

P.E.R.C. NO. 2018-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2015-123

NEWARK DEPUTY CHIEFS ASSOCIATION,
FRATERNAL ORDER OF POLICE/
NJ LABOR COUNCIL,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's report and recommended decision granting the Association's motion for summary judgment and denying the City's cross-motion. The Association's charge alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(3), (5) and (7), when it repudiated the parties' negotiated grievance procedure by refusing to abide by the police director's decision to sustain a grievance. The Commission holds that the City's refusal to abide by the police director's decision constitutes a refusal to negotiate in good faith in violation of subsection 5.4a(5) of the Act.

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, Carmagnola & Ritardi, LLC,
attorneys (Domenick Carmagnola, of counsel)
For the Charging Party, Markowitz & Richman, attorneys
(Matthew D. Areman, of counsel)

DECISION

This case comes to us by way of the City of Newark's (City) exceptions to a Hearing Examiner's decision on a motion and cross-motion for summary judgment. H.E. No. 2018-3, 44 NJPER 136 (¶39 2017). On November 26, 2014, the Newark Deputy Chiefs Association, Fraternal Order of Police/NJ Labor Council (Association) filed an unfair practice charge against the City. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a (3), (5), and (7)^{1/} when it

^{1/} These sections prohibit public employers, their representatives and agents from: (3) Discriminating (continued...)

repudiated the negotiated grievance procedure by refusing to abide by the police director's decision to sustain a grievance.

On April 19, 2016, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the N.J.S.A. 34:13A-5.4a(5) allegation only. The alleged violations of N.J.S.A. 34:13A-5.4a(3) and (7) were dismissed as not meeting the Commission's complaint issuance standards. Wendy Young was assigned as the Hearing Examiner. On May 9, the City submitted its previously filed position statement as its Answer pursuant to N.J.A.C. 19:14-3.1, denying each allegation in the Complaint and raising various defenses.

On July 19, 2017, the FOP filed a motion for summary judgment and on August 1 the City filed a response and cross-motion for summary judgment. On August 28, the motion and cross-motion were referred to the Hearing Examiner. N.J.A.C. 19:14-4.8(a).

We adopt and incorporate the Hearing Examiner's findings of facts, which are recited below. (H.E. at 4-9).

1/ (...continued)
in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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. . . . (7) violating any of the rules and regulations established by the commission.

FINDINGS OF FACT

1. The Association is affiliated with the FOP. The Association is the certified exclusive representative of all deputy chiefs employed by the City. Sean Lavin has been employed by the FOP since 2014 and provides labor representation services to the Association.

2. The City and the Association are parties to a collective negotiations agreement (Agreement) effective from January 1, 2009 through December 31, 2012. The parties are currently in negotiations for a successor agreement.

3. Article III of the parties' Agreement, entitled "Grievance Procedure and Arbitration," contains six sections entitled, respectively, (1) purpose, (2) definition, (3) procedure, (4) City grievances, (5) general provisions, and (6) disciplinary grievance. Section 2 defines a grievance as "any difference or dispute arising over application or interpretation of the terms and conditions of this Agreement and may be raised by an individual, the Association on behalf of the individual or group of all individuals, or the City."

Section 3 of Article III sets out a four-step grievance procedure ending in binding arbitration. Step 1 allows for an aggrieved employee to institute a grievance within ten days of the occurrence after which the aggrieved employee and the police director will try to resolve the matter informally. At Step 2,

if no settlement is reached at Step 1, within ten calendar days after Step 1, the grievance shall be reduced to writing and submitted to the police director. Next, at Step 3, if no acceptable agreement is reached within five calendar days after Step 2, the matter shall be submitted to the police director who shall have ten calendar days to submit his/her decision.

The grievance procedure allows for the parties by mutual agreement to waive steps prior to Step 3. Finally, at Step 4, within two weeks of the transmittal of the police director's written answer, "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." The arbitrator's decision is final and binding on the parties.

Finally, Section 4 of the grievance procedure permits the City to file a grievance with the Association and sets out permissible time frames. If the parties cannot reach a settlement, either party may file for binding arbitration.

4. At some point prior to September 2014, Deputy Chief Domingos Saldida was notified by the City that as the result of a reorganization in the police department he was to be demoted to the rank of captain on November 1, 2014. Saldida needed an additional four months of service time with the City beyond

November in order to meet the twenty-five year requirement to obtain health benefits in retirement.

5. On September 14, 2014, Police Director Venable wrote to Assistant Business Administrator Michael Greene as follows:

Deputy Chief Domingos Saldida is requesting to retire full service as of November 1, 2014. In 1990, he resigned from the Newark Police Department, causing a break in service. Ultimately, he returned to full duty as a Newark Police Officer four months later. He currently has approximately 280 days of accumulated time, which encompasses Compensatory, Holiday and Vacation time.

I am asking that the Finance Section of the Newark Police Department be permitted to deduct the time needed in an effort to allow Deputy Chief Saldida to effectively retire November 1, 2014. In 2013, retired Newark Police Lieutenant Carlos Figueroa was afforded a similar opportunity which allowed him to retire with full medical benefits, upon conferring with Personnel Director Kecia Daniels. While I do understand that this is not the normal practice, this will ultimately be a cost savings measure for the City.

6. On October 29, 2014, Association President Keith Rubel filed a grievance with Police Director Venable entitled "Failure to Allow Use of Compensatory Time for City Credit Towards Retiree Medical Benefits". The grievance was filed on behalf of Deputy Chief Domingos Saldida.

The grievance stated in pertinent part as follows:

In order for Deputy Chief Saldida to retire, in lieu of being demoted, November 1st, 2014 with 25 years of service with the City of

Newark, he requested that the Personnel Director allow him to use four months of Compensatory [sic] time to make up for a four (4) month break he had with the City of Newark in 1990.

I have just been informed that the Personnel Director will not allow Deputy Chief Saldida to use his compensatory time for a four (4) month break in employment that he had with the City in 1990. However, he does have 25 years in the Police and Firemen's Retirement System (PFRS). Deputy Chief Saldida has sufficient time in his compensatory time to make this time up.

This has been done in the past with Lieutenant Carlos Figueroa, when he retired from the City and had to make up a break in service. This is a similar, if not identical situation that Deputy Chief Saldida is facing.

In the grievance, Rubel requests a meeting with Venable to discuss the matter, cites the articles of the Agreement which he believed were being violated and requested as a remedy that Venable sustain the grievance and advise the Personnel Director to allow Saldida to use his accrued compensatory time towards his four-month break in service "as has been done in the past."

7. On November 10, 2014, Police Director Venable responded to the Association's grievance filed by Rubel. He wrote:

I have reviewed your grievance regarding the failure of the City to allow Deputy Chief Domingos Saldida to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits. This would allow Deputy Chief Saldida to retire with 25 years of service with the City as a Deputy Chief, in lieu of being demoted to Captain.

Although this is not the normal practice, I find merit in this grievance as this unique set of circumstances would also be a cost savings measure for the City, as the time would be deducted from his compensatory account in lieu of being paid in a lump sum.

Therefore, I will ask that Michael Greene, the Assistant Business Administrator, conduct a favorable review of this matter. [exhibit C, Lavin certification; exhibit 4, Carmagnola certification]

The City acknowledges that the November 10, 2014 Venable response sustained “. . . Deputy Chief Saldida’s grievance, allowing him to use four months of his accrued compensatory time for credit towards the City’s retiree health care and medical benefits.”

8. The City has failed or refused to abide by the November 10, 2014 decision of Police Director Venable. As a result, Saldida was unable to retire as a Deputy Chief and was demoted to the rank of Captain just before his retirement. Saldida lost value in his accrued time which was paid out at a Captain’s rate rather than a Deputy Chief’s, lost retirement credentials having retired as a Captain and, as a result, suffered losses to his pension benefits.

HEARING EXAMINER’S DECISION AND EXCEPTIONS

On September 21, 2017, the Hearing Examiner issued her decision, finding that the City violated N.J.S.A. 34:13A-5.4a(5) when it refused to implement Police Director Venable’s decision sustaining the Association’s grievance. The Police Director granted the Association’s request for Saldida request to use four

months of his accrued compensatory time for credits towards medical benefits to allow Saldida to retire with 25 years of service with the City as Deputy Chief, instead of being demoted to Captain. The Hearing Examiner ordered, inter alia, that the City implement the Police Director Venable's decision and make Saldida whole for any losses he sustained as a result of its actions.

On October 10, 2017, the City filed "exceptions" to the Hearing Examiner's decision, consisting of a one and one-half page letter stating, in pertinent part, as follows:

The City takes exception to the Hearing Examiner's decision in its entirety and to each of the findings therein adverse to the City for the reasons previously set forth in the City's Brief in Opposition to the Newark Deputy Chiefs Assn., A/W FOP New Jersey Labor Council's Motion for Summary Judgment and in Support of the City of Newark's Cross-Motion for Summary Judgment. . . .

For purposes of illustration, the City takes exception to Hearing Examiner, Wendy Young's, findings that PERC has jurisdiction over this matter, that the procedural time requirements of the Collective Negotiations Agreement (CNA) relating to the grievance procedure were waived, that Police Director Venable had the authority to alter the terms of the CNA and act outside the scope of his employment, and that the City violated N.J.S.A. 34:13A-5.4a(5).

The Association responds that the City has failed to comply with the procedural requirements for filing exceptions.

ANALYSIS

N.J.A.C. 19:14-7.3(b) sets out the following requirements for filing exceptions to a Hearing Examiner's decision:

Each exception shall specify each question of procedure, fact, law, or policy to which exception is taken; identify that part of the report and recommended decision to which objection is made; designate by precise page citation the portions of the record relied on; state the grounds for the exception; and include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with these requirements may be disregarded. If a transcript of the proceedings is ordered for the purposes of filing exceptions to a recommended decision, the ordering party shall have the reporter service file a copy of the transcript with the Commission for inclusion in the record.

The City's October 10, 2017 submission very loosely complies with the requirements established in N.J.A.C. 19:14-7.3(b) for filing exceptions. The City's submission fails to directly and specifically respond to the legal conclusions and case law cited in the Hearing Examiner's decision. Nonetheless, we will respond to the issues the City raises in its submission.

We will first respond to the City's arguments that PERC does not have jurisdiction over this matter, and that the Hearing Examiner erroneously found that it violated N.J.S.A. 34:13A-5.4a(5). The Public Employment Relations Commission (PERC) has exclusive jurisdiction over unfair practice charges. N.J.S.A.

34:13A-5.4c. While unfair practice litigation is prohibited over mere breach of contract claims, a claim that an employer has repudiated an established term and condition of employment may be litigated in an unfair practice proceeding as a refusal to negotiate in good faith with a majority representative, violating N.J.S.A. 34:13A-5.4a(5). Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). An employer's refusal to honor a negotiated grievance procedure has been found to constitute a refusal to negotiate in good faith. Preakness Hospital, P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 198); Keansburg Boro., P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003). PERC has unfair practice jurisdiction over the Association's claim that the City repudiated the negotiated grievance procedure. There is no dispute that the City refused to honor the decision of Police Director Venable, and therefore the Hearing Examiner correctly found that the City violated N.J.S.A. 34:13A-5.4a(5).

Next, the City argues that the Hearing Examiner erroneously concluded that the time requirements of the grievance procedure were waived. The Hearing Examiner found the City's argument that the facts were in dispute as to whether the grievance procedure's time requirements were adhered to was without merit because the Agreement allows the parties by mutual agreement to waive steps 1 and 2, and Police Director Venable's response to the union's

grievance at Step 3 acted as a waiver of any procedural time requirements attached to the prior steps. We agree. The parties availed themselves of the option under the Agreement to mutually agree to waive steps 1 and 2 of the grievance procedure. The Association indicated its agreement to waive steps 1 and 2 by filing its formal grievance with Police Director Venable, requesting that he sustain the grievance and to have a meeting with him. The City indicated its agreement with waiving steps 1 and 2 by responding to the substantive merits of the grievance without raising any objections as to its timeliness.

The City's final argument is that the Police Director did not have the authority to alter the terms of the Agreement outside the scope of his employment. The Hearing Examiner found that if the City disagreed with Police Director Venable's decision, it could have filed for binding arbitration as permitted by step 4 of the grievance procedure. We agree. A challenge as to whether Police Director Venable's decision was correct does not provide justification for the City to refuse to implement his decision. The correct approach for the City to appeal the merits of his decision would be through binding arbitration. Ultimately, the crux of this case is that the Police Director issued a determination sustaining a grievance and the City refused to comply with it, resulting in a violation of N.J.S.A. 34:13A-5.4a(5).

The decision of the Hearing Examiner is adopted, granting the Association's motion for summary judgment and denying the City's cross-motion for summary judgment.

ORDER

The City is ordered to:

A. Cease and desist from:

1. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, particularly, by repudiating the parties' grievance procedure when the City failed to implement Police Director Eugene Venable's November 10, 2014 decision sustaining the Association's grievance regarding Deputy Chief Saldida's request to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits in order to allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

B. Take the following action:

1. Implement Police Director Venable's November 10, 2014 decision sustaining the Association's grievance and permit Deputy Chief Saldida to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits and thereby allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

2. Make Saldida whole for any losses sustained as a result of the City's refusal to implement Police Director Venable's November 10, 2014 decision sustaining the Saldida grievance, including but not limited to, reimbursing Saldida for any related economic losses he incurred as a result of having to retire in the rank of captain in lieu of deputy chief.

3. 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,

4. 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.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Bonanni recused himself. Commissioner Eskilson was not present.

ISSUED: April 26, 2018

Trenton, New Jersey



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 Association concerning terms and conditions of employment of employees in its unit, particularly, by repudiating the parties' grievance procedure when the City failed to implement Police Director Eugene Venable's November 10, 2014 decision sustaining the Association's grievance regarding Deputy Chief Saldida's request to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits in order to allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

WE WILL implement Police Director Venable's November 10, 2014 decision sustaining the Association's grievance and permit Deputy Chief Saldida to use four (4) months of his accrued compensatory time for credit towards the City of Newark's retiree health care and medical benefits and thereby allow him to retire with 25 years of service with the City as a deputy chief in lieu of being demoted to captain.

WE WILL make Saldida whole for any losses sustained as a result of the City's refusal to implement Police Director Venable's November 10, 2014 decision sustaining the Saldida grievance, including but not limited to, reimbursing Saldida for any related economic losses he incurred as a result of having to retire in the rank of captain in lieu of deputy chief.

Docket No. CO-2015-123

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