

I.R. NO. 2016-1

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2015-291

NEWARK POLICE SUPERIOR  
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission designee denies an application for interim relief filed by the Newark Superior Officers Association in an unfair practice case. The charge alleges that the City of Newark violated the New Jersey Employer-Employee Relations Act when it unilaterally adopted a policy requiring that officers on military leave refund pay received from the armed forces, when combined with paid military leave received from the City, exceeded the compensation applicable to their positions with the City. The charge also alleges that the City repudiated settlements of grievances challenging the policy that were made by authorized representatives of the City.

The designee finds that the practice the SOA seeks to preserve or restore is preempted by a pre-existing state statute that bars officers on military leave from receiving compensation in excess of their civilian salaries. He thus concludes that the SOA seeks to preserve a practice that is not a mandatorily negotiable term and condition of employment.

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Appearances:

For the Respondent, Kenneth Calhoun, Assistant  
Corporation Counsel

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

INTERLOCUTORY DECISION

On June 23, 2015, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge alleging that the City of Newark (City) violated the New Jersey Employer-Employee Relations Act, specifically subsections N.J.S.A. 34:13A-5.4(a)(1), (3), (5), and (7)<sup>1/</sup> refusing to grant officers represented by the SOA a leave of absence with pay for the entire

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<sup>1/</sup> 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.; and (7) Violating any of the rules and regulations established by the commission."

duration of military leave. The SOA also alleges that the City repudiated Articles IV and XXVIII of the parties' collective negotiations agreement (CNA) by failing to honor a Step 5 grievance decision of its Police Director.

The charge was accompanied by an application for interim relief, together with a supporting brief, exhibits and the certification of the SOA president. The City has not filed a response to the interim relief application.

The SOA represents all superior officers in the ranks of sergeant, lieutenant, and captain. The City and SOA are parties to a CNA effective from January 1, 2009 through December 31, 2012. The parties are in negotiations for a successor agreement.

The SOA President certifies that, prior to February 10, 2014, it had been the practice that the City provided a paid leave of absence to all officers in the SOA unit on military leave for the duration of the leave.

On February 10, 2014, Acting Police Director/Chief of Police Sheila A. Coley issued Memorandum 2014-39 (SOA Exhibit B) entitled "Compensation While On Military Leave." It provides in pertinent part:

It is our pleasure to be a support employer as we continue to pay full salary and benefits for those personnel who are in the military. However, it has been brought to the City's attention that personnel that are on military leave are receiving full salary from the City of Newark and payments from the armed forces. This is in non-compliance with

the Department of Defense's standards. Therefore any personnel being compensated as such shall submit said payments from the armed forces to the department's Finance Section once payment is received. Failure to comply with this directive will result in disciplinary action.

On February 12, 2014, the SOA filed a grievance (#14-04) asserting that the memorandum was inconsistent with past practice and requesting that the policy change be rescinded. On February 13, the acting director/chief issued a directive temporarily suspending Memorandum 2014-39 "pending agreement settlement with the Superior Officers' Association under Grievance #2014-04."

According to the SOA President, there were no discussions about the issue nor has it been raised in negotiations.

After a new mayor took office in July, 2014, Coley was succeeded by a new police director, Eugene Venable. On September 1, 2014, Venable issued General Order No. 14-01.

Section I, "Purpose" reads:

The purpose of this procedure is to establish a standardized policy for reporting, recording and utilizing military leave in accordance with applicable laws.

Section II, "Policy" reads:

It is the policy of the Newark police department to grant military leave to personnel who are entitled to such a leave of absence. The Department will allow a leave of absence to non-qualifying orders without pay but without loss of time.

The Newark Police Department shall be guided by the New Jersey State Laws N.J.S.A. 38A:4-

4, N.J.S.A. 38:23-1, N.J.S.A. 38:23-3,  
N.J.S.A. 38:23C-20a, and City of Newark  
Executive Order #ML-01-0001.

The General Order also:

Lists Military Active Duty Categories;

Itemizes Non-Qualifying Orders;

Sets forth detailed eligibility criteria;

Details requirements for the submission of  
military orders and other record-keeping and  
administrative obligations.

Provides that all prior policies inconsistent  
with General Order No. 14-01 are rescinded  
and repealed.

On September 13, 2014, the SOA filed another grievance  
(2014-13) seeking rescision of General Order No. 14-01. On  
September 16, the Director issued a Memorandum rescinding General  
Order 14-01 and advising that "The Newark Police Department will  
continue to conform to past practice and custom which provides a  
leave of absence with pay to members on military leave."

However, on January 9, 2015, Mayor Ras Baraka, in response  
to the Department of Defense's ending of combat missions under  
"Operation Enduring Freedom" and "Operation Noble Eagle,"  
rescinded an executive order promulgated in 2001 (No. ML-01-001)  
which had provided City employees with a "24 month paid  
differential leave of absence when activated for military duty."

A memorandum (No. 15-103) issued March 12, 2015 by the  
police director advised Newark police that military leave would

be administered "in accordance with federal and state statutory parameters that govern paid military leave."

On June 23, 2015 the SOA filed its unfair practice charge and an application for interim relief. It asserts that (1) the City unilaterally changed mandatorily negotiable terms and conditions of employment during the course of collective negotiations and (2) repudiated the grievance procedure by failing to implement grievance settlement(s) reached by authorized representatives of the City. The undersigned was designated to rule on the SOA's application.

#### ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The SOA contends it is entitled to interim relief because the City has unilaterally changed terms and conditions of

employment during negotiations for a successor agreement. It argues that the City's actions taken after Acting Director Coley and Director Venable, respectively, agreed to settle Grievances Nos. 2014-04 and 2014-13 repudiated Article IV "Grievance Procedure and Arbitration" and violated Article XXVII "Maintenance of Standards."

For the following reasons I deny the SOA's application as I conclude that it has not established a substantial likelihood of success on the legal and factual merits of its claims. I find that the past practice of compensation for military leave that the SOA seeks to continue, is inconsistent with, and is thus preempted by, applicable state laws that existed prior to the most recent City-SOA CNA.

The genesis of this dispute was then-Director Coley's February 10, 2014 memorandum (No. 2014-39) which reads in pertinent part:

However, it has been brought to the City's attention that personnel that are on military leave are receiving full salary from the City of Newark and payments from the armed forces. This is in non-compliance with the Department of Defense's standards. Therefore any personnel being compensated as such shall submit said payments from the armed forces to the department's Finance Section once payment is received. Failure to comply with this directive will result in disciplinary action.

The SOA asserts that the rules governing military leave compensation described above change mandatorily negotiable terms and conditions of employment.

Compensation for officers on military leave is, in the abstract, mandatorily negotiable. See Freehold Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-26, 17 NJPER 427 (¶22206 1991).<sup>2/</sup> But, where a statute, expressly, specifically and comprehensively sets that term and condition of employment, a conflicting past practice or contract language is not enforceable. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982). That is the case here.

Paragraph 2 of Section II "Policy", of Director Venable's General Order 2014-1 cites several laws addressing military leave.

Among them, N.J.S.A. 38:23-3 is pertinent to the SOA's claim that a requirement to refund to the City any payments from the armed forces which would, in combination with an officer's military leave pay, compensate him/her in an amount exceeding normal civilian salary, changed mandatorily negotiable terms and conditions of employment.

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2/ Freehold was a scope of negotiations decision declining to restrain arbitration, thus giving an arbitrator jurisdiction over the merits of a dispute concerning the terms of a military leave. Here the SOA must show that the City's action violated its obligation to negotiate by changing a mandatorily negotiable term and condition of employment.



N.J.S.A. 38:23-3 "Compensation of public officers or employees while in military or naval service," reads:

Any officer, department, institution, committee, commission or other body of the state or any subdivision or municipality thereof, may pay in his or its discretion the whole or a part of the salaries or compensation of their employees or attaches during the time they are engaged in a branch of the military or naval service of the national government or of this state.

No greater portion of the salary or compensation of a commissioned officer as an employee of a department of the state or municipal government shall be paid to him under this section than will, when added to his salary as such commissioned officer, equal the amount paid to him by the state or municipal department before entering the military or naval service.

Construing the law, the Supreme Court in Lynch v. Edgewater, 8 N.J. 279, 287 (1951), held:

Prior to [the enactment of N.J.S.A. 38:23-1] there existed a statute (which is still in effect), L. 1918, c. 16, sec. 1, now R.S. 38:23-3, which granted discretionary authority to a municipality to pay in whole or in part the salaries or compensation of its employees "during the time they are engaged in a branch of the military or naval service of the national government or of this state" provided that no greater portion of the salary or compensation of a commissioned officer "shall be paid to him" under this section than will when added to his salary as such commissioned officer equal the amount paid to him by the municipality before he entered the military or naval service. It is readily to be seen that the 1918 statute applied to all types of military or naval service and provided only permissive payment of civilian compensation and limited reserve

commissioned officers to the receipt of such part of their civilian compensation as constituted the difference between their civilian pay (if greater than the military) and their military pay.

A comparison of the current language of N.J.S.A. 38:23-3 and the law as recited in the Supreme Court's 1951 decision in Lynch, shows that its text has remained unchanged. Any claim that an officer on military leave can receive both his/her full civilian salary and additional compensation from the armed forces is preempted by N.J.S.A. 38:23-3.<sup>3/</sup>

The conflict between the terms of the statute and the alleged past practice the SOA seeks to preserve and/or restore means that as a matter of law, the SOA is not substantially likely to prevail on its claim that the City unilaterally changed a mandatorily negotiable term and condition of employment. Thus compensation paid by the City and/or the armed forces to officers

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<sup>3/</sup> In addition, there is a pending bill before the Legislature, 2014 SB 1375, that would amend N.J.S.A. 38:23-3. The sponsor's statement acknowledges that, at present, the statute does not allow the compensation that the SOA seeks.

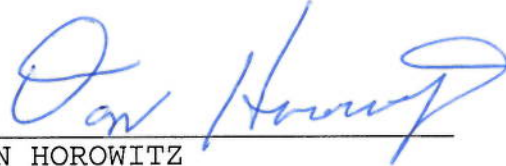
N.J.S.A.38:23-3 provides that a public employer may pay, at its discretion, the whole or a part of the salary of a public employee during the time the public employee is engaged in State or federal military service. However, the salary paid when added to the military salary cannot exceed the regular salary from the public employment paid before the military service. This bill removes this limitation.

on military leave cannot exceed the normal full salary of the employee.<sup>4/</sup>

Given that the subjects of the asserted grievance settlements are not mandatorily negotiable, I need not consider the interim relief application as it pertains to the City's alleged repudiation(s) of the grievance procedure.

ORDER

The application for interim relief is denied.



DON HOROWITZ  
Commission Designee

DATED: August 27, 2015

Trenton, New Jersey

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<sup>4/</sup> My decision is limited to the SOA's claim that the City is unilaterally changing mandatorily negotiable terms and conditions of employment by requiring that officers on military leave must refund any amounts received from the armed forces that, when added to military leave pay from the City, results in compensation higher than that applicable to their police positions.