

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2017-266

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, and denies the City of Newark's cross-motion, in an unfair practice case filed by the SOA. The SOA'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(1), (5), (6), and (7), when it repudiated the parties' negotiated grievance procedure by refusing to abide by the Public Safety Director's decision to sustain a grievance. The Commission holds that the City's refusal to implement the Police Director's decision constitutes a refusal to negotiate in good faith in violation of subsection 5.4a(5), and derivatively a(1), 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, France Casseus, Assistant
Corporation Counsel

For the Charging Party, John J. Chrystal III,
President, Newark Police Superior Officers' Association

DECISION

This case comes to us by way of a motion for summary judgment filed by the Newark Police Superior Officers' Association (SOA), and by way of a cross-motion for summary judgment filed by the City of Newark (City), in an unfair practice case filed against the City by the SOA. The unfair practice charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1), (5), (6), and (7),^{1/} when it

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 employees in that unit, or refusing to process (continued...)"

repudiated the parties' negotiated grievance procedure by refusing to abide by the Public Safety Director's decision to sustain a grievance.

PROCEDURAL HISTORY

On June 6, 2017, the SOA filed the instant unfair practice charge. On February 26, 2018, the Acting Director of Unfair Practices issued a complaint and notice of pre-hearing on the a(1), (5), and (6) allegations only; the a(7) allegation was dismissed.

On May 17, 2018, the SOA filed a motion for summary judgment supported by a brief, exhibits, and the certifications of its President, Captain John J. Chrystal III (Chrystal), and its Sergeant-at-Arms, Lieutenant Victor M. Manata (Manata).

On May 29, 2018, the City filed a cross-motion for summary judgment supported by an opposition brief, exhibits, and the certifications of its Public Safety Director (Director), Anthony F. Ambrose (Ambrose), its attorney, France Casseus (Casseus), and its Personnel Director, Kecia Daniels (Daniels).

On May 31, 2018, the SOA filed a reply brief.

1/ (...continued)
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 June 7, 2018, the SOA's motion for summary judgment and the City's cross-motion for summary judgment were referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a).

FACTS

The SOA represents all superior officers employed by the City in the ranks of sergeant, lieutenant, and captain. The City and the SOA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2013 through December 31, 2015. The grievance procedure ends in binding arbitration.

Article IV of the parties' expired CNA, entitled "Grievance Procedure and Arbitration," provides in pertinent part:

Section 3: Procedure

* * *

Step 5: 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: 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.

* * *

Section 5: General Provisions

* * *

(b) If the City fails to meet and/or answer any grievance within the prescribed time limits as herein before provided, such grievance shall be presumed to be denied [and] may be processed to the next step.

Article X of the parties' expired CNA, entitled "Health Insurance and Life Insurance," provides in pertinent part:

Section 11:

a. Effective January 1, 2006 a voluntary cash waiver incentive program shall be implemented, whereby an employee would receive a pro-rata payment equal to 10% of the annual premium for each benefit plan that is waived at the end of the calendar year, provided that proof of alternative coverage is submitted.

b. Effective January 1, 2006, where an employee who is represented by the S.O.A. is married to another City employee, only one spouse shall be entitled to be a subscriber under any benefit plan offered by the City, and the other spouse shall be entitled to dependent coverage under the plan of the subscriber spouse. If the benefit plans of the Collective Bargaining Agreements are equal, the subscriber shall be the employee with the earliest date of birth in the calendar year. If the benefit plans under the two Collective Bargaining Agreements differ, the contract with the highest benefit level will prevail. Where one employee retires, the remaining active employee becomes the primary subscriber and the retiring spouse becomes the dependent. When they are both retired and one spouse dies, the retiree will be allowed to enroll as a primary subscriber for the benefit plans to which he/she is entitled. In the event of divorce or death of the primary subscriber, the dependent employee shall be allowed to enroll for the benefit plans to which he/she is entitled.

c. If an employee who is the spouse of another City employee must waive his/her benefit plan, and becomes a dependent under his/her spouse's plan by the virtue of the above clause, the pro-rata payment shall be equal to 5% of the annual premium. In all cases, the annual payment shall be made in December of any calendar year. The dependent must be an active employee to receive the pro-rata payment.

On January 5, 2016, the SOA President filed a grievance with the City's then-Police Director Eugene Venable (Venable) on behalf of Captain Ivonne Roman (Roman) that provides in pertinent part:

The Superior Officers' Association hereby grieves the failure of the City of Newark, Office of Employee Benefits, to provide Captain Ivonne Roman her annual health care premium for waiving her health care insurance . . . [a]s per the Collective Negotiations Agreement (CNA) Article X Health and Life Insurance

* * *

Captain Ivonne Roman waived her health care insurance. As such, Captain Roman was entitled to receive 10% of the annual health care premium this past December. However, the City has failed to abide by the agreement.

On January 13, the City's Legal Affairs Unit acknowledged receipt of the SOA's grievance.

On December 6, 2016, Director Ambrose issued a letter to the SOA President regarding the grievance filed on behalf of Captain Roman that provides in pertinent part:

I have reviewed the grievance and find it is with merit. Since Captain Ivonne Roman

voluntarily waived her health care benefits for the year 2015, she is entitled to receive 10% of the health benefit plans that she waived. I will instruct the person responsible to immediately pay Captain Roman her entitled health care premium waiver payment. Therefore, I find your grievance is with merit and is sustained.^{2/}

On March 2, 2017, the SOA filed a related civil action against the City (ESX-SC-506-17) seeking to collect Captain Roman's cash waiver payment for 2015. The City's attorney and Personnel Director certify that they realized Captain Roman was not entitled to a cash waiver payment when researching the SOA's collection action.^{3/} According to the Personnel Director, Captain Roman was/is married to a retired City employee during the relevant period in question and is required to become the primary subscriber under the City's health benefits plan with her husband as a dependent.

2/ In its brief, the SOA asserts that "[t]he parties had several meetings regarding this . . . matter" and "[a]fter arms length negotiations and discussions of past settlements with this . . . matter and bargaining history, Director Ambrose agreed to sustain the grievance in favor of the SOA."

3/ If the Public Safety Director's grievance decision was unacceptable, either party had two (2) weeks to demand binding arbitration. The parties' negotiated grievance procedure does not grant the City's law department or division of personnel the authority to review, rescind, or recommend rescission of the Public Safety Director's grievance decisions after the expiration of this two-week period. See 2013-2015 CNA, Art. IV.

On April 21, 2017, Captain Anthony M. Costa (Costa) issued a letter on behalf of Director Ambrose^{4/} to the SOA President regarding the grievance filed on behalf of Captain Roman that provides in pertinent part:

I am rescinding the letter issued in the above matter dated December 6th, 2016 sustaining the grievance filed on behalf of Captain Roman. After this matter was reviewed by the Law Department they have advised me that the grievance was sustained in error. Pursuant to the language in the Collective Bargaining Agreement, Captain Roman cannot waive her health coverage. As an active employee married to a City of Newark retiree, Captain Roman is required to become the primary subscriber as specified in Article X, Section 11(B).

Director Ambrose certifies that he changed the grievance decision because he was not aware of language in the parties' CNA indicating that Captain Roman was not entitled to a cash waiver payment.

On June 6, 2017, the SOA filed the instant unfair practice charge.

LEGAL ARGUMENTS

The SOA argues that its motion for summary judgment should be granted because there are no material facts in dispute. Specifically, the SOA maintains that the City refused to honor Director Ambrose's December 6, 2016 grievance decision and

^{4/} Director Ambrose certifies that Captain Costa is his chief of staff and had authority to sign the letter.

rescinded same on April 21, 2017; that the City should have demanded binding arbitration if it disagreed with the merits of the underlying grievance; and that the City's repudiation of the parties' negotiated grievance procedure constitutes a refusal to negotiate in violation of the Act. The SOA contends that the unfair practice charge was timely filed within six months of both Director Ambrose's December 6, 2016 grievance decision and his April 21, 2017 rescission. The SOA asserts that it was entitled to rely on Director Ambrose's December 6, 2016 grievance decision given that he was the City's designated agent as specified in the parties' negotiated grievance procedure.

The City argues that its cross-motion for summary judgment should be granted because the unfair practice charge was untimely filed. Specifically, the City maintains that the SOA and Captain Roman were aware that a cash waiver payment for 2015 was due in December of the calendar year; that based upon the initial filing of the underlying grievance in January 2016, the SOA and Captain Roman should have initiated arbitration in late February/early March 2016 when they received no response from the City; and that the SOA and Captain Roman sat on their rights and waited until after the six-month statute of limitations^{5/} lapsed in June 2017

5/ N.J.S.A. 34:13A-5.4c provides in pertinent part:

[N]o complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from

(continued...)

before filing the instant unfair practice charge. The City contends that Director Ambrose originally sustained the grievance in error and that granting Captain Roman a cash waiver payment would be a windfall at taxpayers' expense. The City asserts that it is not refusing to negotiate in good faith or repudiating the grievance procedure because Captain Roman is not entitled to a cash waiver payment for 2015 pursuant to Article X of the parties' CNA.^{6/}

In reply, the SOA reiterates that the unfair practice charge was timely filed; that the merits of the underlying grievance are

5/ (...continued)

filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

6/ As noted in City of Newark, H.E. No. 2018-3, 44 NJPER 136 (¶39 2017), the same legal arguments have been raised by the City in numerous recent decisions that are nearly identical to the instant matter. See, e.g., City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013) (City refused to implement settlement between SOA and police director regarding terminal leave payments); City of Newark, H.E. No. 2014-1, 40 NJPER 124 (¶48 2013) (City's refusal to implement police director's decision regarding payment for compensatory time violated 5.4a(5)); City of Newark, H.E. No. 2015-8, 41 NJPER 454 (¶141 2015) (City violated 5.4a(5) when it refused to implement police director's decision sustaining grievances regarding accrued compensatory time and longevity for retired officers); City of Newark, H.E. No. 2015-12, 42 NJPER 121 (¶35 2015) (City violated Act by refusing to pay health benefits to retired officer pursuant to police director's grievance settlement); City of Newark, H.E. No. 2018-3, 44 NJPER 136 (¶39 2017), adopted P.E.R.C. No. 2018-40, 44 NJPER 387 (¶109 2018) (City's refusal to implement police director's decision allowing officer to use compensatory time for credits toward medical benefits so that he could retire with 25 years of service violated 5.4a(5)); City of Newark, I.R. No. 2015-1, 41 NJPER 287 (¶95 2014), app. disp. 42 NJPER 212 (¶59 App. Div. 2015).

irrelevant to whether the City repudiated the parties' negotiated grievance procedure by rescinding Director Ambrose's December 6, 2016 grievance decision; and that changing terms and conditions of employment during negotiations for a successor agreement by repudiating the grievance procedure is an unfair practice.

STANDARD OF REVIEW

We note that 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. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{7/} In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of

^{7/} N.J.A.C. 19:14-4.8(e) provides:

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.

protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

ANALYSIS

It is undisputed that the SOA's January 5, 2016 grievance regarding Captain Roman's cash waiver payment for 2015 was sustained on December 6, 2016 by the City's designated grievance representative, Director Ambrose. The Commission has held that an employer's refusal to abide by a decision of its designated grievance representative constitutes a refusal to negotiate in good faith in violation of subsection 5.4a(5) of the Act. City of Newark, H.E. No. 2018-3, 44 NJPER 136 (¶39 2017), adopted P.E.R.C. No. 2018-40, 44 NJPER 387 (¶109 2018); see also Middletown Tp. and PBA Local 124, P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), aff'd 34 NJPER 228 (¶79 2008) (holding that "[i]f the parties are not bound by the results of the intermediate steps of a grievance procedure they intended to be binding, then the procedure will be ineffective in quickly and inexpensively resolving disputes"); City of Newark, P.E.R.C. No. 2008-34, 33 NJPER 316 (¶120 2007), recon. den. P.E.R.C. No. 2008-53, 34 NJPER 71 (¶29 2008) (holding that "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").

We reject the City's assertion that it is not refusing to negotiate in good faith nor repudiating the grievance procedure because Captain Roman is not entitled to a cash waiver payment for 2015 pursuant to Article X, Section 11(b) of the parties' CNA. The Commission's role is not to substitute its judgment for the judgment of the City's designated grievance representative who evaluated the substantive and procedural merits of the underlying issue. City of Newark, H.E. No. 2016-11, 42 NJPER 384 (¶109 2015).^{8/} Moreover, the Commission has held that the contractual merits of a grievance are not relevant to the issue of whether an employer repudiated an applicable grievance procedure. Keansburg Bor., P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003). Accordingly, if the City disagreed with the basis for Director Ambrose's December 6, 2016 grievance decision, it was incumbent upon the City to file a demand for arbitration in accordance with the parties' negotiated grievance procedure. See City of Newark, 44 NJPER 387; accord Burlington Cty., P.E.R.C. No. 2018-41, 44 NJPER 391 (¶110 2018) (finding that the county

8/ Pursuant to N.J.A.C. 19:14-8.1(b), "[i]f no exceptions are filed, [a hearing examiner's] 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."

"made no attempt to utilize the grievance procedure to challenge the decision of its hearing officer in grievance arbitration" and instead "repudiated the grievance procedure by unilaterally imposing . . . [a] bidding schedule[] that . . . [conflicted with] its own hearing officer's decision"). The fact that the City rescinded Director Ambrose's decision on April 21, 2017 does not change our finding that it repudiated the grievance procedure by not implementing his decision.

We also reject the City's claim that the SOA should have initiated arbitration when it did not receive a timely response to its January 5, 2016 grievance because, pursuant to Art. IV, Section 5(b) of the parties' CNA, the grievance was "presumed to be denied" if no decision was issued within the time limit prescribed in the grievance procedure. When interpreting an identical "presumed to be denied" grievance procedure provision, the City advanced the same argument which we found to be without merit given that there were no actual denials in the record and the stated reasons for refusing to implement the grievance decisions did not include the City's belief that the grievances were deemed denied. The Commission has held that the discretion and authority of an employer's designated grievance representative are not extinguished until either party exercises its right to proceed to binding arbitration. City of Newark, 42 NJPER 384. Here, as in City of Newark, 42 NJPER 384, there are

no actual denials in the record before us and the reasons specified in the April 21, 2017 rescission do not include the City's belief that the grievance was deemed denied.

Finally, we reject the City's claim that the unfair practice charge was untimely. The SOA's charge was filed on June 6, 2017, well-within the six-month statutory limitations period given that the SOA did not receive notice of the City's rescission until April 21, 2017. See N.J.S.A. 34:13A-5.4c.

Accordingly, we find that the City's failure to implement Director Ambrose's December 6, 2016 grievance decision regarding Captain Roman's cash waiver payment for 2015 is a violation of subsection 5.4a(5), and derivatively a(1), of the Act, and grant the SOA's motion for summary judgment.^{9/} The City's cross-motion is denied.

ORDER

The Newark Police Superior Officers' Association's motion for summary judgment is granted. The City of Newark's cross-motion for summary judgment is denied.

The City is ordered to:

A. Cease and desist from:

1. Refusing to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its

^{9/} The SOA has not advanced any argument pertaining to its 5.4a(6) claim. Accordingly, we do not consider same.

unit, particularly, by repudiating the parties' grievance procedure when the City failed to implement Director Ambrose's December 6, 2016 decision sustaining the SOA's grievance regarding Captain Roman's cash waiver payment for 2015.

B. Take the following action:

1. Implement Director Ambrose's December 6, 2016 decision sustaining the SOA's grievance and providing Captain Roman with a cash waiver payment for 2015.

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.

3. Notify the Chair of the Commission within twenty (20) days of receipt of this decision what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

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

ISSUED: August 16, 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 refusing to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its unit, particularly, by repudiating the parties' grievance procedure when the City failed to implement Director Ambrose's December 6, 2016 decision sustaining the SOA's grievance regarding Captain Roman's cash waiver payment for 2015.

WE WILL implement Director Ambrose's December 6, 2016 decision sustaining the SOA's grievance and providing Captain Roman with a cash waiver payment for 2015.

WE WILL post in all places where notices to employees are customarily posted, copies of this 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 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.

WE WILL notify the Chair of the Commission within twenty (20) days of receipt of this decision what steps the Respondent has taken to comply with this order.

Docket No. CO-2017-266

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