

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-2014-169  
CO-2014-170

NEWARK POLICE DEPARTMENT  
SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the City's exceptions and adopts a Hearing Examiner's report and recommended decision (H.E. No. 2020-8) granting the SOA's motion for summary judgment on its unfair practice charges and denying the City's cross-motions for summary judgment. The charges allege the City violated the Act, N.J.S.A. 34:13A-1, et seq., when it failed to honor the decisions of its Police Director to sustain the grievances of two unit members concerning lump sum payouts for unused vacation days upon retirement. Finding that the CNA designates the Police Director as the City's authorized agent at Step 5 of the grievance procedure, and the Police Director found the grievances had merit, the Commission concurs with the Hearing Examiner's legal conclusion that the City's refusal to abide by the decision of its designated grievance representative 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.

P.E.R.C. NO. 2021-2

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CO-2014-170

NEWARK POLICE DEPARTMENT  
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Charging Party.

Appearances:

For the Respondent, Carmagnola & Ritardi, attorneys  
(Domenick Carmagnola, of counsel)

For the Charging Party, John J. Chrystal, III  
(President, Newark Police SOA)

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. 2020-8, 46 NJPER 542 (¶122 2020). On January 28, 2014, the Newark Police Superior Officers' Association (SOA) filed unfair practice charges against the City. The charges allege 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), (3), (5), and (7) when it unilaterally repudiated Articles IV and XV of the parties' collective negotiations agreement (CNA) by failing to honor the Step 5 grievance decisions of its Police Director that sustained

grievances filed by the SOA on behalf of two recently retired unit members seeking lump sum payouts for vacation days. The charges seek an order requiring the City to honor the sustained grievance decisions of its Police Director and provide both retired unit members with the payments specified therein.

On January 7, 2015, the Director of Unfair Practices consolidated the cases and issued a Complaint and Notice of Pre-Hearing on the N.J.S.A. 34:13A-5.4a(1), (3), and (5) allegations.<sup>1/</sup> On January 15, 2015, the City submitted its Answer denying that it refused to negotiate in good faith. On July 13, 2018, the SOA filed motions for summary judgment in both CO-2014-169 and CO-2014-170. On July 26, 2018, the City filed a response and cross-motion for summary judgment. On August 9, 2018, 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. (H.E. at 4-6). We briefly summarize the relevant facts

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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.; (3) Discriminating 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.; and (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."

as follows. Article IV of the CNA sets forth the parties' grievance procedure. Step 5 of the grievance procedure provides that a grievance be submitted to the City's Police Director for decision. Step 6 is the final step of the grievance procedure, which allows either party to submit the matter to arbitration. In August and September 2011, the SOA filed grievances with the City's Police Director alleging that the City violated Article XV of the CNA by failing to pay two recently retired unit members additional vacation days as part of their lump sum retirement payouts for accrued compensatory time. On November 8, 2013, the Police Director sustained both grievances, determining that Captains Mark and William Whitley were entitled to receive payment for 43 and 29 vacation days, respectively, that had been deducted from their total lump sum retirement payouts. The Police Director's written decisions sustaining the grievances specified that the vacation day payments were to include longevity, be made at the 2013 rate of pay, and be made immediately. The City did not file for arbitration pursuant to Step 6 of the grievance procedure to challenge either grievance determination. The City has failed to implement payment of either of the Police Director's grievance decisions.

The City filed a letter making the following exceptions to the Hearing Examiner's report:

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 Briefs in Opposition to the Newark Police Superior Officers Association's Motion for Summary Judgment and in Support of the City of Newark's Cross-Motion for Summary Judgment in both matters: Captain Mark Whitley (CO-2014-169) and Captain William Whitley (CO-2014-170). A true copy of the City's briefs are attached hereto and the City hereby renews the arguments set forth therein.

Of note, the Hearing Examiner's decision violates explicit state statutes (N.J.S.A. 11A:6-3) and administrative codes (N.J.A.C. 4A:6-1.2), acknowledges and affirms a contract that is void against public policy and incorrectly calculates payment based on the incorrect salary year.

Accordingly, the City of Newark respectfully requests that the Commission reverse the Hearing Examiner's grant of Summary Judgment in favor of the Association and grant Summary Judgment in favor of the City.

The SOA argues that the City's exceptions letter does not comply with the Commission's rules on exceptions. The SOA asserts that the Hearing Examiner's decision does not violate state law and was supported by the facts and legal precedent. The SOA cites Commission precedent supporting the position that the issue of payment for unused vacation days is not preempted and can be arbitrated. It argues that:

Hence, the parties have Article XV Accrued Compensatory Time in the CNA, for lump sum payments upon retirement, including vacation. If the matter can be arbitrated the person with the actual authority in the grievance procedure can settle it. That's what was

done. The [Police] Director settled the grievance.

We find that the City's exceptions letter does not strictly comply with the requirements established in N.J.A.C. 19:14-7.3(b) for filing exceptions.<sup>2/</sup> Nonetheless, we will respond to the issues the City raises in its submission. See City of Newark, P.E.R.C. No. 2018-40, 44 NJPER 387 (¶109 2018).

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). We have reviewed the record, the Hearing Examiner's Findings of Fact and Conclusions of Law, and the parties' submissions. As noted above, we find that the Hearing Examiner's findings of fact are supported by the record and we adopt them. We further hold that the Hearing Examiner has correctly resolved the legal issues presented by this dispute.

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<sup>2/</sup> 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.

We first address the City's assertions that the Hearing Examiner's decision incorrectly calculates the vacation leave payments due to the grievants and supports a contract that is void against public policy. Those claims do not address the Hearing Examiner's legal determinations on the unfair practice charge before her, but speak to the Step 5 contractual grievance decision made by the City's own Police Director. The CNA designates the Police Director as the City's authorized agent at Step 5 of the grievance procedure, and the Police Director found the grievances had merit. "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". City of Newark, P.E.R.C. No. 2008-34, 33 NJPER 316 (¶120 2007). "[A]n 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, P.E.R.C. No. 2019-2, 45 NJPER 76 (¶19 2018); see also City of Newark, P.E.R.C. No. 2018-40, 44 NJPER 387 (¶109 2018); and Passaic Cty. (Preakness Hospital), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1985). "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." Newark, 45 NJPER 76. The issue before the Hearing Examiner was whether the City

repudiated the applicable grievance procedure it negotiated for the resolution of contractual disputes by not honoring the Police Director's decision; the contractual merits of the grievance that the City now disputes are not relevant to that determination.

Id.; Keansburg Bor., P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003). If the City was not pleased with the outcome of the grievance as decided by its Police Director, it could have filed for arbitration pursuant to Step 6 of the grievance procedure. It is undisputed that it did not.

In Newark, 44 NJPER 387, involving a different police union, the City similarly refused to implement the Police Director's grievance decision after it failed to avail itself of the contractual arbitration process. We held:

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).

Accord Burlington Cty., P.E.R.C. No. 2018-41, 44 NJPER 391 (¶110 2018) (finding that the county "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").

We next address the City's contention that it cannot enforce the grievance decision of its Police Director because that decision violates N.J.S.A. 11A:6-3 and N.J.A.C. 4A:6-1.2.

N.J.S.A. 11A:6-3(e) provides:

Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only; except that vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor may accumulate at the discretion of the appointing authority until, pursuant to a plan established by the employee's appointing authority and approved by the commission, the leave is used or the employee is compensated for that leave, which shall not be subject to collective negotiation or collective bargaining.

N.J.A.C. 4A:6-1.2(g) provides, in pertinent part:

(g) Appointing authorities may establish procedures for the scheduling of vacation leave. Vacation leave not used in a calendar year because of business necessity shall be used during the next succeeding year only and shall be scheduled to avoid loss of leave, provided, however, that:

. . .

3. In local service, vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor may accumulate at the discretion of the appointing authority until, pursuant to a plan established by the employee's appointing authority and approved

by the Chairperson or designee, the leave is used or the employee is compensated for that leave.

The Commission has held that N.J.S.A. 11A:6-3(e) and N.J.A.C. 4A:6-2(g) preempt the carrying over of vacation leave not taken in a given year beyond the succeeding year. Pt. Pleasant Beach Bor., P.E.R.C. NO. 2018-28, 44 NJPER 298 (¶83 2018). However, the Commission has also held that the issue of payment for unused accumulated vacation days is mandatorily negotiable. Mount Holly Tp., P.E.R.C. No. 2011-41, 36 NJPER 423 (¶164 2010). In Mount Holly, the Commission found that although Civil Service regulations prohibit the accumulation of more than two years of vacation leave, they do "not expressly and specifically prohibit an employer from agreeing to give an employee the option of a cash payment for unused but still available vacation days instead." Id.; see also I.A.F.F. v. City of Hoboken, 2014 N.J. Super. Unpub. LEXIS 190 (App. Div. 2014) (Appellate Division upheld arbitrator's award requiring City to pay retiring fire officer terminal leave on up to three years of accrued vacation time, even though the CNA's allowance of up to three years of vacation time to be carried over annually violated N.J.S.A. 11A:6-3(e)). While Mount Holly and Hoboken allowed arbitration over the issue of compensation for accumulated vacation leave, leaving the merits to the arbitrators, here the need for an arbitration award to decide the PBA's grievances was

obviated by the City's Police Director's Step 5 grievance decisions sustaining the grievances and the City's choice not to proceed to arbitration.

Based on the foregoing, we find that the Hearing Examiner appropriately applied the pertinent Commission precedent to the facts. We adopt the Hearing Examiner's decision holding that the City's failure to implement its Police Director's November 8, 2013 Step 5 grievance decisions ordering the City to pay retired Captains Mark and William Whitley for 43 and 29 vacation days, respectively, is a violation of subsection 5.4a(5), and derivatively a(1), of the Act. Accordingly, the SOA's motion for summary judgment on the 5.4a(5) and a(1) charges are granted, and the City's cross-motions for summary judgment on those charges are denied. Finally, we adopt the Hearing Examiner's analysis dismissing the SOA's 5.4a(3) charge. (H.E. at 10-11).

#### ORDER

1. The City 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 by refusing to provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement pursuant to Grievance Nos. 2011-12 and 2011-15

which were both sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

2. Refusing to negotiate in good faith with the SOA concerning terms and conditions of employment of employees in its unit, particularly by repudiating the grievance procedure by failing to implement the Police Director's decision, which the City did not appeal, to sustain Grievance Nos. 2011-12 and 2011-15 and provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement.

B. Take the following action:

1. Provide retired Captain Mark Whitley payment for forty-three (43) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-12 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

2. Provide retired Captain William Whitley payment for twenty-nine (29) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-15 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

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 Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: August 13, 2020

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 interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating the grievance procedure by refusing to provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement pursuant to Grievance Nos. 2011-12 and 2011-15 which were both sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

**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 grievance procedure by failing to implement the Police Director's decision, which the City did not appeal, to sustain Grievance Nos. 2011-12 and 2011-15 and provide Captain William Whitley and Captain Mark Whitley with lump sum payments for their unpaid vacation time upon retirement.

**WE WILL** provide retired Captain Mark Whitley payment for forty-three (43) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-12 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

**WE WILL** provide retired Captain William Whitley payment for twenty-nine (29) vacation days, including longevity, at the 2013 rate of pay pursuant to Grievance 2011-15 which was sustained at Step 5 of the parties' negotiated grievance procedure by Police Director DeMaio.

Docket Nos. CO-2014-169  
CO-2014-170

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) 292-9830

APPENDIX "A"