I am directing the Office of Management and Budget to pay Sergeant Gasavage her accrued 2010 compensatory time, immediately.

7. The City did not file for arbitration pursuant to Step 6 of the grievance procedure and refused to pay the monies owed pursuant to the grievance sustained by DeMaio. The SOA's unfair practice charge seeks an order requiring the City to pay Gasavage for her accrued compensatory time owed under the sustained

grievance. It also asks for a posting and a cease and desist order.

#### ANALYSIS

Summary judgment 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.

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 Gasavage seeking payment for on-call assignments in 2010 and 2011, and that Police Director DeMaio sustained the grievance, ordering the Office of Management and Budget to immediately pay the monies owed-208 hours of compensatory time. The City did not appeal the Director's decision by requesting binding arbitration as set out in its negotiated grievance procedure and has refused to pay pursuant to the Director's

determination. Under these circumstances, I find that no genuine issue of material fact requires a plenary hearing.

Rather the issue is whether the refusal of the City to abide by the Police Director's Step 5 grievance decision repudiates the parties' negotiated grievance procedure and, therefore, whether as a matter of law the City must pay Gasavage the monies owed to her for 2010 and 2011.

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 an 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 sustained the Gasavage grievance. Step 5 permits either party to appeal a determination it does not agree with to binding arbitration. The City neither implemented the Police Director's decision to sustain the grievance nor did it appeal that decision to arbitration.

The City concedes that the grievance was sustained but asserts that Police Director DeMaio did not have the apparent authority to settle the grievance.<sup>2/</sup> In support of its argument,

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<sup>2/</sup> The City argued at first in its Answer to the Complaint that the grievance was not meritorious. The SOA correctly countered that the merits of the Gasavage grievance are not at issue here. The Step 5 decision of the Police Director was determinative in that regard. I agree, but have not addressed this contention since the City's submission in  
(continued...)



the City produced two documents. The first is a memorandum dated November 14, 1997 from then Business Administrator Glenn Grant to former Police Director Joseph Santiago, former Fire Director Stanley Kossup and then 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.

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2/ (...continued)  
response to the SOA motion abandons that argument. Borough of Keansburg, P.E.R.C. No. 2004-29, 29 NJPER 506, 507 (¶160 2003) (contractual merits of grievance not relevant to issue of whether employer repudiated grievance procedure.)

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. Additionally, the grievance procedure protects the City's interest as expressed in the 1997 policy directive by permitting the City to appeal any determination it disagrees with to binding arbitration at Step 6. Here, the City did not appeal, but simply refused to pay Gasavage the 208 hours ordered by DeMaio in resolution of the SOA grievance.

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 DeMaoi's Step 5 determination, arguing that Police Director DeMaio had no authority to bind the City as to the Gasavage 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, the chief never suggested that he possessed such authority. This case is inapposite.

First, there is no question that, here, the parties reached agreement on a grievance procedure that designates the Police Director to resolve grievances at Step 5. Also, he 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. No. 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).

Based on the foregoing, the City's refusal to abide by the Police Director's grievance determination 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 5.4 a(1) and (5) of the Act when it refused to pay Sergeant Gasavage on-call pay for 2010 and 2011 (208 hours) pursuant to Grievance 2012-22 which was sustained 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 decision to sustain Grievance No. 2012-22 and pay Sergeant Gasavage on-call pay for 2010 and 2011 (208 hours of compensatory time).

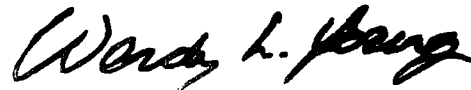
2.) Refusing to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its unit, particularly, by repudiating the grievance procedure when the City failed to implement the Police Director's decision to sustain Grievance No. 2012-22 and pay Sergeant Gasavage on-call pay for 2010 and 2011 (208 hours of compensatory time).

B. Take the following action:

1.) Pay Sergeant Gasavage on-call pay for 2010 and 2011 (208 hours of compensatory time) pursuant to Grievance 2012-22 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio with interest 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.



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Wendy L. Young  
Hearing Examiner

DATED: July 18, 2013  
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 July 29, 2013.



# 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 when the City failed to implement the Police Director's decision to sustain Grievance No. 2012-22 and pay Sergeant Gasavage on-call pay for 2010 and 2011 (208 hours of compensatory time).

**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 when the City failed to implement the Police Director's decision to sustain Grievance No. 2012-22 and pay Sergeant Gasavage on-call pay for 2010 and 2011 (208 hours of compensatory time).

**WE WILL** pay Sergeant Gasavage on-call pay for 2010 and 2011 (208 hours of compensatory time) pursuant to Grievance 2012-22 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio with interest pursuant to R. 4:42-11.

Docket No. CO-2013-098

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

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.

  
Wendy L. Young  
Hearing Examiner

DATED: July 18, 2013  
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 July 29, 2013.