

H.E. No. 2013-14

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-2012-148

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the City of Newark violated subsections 5.4a(1) and (5) of the Act when it refused to pay terminal leave to a grievant pursuant to a settlement agreement. The written settlement agreement was entered into by the City's Police Director who is its designated representative at step 5 of the parties' grievance procedure.

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 REPORT
AND RECOMMENDED DECISION

On November 23, 2011, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge with the Public Employment Relations Commission (Commission or PERC) against the City of Newark (City). The SOA alleges that the City violated sections 5.4a(1), (3), (5), (6) and (7)^{1/} of the New Jersey

^{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 by this act; (3) Discriminating against employees with regard to hire, tenure of employment or any term or condition of employment to encourage or discourage employees from the exercise of the rights guaranteed by this act; (5) Refusing to negotiate in good faith with a majority (continued...)"

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act) when the City failed or refused to implement a settlement agreement of SOA Grievance 11-02 executed by the SOA and City Police Director Samuel DeMaio. The City's conduct allegedly repudiates the parties' negotiated grievance procedure and unilaterally changes terms and conditions of employment.

On May 8, 2012, a Complaint and Notice of Hearing was issued on the alleged violations of sections 5.4a(1) and (5) of the Act; the remaining alleged violations did not meet the Commission's complaint issuance standard and were dismissed. On June 29, 2012, the City filed an Answer to the Complaint. It denies having violated the Act. It admits there was a settlement agreement signed by the Police Director resolving SOA Grievance 11-02, and its refusal to implement the settlement terms. It adds that the Business Administrator did not approve the agreement, and asserts that the Director's execution of the agreement violated a policy requiring that grievance settlements be approved by the Business Administrator.

1/ (...continued)
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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement, and (7) Violating any of the rules and regulations established by the commission."

On July 3, 2012, the SOA filed a Motion for Summary Judgment, a brief, exhibits A through H, and a request for a stay of the hearing. On July 12, 2012, the City filed a letter brief opposing the Motion, together with exhibit A.^{2/} On July 9, 2012, the Commission granted the SOA's request to stay the hearing, and on July 16, 2012, the Commission referred the Motion to me for a decision. N.J.A.C. 19:14-4.8. Additional Certifications by Captain John Chrystal and Assistant Corporation Counsel Alison Brown Jones were filed by August 3, 2012.

The standards for summary judgment are found at N.J.A.C. 19:14-4.8(e):

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.

Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995) also establishes the standard to be used in deciding whether a genuine issue of material fact precludes summary judgment. We must:

. . .consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving

^{2/} Charging Party's exhibits are referred to as CP-A through H; Respondent's exhibits are referred to as R-A. R-A consists of three pages referred to as R-A1, 2 and 3.

party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. [Id. at 540]

A motion for summary judgment should be granted cautiously and not used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (1981); Essex Cty. Ed. Serv Comm., PERC No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, PERC No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying on the pleadings, I make the following:

FINDINGS OF FACT

The majority of the facts are undisputed. In its brief, the City stated: "The City adopts and incorporates the statement of material facts as outlined in the SOA's Motion . . ." with the addition of two facts. Accordingly, facts 1 through 12 below are undisputed.

1. The SOA is an employee representative within the meaning of the Act and is the exclusive representative of all superior officers employed by the police department of the City in the positions of sergeant, lieutenant and captain. Currently, the negotiations unit is comprised of approximately 230 superior officers.

2. The City is a public employer within the meaning of the Act, and is subject to the Act.

3. The City and the SOA are parties to a collective negotiations agreement effective for the period January 1, 2009 through December 31, 2012 (CP-A).

4. Article IV of the parties' agreement contains the grievance and arbitration procedure. According to Step 5 of the procedure the Police Director is the last step (last City official) in the grievance procedure before the grievance can be moved to an outside, third party neutral for disposition.

The Business Administrator is not a part or step of the grievance procedure.

I add to this fact that if no settlement is reached, according to step 6, either party can request arbitration (CP-A, page 9).

5. Captain John J. Chrystal, III is the SOA's president. On January 13, 2011, Chrystal filed Grievance 11-02 on behalf of Sergeant Zaid Braswell with then-Director Garry F. McCarthy, regarding the City's alleged failure to pay accrued compensatory time at the time of Braswell's retirement, citing, among others, Article 15 "Accrued Compensatory Time" (CP-B). McCarthy left the Department to head another city's police department before resolving the grievance.

On June 3, 2011, Chrystal met with McCarthy's successor, Police Director Samuel DeMaio, who agreed to settle Grievance 11-02 with the SOA.

6. On Friday, June 3, 2011, Director DeMaio's assistant, Captain Kerry DosSantos, sent an email to David Gambert, Esq., Assistant Corporation Counsel for the City:

This email serves as confirmation that Police Director Samuel DeMaio has agreed to settle the grievance regarding Sergeant Zaid Braswell by awarding two years vacation time and whatever other time he is entitled to according to the SOA contract (CP-C).

7. On Wednesday, November 23, 2011, the SOA filed the unfair practice charge with PERC alleging the City had not complied with the settlement agreement.

Gambert subsequently left the City's employment and the Braswell grievance was reassigned to Brendan Egan, Esq., the City's Assistant Corporation Counsel, Labor Section Chief.

8. On Wednesday, November 23, 2011, Egan sent Chrystal an email, with a draft settlement agreement attached. Egan wrote:

Captain Chrystal, in follow up to your email of November 11, 2011, please see the attached PDF for the revised MOA [Memorandum of Agreement]. Kindly review and have the necessary executions made and returned to me.

Later the same day, Chrystal responded by email:

Paragraph one has to reflect the 2011 rate. Delete paragraphs 8 and 19. Paragraphs 9, 15 and insert a paragraph that all conditions agreed to only pertain to this instant matter and no other matters (CP-D). Also, please see paragraph 13 as it concerns your suggestion below. Thank you. (CP-D).^{3/}

3/ CP-D reveals there were emails exchanged over the provisions (continued...)

9. On Thursday, December 1, 2011, Chrystal reviewed the proposed agreement from Egan and printed it. The grievant and Chrystal were satisfied with the changes. Chrystal, Braswell, and DeMaio signed it (CP-E). They agreed the City would pay Sgt. Braswell 52 vacation days, 10 compensatory days and 53 days of service time calculated at the 2011 rate (CP-E).

Copies of the signed agreement were sent to the City's Corporation Counsel. The Director sent the agreement to the Office of Management and Budget for payment. As of this date, no payment has been made.

10. On Tuesday, May 8, 2012, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the alleged violations of section 5.4a(1) and (5) of the Act.

11. On Tuesday, June 12, 2012, Police Director DeMaio, sent a letter to Business Administrator Julian X. Neals regarding the "Failure to abide by the settlement agreement for Grievance 201[1]-02 Sgt. Zaid Braswell." DeMaio wrote:

I would like to bring to your attention the above unresolved matters that remain in the Office of Management and Budget pending approval. Both of these matters, which are grievances, had been mutually settled by the department member and the Corporation Counsel. Notwithstanding, there are memorand[a] of agreement that have already been signed.
(Exhibit CP-G)

3/ (...continued)
of the attached agreement between Chrystal and Egan dating back to November 11, 2011.

Corporation Counsel Anna Pereira and Chrystal were sent copies of the letter (CP-G).

12. On June 29, 2012, the City filed an Answer to the Complaint stating that the Director did not have approval from the Business Administrator to settle the Braswell grievance (CP-H).

To these facts, the City adds, in a certification by Assistant Corporate Counsel Alison Brown Jones:

13. For the last two years of his service to the City, Sgt. Braswell was working in the Department of Neighborhood Services (DNS) as the Manager, and he did not report the use of his vacation, compensatory or service time to the City.

14. The agreement was signed by Police Director DeMaio contrary to the City's policy that the approval of the Business Administrator was necessary to settle the grievance (R-A1 through 3).

I regard the phrase "contrary to the City's policy that the approval of the Business Administrator was necessary to settle the grievance" as a disputed assertion and part of the City's legal position in this matter.

In addition to the above facts, I add:

15. The parties' negotiated grievance procedure's stated purpose is:

. . .to secure, at the lowest possible level, an equitable solution to problems which may arise affecting the terms and conditions of the Agreement. The parties agree that this

procedure will be kept as informal as may be appropriate (CP-A, page 8).

16. Step 5 of the grievance procedure provides:

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. The aggrieved employee has a right to representation by an official of the Association in steps 1, 2, 3, 4 and 5 above. The parties may, by mutual agreement, waive the steps prior to step 4. If a grievance arises as a result of action taken by the Chief of Police, Police Director or a city official, the grievance shall be filed with the Chief of Police.

Step 6, "Arbitration" provides, in relevant 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 as hereinafter set forth.

17. R-A consists of three memos issued between 1997 and 2006 from various City officials to department directors. R-A1 dated, December 7, 2006, was addressed to "All department directors". It states, in relevant part,

Unless you have secured the express, written consent of the Business Administrator, please be advised that you (or your designee) are unauthorized to settle any grievance filed by a labor union.

R-A2, dated March 28, 2003, was addressed to Robert K. Rankin, Police Director and Edward Dunham, Fire Director. R-A2 states, in relevant part,

Please ensure that you and your supervisory staff remain mindful of the attached policy directive issued . . . November 14, 1997, which places a restriction on the settlement of grievances.

R-A3, dated November 14, 1997, was addressed to Joseph J. Santiago, Police Director, Stanley Kossup Fire Director and Thomas O'Reilly, Police Chief. It provides, 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 . . . without prior consultation with the Business Administrator.

ANALYSIS

Summary Judgment must be granted if the facts are undisputed and the movant is entitled to judgment as a matter of law; the motion must be denied if material factual disputes exist. Brill at 529; Judson v. People's Bank & Trust of Westfield, 17 N.J. 67, 74-75 (1954); N.J.A.C. 19:14-4.8(e).

Here, the material facts are undisputed and for the reasons below, I find that the SOA is entitled to a judgment in its favor as a matter of law.

The issue here is whether the City was warranted in refusing to implement a settlement executed by the police director, pursuant to step 5 of the negotiated grievance procedure

specifying the director as the management representative at that step. The City asserts that it refuses to implement the grievance settlement agreement because the Business Administrator did not approve it.

N.J.S.A. 34:13A-5.3 requires public employers to negotiate grievance procedures for disputes covered by the terms of the collective negotiations agreement.

N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with the majority representative or refuse to process the grievances presented by the majority representative. The Commission has previously held, in circumstances similar to these, that an employer's refusal to honor the binding decision of its grievance representative constitutes a refusal to negotiate in good faith, particularly, its unjustifiable refusal to abide by the grievance procedure it negotiated for the resolution of contractual disputes.

In 2007, in a case similar to this one, the Commission found that the City violated 5.4a(5) of the Act when it repudiated the Police Director's settlement of a grievance over vacation allotment. City of Newark, P.E.R.C. No. 2008-034, 33 NJPER 316 (¶120 2007). There, the City also argued that the Director did

not have legal authority to settle the grievance. However, the Commission did not accept that argument, finding:

In the labor relations context, an employer will be bound by its negotiated grievance procedure and the decisions of the agents it has authorized to represent it at each step.

The City cannot unilaterally rescind a grievance settlement reached by its Police Director under the negotiated grievance procedure. That rescission repudiates the grievance procedure and violates section 5.4a(5).

Id., 33 NJPER at 318.

In addition, here the City argues that Braswell misrepresented facts about his leave entitlements, and that the settlement agreement should be voided because of the misrepresentations, which led to mutual and/or unilateral mistake. The City cites commercial and insurance cases, but no relevant labor/employment cases to support these arguments. The issue of Braswell's leave is relevant to the merits of the grievance but has no bearing on the issue of the City's alleged repudiation of the grievance procedure.^{4/} In Bor. of Keansburg, P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003) (Keansburg), summary judgment was granted where the Borough refused to implement numerous grievance determinations of its designated agent. There, as here, the Borough argued that the grievance had

^{4/} In its certification the City does not allege that Braswell misrepresented his entitlement, only that Braswell had not reported leave time.

no merit. The Commission rejected the argument noting that contractual merits of a grievance are not relevant to whether an employer repudiated the grievance procedure.

The Commission found that the employer had flouted the negotiated procedure and could not rely on its internal policy limiting the authority of its designated representative's ability to decide or settle grievances. The principle applies here. The City's policy limiting its managers' authority to settle grievances does not allow the City to disregard the terms of the grievance procedure. In Passaic Cty. (Preakness Hospital), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1986) (Preakness Hospital), the Commission found that a public employer violated 5.4a(5) of the Act when it refused to implement an adverse decision at step 3 of the grievance procedure. The Commission concluded the hospital had refused to negotiate in good faith, finding that the union pursued the grievance procedure winning a favorable ruling and the hospital then failed to comply with that ruling. Preakness Hospital affirmed that grievance procedures negotiated for the resolution of contractual disputes must be honored, and that public employers are not authorized to consciously disregard such procedures.

Article IV, Steps 5 and 6, taken together, authorize the Director to decide or resolve grievances.^{5/} The Business Administrator is not mentioned at any step in the grievance procedure. None of the provisions in the grievance procedure limit the Director's authority to resolve grievances, nor do any require further or prior approval of settlements by the Business Administrator. Where there is no language to the contrary contained in the settlement agreement, the SOA is entitled to assume that settlements made by the designated City representatives at the various steps of the procedure are final. None of the competent evidence supports a finding that the SOA was made aware of any limits on the Director in resolving grievances. The City later decided that it would not implement the terms of the settlement, and it has not made the payments to Braswell. Here, as in Newark, Preakness Hospital and Keansburg, the employer disregarded the decision of its own agent who acted in accordance with the express authority of the collective agreement.

The City also argues that the Director did not have authority to resolve the grievance, citing his lack of apparent authority. I reject this argument. Article IV, step 5, by its terms, establishes the Director's authority. The SOA was

^{5/} Article IV step 6, the arbitration provision, provides that "if the grievance is not settled to the satisfaction of both parties, . . .".

entitled to rely on the specific terminology in the grievance procedure and, therefore, Director DeMaio's express authority to resolve the grievance. Here, between June and December 2011, proposals were exchanged between the parties leading to an agreement, signed by Braswell, the SOA and Director DeMaio (CP-E). The City now attempts to rely on its policy contained in R-A1 to A3 in order to nullify the agreement made by its representative authorized to settle grievances under the parties' contract. Under these circumstances the City's conduct is unjustified and amounts to bad faith.

CONCLUSIONS OF LAW

The City of Newark violated section 5.4a(1) and (5) of the Act when it refused to implement the memorandum of agreement signed by Police Director DeMaio, Grievant Sergeant Zaid Braswell and SOA President Captain John J. Chrystal III (Exhibit CP-E). Under section 5.4a(1) and (5), the City had a legal obligation to adhere to the provisions of the grievance procedure and implement the settlement negotiated by its designated agent. Its failure to do so violated 5.4a(1) and (5) of the Act. Accordingly, I grant the SOA's motion for summary judgment.

RECOMMENDED ORDER

1. The SOA's motion is granted.
2. The City of Newark is ordered to:
 - A. Cease and desist from:

1.) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed by this Act, particularly, by refusing to implement the terms of a Memorandum of Agreement resolving a grievance filed by the SOA, Grievance 11-02, that resolved a dispute filed under the grievance procedure of the collective negotiations agreement and was negotiated with and executed by the police director in accordance with step 5 of that procedure.

2.) Refusing to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its unit, particularly, by refusing to implement the terms of a Memorandum of Agreement resolving a grievance filed by the SOA, Grievance 11-02, that resolved a dispute filed under the grievance procedure of the collective negotiations agreement and was negotiated with and executed by the police director in accordance with step 5 of that procedure.

B. Take the following action:

1.) Immediately implement the terms of the Memorandum by paying Zaid Braswell 52 days of vacation, 10 days of compensatory time and 53 days of service time at the 2011 rate of pay, plus interest as provided by R.4:42-11(a).

2.) Post in all places where notices to employees are customarily placed, copies of the attached Notice marked as "Appendix A." Copies of such notices, 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 insure 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 Respondent has taken to comply with this Order.



Perry O. Lehrer
Hearing Examiner

Dated: January 29, 2013
Trenton, NJ

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 February 8, 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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this Act, particularly, by refusing to implement the terms of a Memorandum of Agreement resolving a grievance filed by the SOA, Grievance 11-02, that resolved a dispute filed under the grievance procedure of the collective negotiations agreement and was negotiated with and executed by the police director in accordance with step 5 of that procedure.

WE WILL NOT refuse to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its unit, particularly, by refusing to implement the terms of a Memorandum of Agreement resolving a grievance filed by the SOA, Grievance 11-02, that resolved a dispute filed under the grievance procedure of the collective negotiations agreement and was negotiated with and executed by the police director in accordance with step 5 of that procedure.

WE WILL immediately implement the terms of the Memorandum by paying Zaid Braswell 52 days of vacation, 10 days of compensatory time and 53 days of service time at the 2011 rate of pay, plus interest as provided by R.4:42-11(a).

Docket No. CO-2012-148

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