

P.E.R.C. NO. 2008-34

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-2007-070  
CO-2007-071  
CO-2007-105

NEWARK POLICE SUPERIOR  
OFFICERS' ASSOCIATION

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the Newark Police Superior Officers' Association's motion for summary judgment on an unfair practice charge it filed against the City of Newark. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act when it repudiated an agreement resolving a vacation grievance. The Commission denies the City's cross-motion on this unfair practice charge. The Commission holds that the City cannot unilaterally rescind a grievance settlement reached by its police director under the negotiated grievance procedure. Such rescission repudiates the grievance procedure and violates section 5.4a(5) of the Act. The Commission denies cross-motions for summary judgment on two unfair practice charges filed by the SOA alleging that the City repudiated side agreements reached concerning the terms and conditions of employment of a new scuba and helicopter squad. The Commission finds that neither party has presented evidence of their negotiations history as it relates to side agreements and other settlements and that a more complete record is required.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys (Stefani C. Schwartz, of counsel and on the brief; Joshua I. Savitz, on the brief)

For the Charging Party, Markowitz & Richman, attorneys (Stephen C. Richman and Matthew D. Areman, of counsel and on the brief)

DECISION

This case comes to us by way of cross-motions for summary judgment. The Newark Police Superior Officers' Association ("SOA") filed unfair practice charges against the City of Newark alleging that the City reneged on side agreements detailing the terms and conditions of employment for the police scuba and helicopter units. Those charges require a more complete record detailing the authority of the Police Director to enter into side agreements, so we deny the cross-motions. We treat differently a third charge filed by the SOA alleging that the City refused to

recognize a grievance settlement regarding vacation time for superior officers. The authority of the City's grievance representative to resolve grievances is settled. Accordingly, we grant the SOA's motion on this charge and deny the City's cross-motion.

The scuba (CO-2007-70) and helicopter (CO-2007-71) charges were filed on August 31, 2006. They allege that the City violated N.J.S.A. 34:13A-1 et seq., specifically 5.4a(5) and (7). The vacation charge (CO-2007-105) was filed on October 5 and alleges that the City violated 5.4a(1), (5) and (7)<sup>1/</sup>.

On June 25, 2007, the Director of Unfair Practices consolidated the three charges and issued a Complaint and Notice of Hearing.<sup>2/</sup> The City filed an Answer asserting that all decisions were made appropriately and not in violation of the Act.

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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."

<sup>2/</sup> The Director of Unfair Practices refused to issue a Complaint on the 5.4a(7) charges because no Commission rules or regulations were alleged to have been violated.

On August 17, 2006, the SOA filed its motion for summary judgment with exhibits and the certifications of former Police Director Anthony F. Ambrose III, retired Deputy Chief John F. Huegel, Sergeant and former Councilman Hector Corchado, and Councilman Luis A. Quintana. The SOA asserts that the undisputed facts establish that the City violated the Act when it repudiated the scuba, helicopter and vacation agreements reached by the SOA with the Police Director and the Chief of Police.

On September 29, 2006, the City filed a cross-motion for summary judgment with exhibits and certification of counsel. It asserts that the Police Director did not have the legal authority to negotiate the scuba, helicopter and vacation agreements and that only the Mayor and Council may enter into contracts pursuant to the Mayor-Council form of government under the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 to 210, and the City's Code.<sup>3/</sup>

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co.

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<sup>3/</sup> The City also argues that if we do not dismiss the charges, we should defer them to arbitration. Deferral is not appropriate here as the SOA is alleging a repudiation of the City's negotiated obligations and the City is denying that it entered into any binding agreement at all on these subjects. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

Vacation Grievance

\_\_\_\_\_We begin with the vacation grievance settlement agreement. The following facts are derived from the certifications and exhibits filed in support of the cross-motions. The SOA is the recognized majority representative for approximately 254 superior officers employed by the City in the ranks of sergeant, lieutenant and captain. Article XI of the parties' agreement (Vacations) provides, in part:

\_\_\_\_\_Section 1.

Each employee shall be entitled to annual vacation leave with pay as follows:

Sergeant	26 working days
Lieutenant	27 working days
Captain	28 working days

\* \* \*

Section 5.

Effective January 15, 2000, a service based vacation leave schedule (same as FOP, meaning the officer shall retain the same vacation that he/she had as a police officer upon promotion) shall be implemented except that no police officer promoted into the bargaining unit will receive less days than he/she is earning as a police officer at time of promotion. Effective January 15, 2000, existing Sergeants upon promotion to Lieutenant for the duration of this agreement only will max out at 27 days. Effective January 15, 2000, existing lieutenants upon promotion to Captain will remain at 27 days.

Article IV (Grievance Procedure and Arbitration), Section 3, Step 5 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.

On January 31, 2006, the Police Director issued Director's Memorandum 06-96, titled "Vacation Schedules for Supervisors." This memorandum was not signed by the Mayor or Business Administrator or approved by the Council. It set forth the Article XI, Section 5 contract language and the vacation schedule in the FOP contract. The FOP contract referenced in Section 5 grants vacation leave of between 18 and 26 days depending on years of service.

On February 3, 2006, the SOA filed a grievance with the Director alleging that his memorandum contradicted the parties' collective negotiations agreement and past practice. The Director certifies that he was the police department head and in that capacity had the authority to settle grievances and unfair practices. He further certifies that he has settled hundreds of grievances, many of which had a significant financial impact.

After a canceled February 27 meeting, the SOA met with the Director to discuss the vacation grievance on June 9. A settlement was reached providing that Article XI, Section 5 is ambiguous regarding "relying on another bargaining unit's agreement" and that the parties agree to "interpret" the Article to provide sergeants with 26 vacation days, lieutenants with 27 vacation days and captains with 28 vacation days as set forth in Section 1.

On June 29, 2006, the Director issued a memorandum rescinding his January 31 memorandum in accordance with the settlement. On the same date, the Director issued a memorandum incorporating the agreement to settle the vacation grievance. The memoranda were neither signed by the Mayor and Business Administrator nor approved by the City Council. On July 1, 2006, a new mayor took office. On July 27, the new acting Police Chief advised the SOA that the vacation agreement was not enforceable and suggested the parties meet. The unfair practice charge ensued.

N.J.S.A. 34:13A-5.3 requires public employers to negotiate grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions. Such grievance procedures must be used

for any dispute covered by the terms of the collective negotiations agreement. Ibid.

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 a majority representative or to refuse to process grievances presented by the majority representative. An employer's refusal to honor the binding decision of its grievance representatives may constitute a refusal to negotiate in good faith, and, in particular, an unjustifiable refusal to honor the grievance procedures it negotiated for the resolution of contractual disputes. Borough of Keansburg, P.E.R.C. 2004-29, 29 NJPER 506 (¶160 2003); Passaic Cty. (Preakness Hosp.), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985). This principle applies here.

The vacation grievance challenged the Director's memorandum setting forth the Article XI, Section 5, contract language and the terms of the FOP agreement. The grievance asserted that Article XI, Section 1 had been followed, even after 2000, and provided sergeants with 26 vacation days without the limitations of Section 5. Step 5 of the parties' grievance procedure specifically authorizes the Director to decide grievances and is the last step before binding arbitration. The City argues that the vacation grievance settlement is void because the Director lacked the legal authority to change terms and conditions of employment set forth in the contract. We are not persuaded by



this argument. 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. This grievance settlement interprets what the City and SOA agree is ambiguous contract language and does not alter the terms and conditions of the collective negotiations agreement. 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). The SOA's summary judgment motion is therefore granted on the vacation grievance settlement unfair practice charge. The City's cross-motion is denied.

#### Scuba and Helicopter Side Agreements

We now review the scuba and helicopter side agreements. On December 29, 2005, the City and SOA entered into a Memorandum of Agreement ("MOA") setting the terms and conditions of a successor collective negotiations agreement effective January 1, 2005 through December 31, 2008. The MOA stated that the parties agreed to negotiate terms and conditions of employment prior to the implementation of a helicopter and/or scuba squad.

On January 26, 2006, the Police Director issued General Order 06-02. It prescribed the duties and responsibilities of members assigned to the scuba team. The SOA demanded to

negotiate the terms and conditions for the new unit and the Director agreed. On June 9, the Director and the Police Chief signed two side agreements with the SOA, one for the helicopter unit and one for the scuba unit. On June 29, the Director issued a memorandum incorporating the side agreements.

On July 27, 2006, the new acting Chief advised the SOA that the helicopter and scuba agreements were not enforceable and suggested the parties meet. The unfair practice charges ensued.

On the current record, we deny the motions concerning the scuba and helicopter side agreements. In Borough of Palmyra, P.E.R.C. No. 2008-5, 33 NJPER 207 (¶75 2007), recon. granted P.E.R.C. 2008-16, 33 NJPER 232 (¶89 2007), we dismissed an unfair practice charge after considering the parties' past negotiations history in concluding that the Council had to ratify the successor contract. Here, the City asserts that the Police Director did not have authority to bind it in the negotiation of the helicopter and scuba unit side agreements. The SOA disputes this assertion. Neither party has presented evidence of their negotiations history as it relates to side agreements and other settlements. To analyze this case in accordance with Palmyra, we require a more complete record.<sup>4/</sup>

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<sup>4/</sup> The City filed a motion to sever the vacation charge from the helicopter and scuba charges. Our decision on the vacation settlement effectively moots the motion.

ORDER

The motion and cross-motion for summary judgment on Docket Nos. CO-2007-070 and CO-2007-071 are denied.

The City's cross-motion for summary judgment on Docket No. CO-2007-105 is denied.

The SOA's motion for summary judgment on Docket No. CO-2007-105 is granted. 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 to them by the Act, particularly by repudiating the grievance procedure it negotiated with the SOA when it refused to implement a grievance settlement at Step 5 regarding vacation for superior officers.

2. Refusing to negotiate in good faith with the SOA concerning terms and conditions of employment, particularly by repudiating the grievance procedure it negotiated with the SOA when it refused to implement a grievance settlement at Step 5 regarding vacation for superior officers.

B. Take this action:

1. Implement the vacation grievance settlement agreement.

2. 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. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Watkins voted in favor of this decision on the vacation grievance issue. None opposed.

Chairman Henderson, Commissioners Branigan, Fuller and Watkins voted in favor of this decision on the scuba/helicopter issue. Commissioner Buchanan voted against this portion of the decision.

ISSUED: December 20, 2007

Trenton, New Jersey

**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 we negotiated with the Newark Police Superior Officers' Association when we refused to implement a grievance settlement at Step 5 regarding vacation for superior officers.

WE WILL cease and desist from refusing to negotiate in good faith with the SOA concerning terms and conditions of employment, particularly by repudiating the grievance procedure we negotiated with the SOA when we refused to implement a grievance settlement at Step 5 regarding vacation for superior officers.

WE WILL implement the vacation grievance settlement agreement.

CO-2007-070  
CO-2007-071  
CO-2007-105

\_\_\_\_\_  
Docket No.

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372