P.E.R.C. NO. 2018-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HACKENSACK,

Respondent,

-and- Docket No. CO-2017-106

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds, based upon stipulated facts in lieu of a hearing pursuant to N.J.A.C. 19:14-6.7, that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4a(5), by unilaterally implementing salary increases for unit members in order to settle pending litigation without negotiating with the UPSEU.

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, Wiss & Bouregy, P.C. (Raymond R. Wiss, of counsel; Thomas K. Bouregy, Jr., and Timothy J. Wiss, on the brief)

For the Charging Party, Rothman Rocco LaRuffa, LLP (Eric J. LaRuffa, of counsel)

DECISION

On November 14, 2016, the United Public Service Employees Union (UPSEU) filed an unfair practice charge against the City of Hackensack (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 5.4a(1) and (5),[1/] when it unilaterally implemented pay increases for seven unit members.

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. . . ."

On August 8, 2017, the Acting Director of Unfair Practices issued a Complaint on the charge. On August 21, the City filed an Answer denying the allegation that it violated subsections 5.4a(1) and (5) of the Act. The Answer stated that the City's implementation of pay increases for seven unit members was the result of a settlement between the City and those unit members in a federal lawsuit.

The parties agreed to stipulate the facts, waive a Hearing Examiner's Report and Recommended Decision, and have the Commission issue a decision based on the stipulated facts and the parties' legal arguments. N.J.A.C. 19:14-6.7.[2/] On February 16, 2018, the parties filed a joint stipulation of facts along with seven joint exhibits. On March 20, each party filed a brief.

FACTS

Based upon the parties' stipulations and exhibits, the record is comprised of these facts:

- The City is a public employer within the meaning of the New Jersey Employer-Employee Relations Act (Act).

2/ The parties were advised that the facts as stipulated constitute the complete record to be submitted to the Commission. The UPSEU was placed on notice that to the extent that the stipulated facts are insufficient to sustain its burden of proof by a preponderance of the evidence, the Complaint may be dismissed by the Commission. Similarly, the City was advised that it too must rely upon the sufficiency of the stipulated record to sustain any affirmative defenses it has asserted.

- UPSEU is a public employee representative under the Act and is the certified majority representative of a negotiations unit consisting of all of the City's employees identified in the December 12, 1997 Certification of Representative, Docket No. RO-98-36, with the exception of temporary and seasonal employees.

- The City and UPSEU are parties to a collective negotiations agreement (CNA) effective January 1, 2014 through December 31, 2017.

- Article 3.5 of the CNA sets forth the City's non-grievable right to award performance-based merit pay increases to employees.

- On or about April of 2015, some unit members approached UPSEU Labor Relations Representative Marck McCart (McCart) indicating their desire to receive merit pay increases and promotions from the City. They complained to McCart that another unit member assigned to the Municipal Court, Maria Helena Battaglia (Battaglia), was promoted by the City on or about August 21, 2013 from the position of Clerk 2 to Deputy Court Administrator with a salary increase of about $10,000 per year. The unit members alleged that although Battaglia had been employed in the Municipal Court for approximately 25 years, the only reason she was promoted over other unit members was because she was the wife of a City councilman.

- McCart advised the complaining unit members that they should apply for merit pay increases per Article 3.5 of the CNA.

- Some of the complaining unit members applied to the City for merit pay increases but never received any responses from the City or any merit pay increases.

- In August 2013, Battaglia was removed from the Deputy Court Administrator position when it was discovered that the position had not been properly posted and she had not been properly interviewed.

- Despite being removed from the Deputy Court Administrator position, Battaglia retained her approximately $10,000 salary increase.

- On or about July 7, 2015, seven unit members employed in Clerk positions with the Municipal Court commenced a lawsuit against the City in the Superior Court of New Jersey, Law Division, Bergen County, alleging political discrimination in violation of 42 U.S.C. § 1983 by rewarding the political activities of the Battaglia family when it promoted Battaglia and not the similarly situated public employees who were not involved in political activity.

- The City removed the lawsuit to federal court (U.S. District Court of New Jersey, docket Civ. No.: 15-cv-6030 (KM)).

- On September 19, 2016, U.S. District Court Judge Kevin McNulty signed an Order indicating that he had been advised that the matter had been settled and ordering that it be dismissed with prejudice.

- By "Interoffice Communication" of September 20, 2016, then-City Manager David R. Troast confirmed that the lawsuit was settled and the City was authorized to increase the salaries of the unit members who were plaintiffs in the lawsuit by 5% (with the exception of Mary Kurzum, Deputy Court Administrator, who would only be permitted an increase to the maximum level for that position as stated in an April 18, 2016 salary ordinance).

- Following the settlement of the lawsuit, UPSEU filed the instant unfair practice charge on November 14, 2016.

- The City never notified or advised UPSEU that it was settling the unit members' lawsuit prior to Judge McNulty's September 19, 2016 Order indicating it had been settled.

- On August 21, 2017, the City filed an Answer to the unfair practice charge.

- No unit members, including the seven who were plaintiffs in the lawsuit and settlement, were

ever granted a merit pay raise pursuant to Article 3.5 of the CNA.

ARGUMENTS

The UPSEU asserts that the City violated subsections 5.4a(1) and (5) of the Act by providing non-merit salary increases to seven unit members without negotiating with the UPSEU. It argues that the Commission and courts have found that even changes in mandatorily negotiable terms and conditions of employment that are beneficial to employees violate the Act if imposed unilaterally or by negotiating directly with employees instead of with the majority representative. The UPSEU notes that the City's agreement to provide 5% raises to settle a lawsuit could have been legally granted as merit-based increases pursuant to Article 3.5 of the CNA, but that the City instead negotiated directly with the employees for non-merit salary increases.

The City asserts that the salary increases for the seven unit members are not negotiable because the issue is preempted by 42 U.S.C. § 1983, which allows employees to file a lawsuit for political discrimination. It argues that because the unit members are allowed to file such action, the City's right to resolve the lawsuit preempts any right or obligation the UPSEU has to negotiate over the salary increase the City agreed to in order to settle the lawsuit. The City contends that it also has a managerial prerogative to enter into a negotiated settlement

agreement in order to resolve employees' civil litigation concerning political discrimination claims.

ANALYSIS

N.J.S.A. 34:13A-5.3 defines when a public employer has a duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. . . . In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be achieved through the collective negotiations process. See, e.g., Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 52 (1978). A public employer's unilateral change to negotiable compensation terms may constitute an unfair practice in violation of subsections 5.4a(1) and a(5) of the Act. See, e.g., County of Atlantic, 230 N.J. 237 (2017); and Hunterdon Cty., supra. For the Commission to find a 5.4a(5) violation, the charging party must prove: (1) a change; (2) in a term or condition of employment; (3) without negotiations. State of New

Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985). An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Lakehurst Bd. of Ed. and Lakehurst Ed. Ass'n, P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004), aff'd, 31 NJPER 290 (¶113 App. Div. 2005).

Section 5.3 of the Act also sets forth that the exclusive right and obligation to negotiate terms and conditions of employment for unit members is vested not in an individual employee or group of employees, but in the majority representative. It provides, in pertinent part:

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes . . . shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. . . . A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.
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> [N.J.S.A. 34:13A-5.3.]

The Supreme Court of New Jersey has described exclusive representation as "the keystone of sound labor-management

relations." D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74, 78 (1990); see also Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545, 548 (¶15254 1984) ("this exclusivity principle is a cornerstone of the Act's structure for regulating the relationship between public employers and public employees").

Exclusive representation by the majority representative is essential to collective negotiations, whereas fractured bargaining by individuals or subgroups of the unit can be destructive to the process enshrined in the Act. In Lullo v. Int'l Ass'n of Firefighters, Local 106, 55 N.J. 409 (1970), the Court explained:

> [T]he major aim [of achieving an equitable balance of bargaining power with employers] could not be accomplished if numerous individual employees wished to represent themselves or groups of employees chose different unions or organizations for the purpose. Such absence of solidarity and diffusion of collective strength would promote rivalries, would serve disparate rather than uniform overall objectives, and in many situations would frustrate the employees' community interests.
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> [Lullo, 55 N.J. at 426.]

The Court specifically discussed the harm to the collective negotiations process caused by a public employer's granting of increased benefits to individual employees:

> It has been said that advantages to an employee through an individual contract "may prove as disruptive of industrial peace as disadvantages." Individually negotiated agreements constitute "a fruitful way of

> interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole." J.I. Case Co. v. N.L.R.B., supra, 321 U.S. at 338-339, 64 S. Ct. at 581; N.L.R.B. v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 180-181, 87 S. Ct. 2001.
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> [Lullo, 55 N.J. at 428.]

Individual agreements are thus void "to the extent that they conflict with collective agreements or interfere with the principles of collective negotiation." Troy v. Rutgers, 168 N.J. 354, 375-376 (2001); see also New Jersey Transit Auth. v. New Jersey PBA, 314 N.J. Super. 129, 139-140 (App. Div. 1998).

The Commission has therefore held that public employers violate subsection 5.4a(5) by negotiating directly with individual employees or groups of employees rather than with their majority representative over negotiable terms or conditions of employment, even where individual negotiations resulted in greater benefits. See, e.g., Town of West New York, P.E.R.C. No. 99-110, 25 NJPER 332 (¶30143 1999) (unilateral placement of unit member at highest salary level to settle political discrimination lawsuit); Camden County, P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994) (unilateral salary increase); City of Union City, P.E.R.C. No. 90-37, 15 NJPER 626 (¶20262 1989) (unilateral salary range increase for two positions); Newark Bd. of Ed., supra,

P.E.R.C. No. 85-24 (employer created incentive program through direct dealing with individual employees); Camden County, H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) (employer dealt directly with employees about merit pay program); Cf. Buena Reg. School Dist. Bd. of Ed., P.E.R.C. No. 93-97, 19 NJPER 246 (¶24121 1993) (union's challenge to disciplinary settlement resulting in employee's salary exceeding salary guide was arbitrable).

The City asserts that, in this context, the compensation of UPSEU members was not negotiable because it was preempted and/or because the City had a managerial prerogative to unilaterally grant raises in order to settle a discrimination lawsuit. Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
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> [Id. at 404-405.]

Compensation is among the most fundamental of mandatorily negotiable terms and conditions of employment in collective negotiations. Robbinsville Tp. Bd. of Ed. v. Washington Tp. Ed. Ass'n, 227 N.J. 192, 199 (2016); Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 589 (1980); and Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 6-7 (1973). Thus, the raises at issue satisfy the first prong of Local 195 in that they intimately and directly affect the work and welfare of public employees.

We next consider the City's statutory preemption argument. Parties may not agree to contravene specific statutes or regulations setting particular terms and conditions of public employment. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). "However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, negotiation is preempted only if the statute fixes the term "expressly, specifically, and comprehensively." Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982). The legislative provision must "speak in the imperative and leave nothing to the

discretion of the public employer." State v. State Supervisory, supra, 78 N.J. at 80.

Here, the City generally asserts that because 42 U.S.C. § 1983 allows lawsuits claiming deprivation of constitutional rights, it has carte blanche to resolve such claims while ignoring any obligation to collectively negotiate changes to UPSEU's terms and conditions of employment. The City has not identified any specific statutory language that mandates or authorizes a settlement in derogation of collectively negotiated salaries or state labor laws. Accordingly, the City has not shown that the federal statute implicated in the lawsuit expressly, specifically, and comprehensively preempts negotiations over UPSEU salaries.

Turning to the third prong of the Local 195 negotiability test, we "balance the interests of the public employees and the public employer." The City claims a managerial right to settle civil litigation regardless of its impact on the UPSEU's rights under the Act to exclusively negotiate fundamental working conditions such as compensation and have its negotiated agreement on such issues honored. We disagree.

In Town of West New York, P.E.R.C. No. 99-110, 25 NJPER 332 (¶30143 1999), the Commission held that the employer's settlement of a political discrimination lawsuit did not permit it to place

the plaintiff at the highest salary level without negotiating with the majority representative.[3/] The Commission held:

> A municipality must act within its lawful authority when it enters into agreements to settle litigation. See Carlin v. Newark, 36 N.J. Super. 74 (Law. Div. 1955); Edelstein v. Asbury Park, 51 N.J. Super. 368 (App. Div. 1958). Cf. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) (agreement on subject that is beyond authority of public employer may not be enforced). The Town's lawful authority to compensate new police officers was limited by the duty to negotiate imposed by section 5.3 before changing the practice regarding initial salary placement. No agreement or promise addressing Betancourt's working conditions could supersede the PBA's exclusive right to negotiate over the terms and conditions of employment of the officers it represents.
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> [West New York, 25 NJPER at 334; emphasis added.]

The Commission's holding in West New York is consistent with New York Public Employment Relations Board (NYPERB) and federal jurisprudence that we find persuasive. NYPERB has similarly held that a public employer's settlement of discrimination claims cannot repudiate or unilaterally alter certain terms and conditions of employment. In Niagara Falls Police Club, Inc. and

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3/ "The complaint alleged that the officers were denied employment because of wrongful political retribution by the Mayor." West New York, H.E. No. 99-16, 25 NJPER 107, 108 (¶30046 1999).

City of Niagara Falls, 49 PERB ¶4505 (2012), a Board Administrative Law Judge held:

> The Board has rejected the contention that an employer's obligations pursuant to civil rights laws necessarily override its bargaining obligations under the Act. . . . Despite the City's legitimate public policy concerns and obligations under federal and state law to respond to the civil rights issues raised in the action brought by the AG, those obligations did not preclude the City from entering into negotiations with the Police Club regarding those aspects of the changes which are mandatorily negotiable prior to issuing the General Orders, nor was there any reason established for its refusal to do so.
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> [Id.; emphasis added.]

See also State of New York (Department of Transportation), 46 PERB ¶3029 (2013) (finding that settlement of disability discrimination claim "do[es] not constitute a license for unilateral actions by employers in contravention of the duty to negotiate under the Act or in violation of an established seniority system.")

At the federal level, the United States Supreme Court in W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757 (1983) affirmed an arbitration award that upheld contractual seniority layoff rights despite conflicting with the employer's settlement of discriminatory hiring claims. It held:

> In this case, although the Company and the Commission agreed to nullify the collective-

> bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent. Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored. Although the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights.
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> [W.R. Grace, 461 U.S. at 771; internal citations omitted; emphasis added.]

The U.S. Courts of Appeals have applied W.R. Grace to hold that even consent decrees agreed to by public employers to settle federal civil rights lawsuits may not conflict with a union's right to collectively negotiate over changes in terms and conditions of employment. In People Who Care v. Rockford Bd. of Educ., 961 F.2d 1335 (7th Cir. 1992), the Seventh Circuit held:

> [P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party's agreement. In particular, they may not alter collective bargaining agreements without the union's consent. Neither may litigants agree to disregard valid state laws. . . . [B]efore altering the contractual (or state-law) entitlements of third parties, the court must find the change necessary to an appropriate remedy for a legal wrong. . . . [W]e direct the district court to vacate those portions of the decree overriding the seniority provisions of the collective

> bargaining agreements or relieving the Board of its obligation to bargain with the unions.
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> [People Who Care, 961 F.2d at 1337, 1339; internal quotes and citations omitted; emphasis added.]

In United States v. City of Hialeah, 140 F.3d 968 (11th Cir. 1998), the Eleventh Circuit held:

> One party to a collective bargaining agreement cannot use the device of a nonconsensual consent decree to avoid its obligations, which the other party negotiated and bargained to obtain. . . . Because a grant of retroactive seniority would alter the rights and benefits of incumbent employees under the collective bargaining agreements, approval of that part of the proposed decree over the unions' objections would violate the police and firefighters' collective bargaining rights under Florida law. If the City wants to alter the manner in which competitive benefits are allocated, it must do so at a bargaining table at which the unions are present. Or, that must be done pursuant to a decree entered after a trial at which all affected parties have had the opportunity to participate.
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> [City of Hialeah, 140 F.3d 968, 983; internal quotes and citations omitted; emphasis added.]

In United States v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002), the Ninth Circuit held that the City's settlement of a lawsuit alleging deprivation of federal constitutional rights under 42 U.S.C. § 14141 could not alter the police union's right to negotiate changes to its terms or conditions of employment:

> The Police League has state-law rights to negotiate about the terms and conditions of its members' employment as LAPD officers and

> to rely on the collective bargaining agreement that is a result of those negotiations. These rights give it an interest in the consent decree at issue. Except as part of court-ordered relief after a judicial determination of liability, an employer cannot unilaterally change a collective bargaining agreement as a means of settling a dispute over whether the employer has engaged in constitutional violations.
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> [City of Los Angeles, 288 F.3d 391, 399-400; internal citations omitted; emphasis added.]

Consistent with West New York and the federal and NYPERB cases discussed above, we find that a public employer's interest in settling litigation does not outweigh a union's interests in maintaining its right to collectively negotiate over otherwise mandatorily negotiable terms and conditions of employment. The interests of the City and the UPSEU did not have to conflict. As in West New York, Niagara Falls, State of New York, W.R. Grace, People Who Care, Hialeah, and Los Angeles, the City's unilateral change in negotiable benefits was not the result of a trial or other judicial determination on the merits of the claim.[4/] This was a conflict of the City's own making, caused by its voluntary decision to settle a lawsuit with a group of seven plaintiffs by unilaterally increasing their salaries in a manner not sanctioned

4/ We agree with the federal courts that an employer's adherence to a judicially ordered remedy that infringes on a majority representative's right to negotiate certain terms and conditions of employment would be legally distinguishable and would not constitute an unfair practice.

by the CNA.[5/] It had a variety of alternatives to avoid infringing on the UPSEU's exclusive right to negotiate salaries, such as settling by other means not involving mandatorily negotiable terms, involving the UPSEU in settlement discussions and obtaining its pre-approval as to any aspects of the settlement interfering with the CNA or its right to negotiate, or, as suggested by the UPSEU, providing the plaintiff unit members with the merit raises already permitted by the CNA.

The City's reliance on Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) is misplaced. In Teaneck, the New Jersey Supreme Court restrained binding arbitration of a teacher's racial discrimination claim because the remedy sought would interfere with the employer's managerial prerogative to "hire, promote, or retain teaching staff." Id. at 16.[6/] Contrary to the City's contention, Teaneck was not a preemption

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5/ See, W.R. Grace, supra, at 767: "[I]t could follow the conciliation agreement . . . and risk liability under the collective bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations."

6/ The Court added that the claim could be referred to the Division on Civil Rights, which has the legislative mandate to review hiring decisions for bias despite interference with managerial prerogatives. Id. at 17-18.

case.[7/] The Court acknowledged that a union could utilize binding arbitration to enforce a statutory discrimination claim so long as it did not challenge a managerial prerogative such as whom to hire, transfer, or promote. Id. at 14-16.[8/] The Commission has applied Teaneck both to restrain binding arbitration and to allow binding arbitration depending on whether the dominant issue was a significant managerial prerogative or a fundamental employee concern.[9/] If the instant case had similarly concerned arbitration of a statutory discrimination claim, then legal arbitrability would turn on whether the decision being challenged concerned a mandatorily negotiable

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7/ See, e.g., Tp. of Wayne v. AFSCME, Council 52, Local 2192, 220 N.J. Super. 340 (App. Div. 1987) ("The finding of non-arbitrability [in Teaneck], however, rested on the completely independent ground that the school board's decision was managerial, arrived at without regard to whether relief from the racial discrimination might or might not be sought in another forum.").

8/ Such arbitration to enforce statutory rights is independent of any statutory right to file a lawsuit to pursue remedies unavailable through grievance arbitration. See New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185, 202 (1996) (contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination).

9/ See, e.g., Washington Tp. Bd. of Ed., P.E.R.C. No. 2004-68, 30 NJPER 135 (¶53 2004) ("Unlike Teaneck, this case involves a negotiable term and condition of employment."); and County of Morris (Morris View Nursing Home), P.E.R.C. No. 2002-11, 27 NJPER 369 (¶32134 2001) ("This grievance challenges the exercise of managerial prerogatives - the assessment of promotional qualifications and the selection of a candidate.").

issue or a non-negotiable managerial prerogative. In contrast, this case concerns whether the City can unilaterally change negotiable compensation terms in order to settle a lawsuit to which the UPSEU is not a party. If the City had settled with the plaintiffs by implementing a managerial prerogative such as a promotion, it would not have been obligated to negotiate with the UPSEU. However, that not being case, neither the City's preemption nor its managerial prerogative arguments are supported by Teaneck.

As in West New York, the crux of this matter is that the UPSEU, as the majority representative, had the exclusive right to negotiate with the City over changes to negotiable terms and conditions of employment such as the salaries of the unit members who received raises. The City admits that it voluntarily granted the raises, without negotiating with the UPSEU, in order to settle pending litigation with those employees. However, the City's private settlement agreement with this group of unit members does not obviate its duty under section 5.3 of the Act to negotiate with the UPSEU concerning such fundamental terms of employment. In conclusion, we hold that absent a judicial decree, statutory mandate, or dominant managerial prerogative compelling the unilateral salary increases, the City violated

subsection 5.4a(5) of the Act by failing to negotiate with the UPSEU over the compensation terms of the settlement agreement.[10/]

REMEDY

As for remedy, the UPSEU requests either that we restore the status quo ante by rescinding the 5% raises and placing the affected unit members at their prior salary levels, or that we increase the salaries of the remaining unit members by 5%. We find the latter option extreme because it would impose a new financial obligation on the employer that it never agreed to. The UPSEU's alternative would return the plaintiffs to their salary levels prior to the 5% raises, but would necessitate recoupment by the City of the employees' increased earnings up until this point. We find that remedy unduly burdensome to the plaintiffs who were beneficiaries of the raises but were not obligated to negotiate them under our Act. We find that the most fair and appropriate remedy would be to prospectively repeal the raises, while placing the affected unit members at the salary level that they would have been at currently had the raises never been granted. This restores the status quo without recoupment, which is a reasonable penalty for the City to incur for its unfair practice. N.J.S.A. 34:13A-5.4(c) (upon finding an unfair

10/ We do not find an independent violation of subsection 5.4a(1) of the Act because the City's attempt to settle the civil litigation was a legitimate and substantial business justification for its conduct.

practice violation, the Commission is empowered to "take such reasonable affirmative action as will effectuate the policies of this act").[11/] This remedy is in accordance with Commission precedent in similar situations involving improperly granted benefits. See West New York (prospectively conform employee's salary and benefits to the levels they would have been if he had started at Step 1 instead of Step 6, and no recoupment); and Camden County, P.E.R.C. No. 94-121, supra (returned to status quo salary with interim increases employee would have been entitled to, and no recoupment of benefits unilaterally granted and already paid because "it would unduly punish the employee for the employer's unfair practice.").

ORDER

The City of Hackensack is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the UPSEU before increasing the salaries of seven unit members.

11/ See Galloway Tp. Bd. of Ed. 78 N.J. 1 (1978) ("Elimination of the prospect of monetary sanction for employers or employee organizations which engage in unlawful conduct would deprive PERC of an effective tool in vindicating the public employees' rights secured by the Act and thereby tend to nullify the deterrent aspect of its remedial authority.")

2. Refusing to negotiate in good faith with the UPSEU concerning terms and conditions of employment of employees in the unit, particularly by unilaterally increasing the salaries of seven unit members.

B. Take this action:

1. Prospectively conform the salaries of the seven unit members who were parties to the settlement to the levels they would be, including any interim increases they would have regularly been entitled to, had the City not granted the raises.

2. Negotiate in good faith with the UPSEU concerning any proposed salary changes and any other negotiable terms and conditions of employment that may be impacted by the City's settlement of the seven unit members' civil litigation.

3. 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) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed.

ISSUED: June 28, 2018

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 its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the UPSEU before increasing the salaries of seven unit members.

WE WILL cease and desist from refusing to negotiate in good faith with the UPSEU concerning terms and conditions of employment of employees in the unit, particularly by unilaterally increasing the salaries of seven unit members.

WE WILL prospectively conform the salaries of the seven unit members who were parties to the settlement to the levels they would be, including any interim increases they would have regularly been entitled to, had the City not granted the raises.

WE WILL negotiate in good faith with the UPSEU concerning any proposed salary changes and any other negotiable terms and conditions of employment that may be impacted by the City's settlement of the seven unit members' civil litigation.

Docket No. CO-2017-106 CITY OF HACKENSACK
(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