

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2021-095

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants a motion for summary judgment filed by the Newark Police Superior Officers' Association (SOA) on its unfair practice charge upon which a complaint issued alleging that the City of Newark (City) violated the New Jersey Employer-Employee Relations Act (Act) when it unilaterally implemented a Voluntary Severance Incentive Program (VSIP). The Commission finds: 1) there are no genuine issues of material fact; 2) the SOA is entitled to relief as a matter of law on its allegations that the City violated sections 5.4a(1) and (5) of the Act when, during negotiations for a successor agreement, it unilaterally implemented the VSIP program; 3) the VSIP program changed mandatorily negotiable terms and conditions of employment regarding retiree health benefits; and 4) the City dealt directly with individual SOA unit members regarding the VSIP program. The Commission finds that while the City has a prerogative to reduce its workforce for economic reasons, the employees who resigned under the VSIP program were not laid off, and the City fails to explain how its unilateral action was necessary to protect the health, safety and continued operation of the City during the COVID-19 pandemic, or how negotiation would have frustrated those objectives. The Commission orders the City to cease and desist from directly dealing with SOA unit members, and to negotiate in good faith with the SOA over mandatorily negotiable subjects, including the issue of unit member retiree health benefits.

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. 2022-34

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NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Kenyatta K. Stewart, Corporation
Counsel (France Casseus, Assistant Corporation Counsel,
on the brief)

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

DECISION

On November 12, 2020, the Newark Police Superior Officers' Association (SOA) filed an unfair practice charge (UPC) against the City of Newark (City) alleging that the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it unilaterally implemented the City of Newark Voluntary Severance Incentive Program (VSIP), and refused to negotiate with the SOA over the VSIP's terms and conditions or associated severable impact issues. On July 27, 2021, the Director of Unfair Practices issued a Complaint and Notice of

Pre-Hearing on the UPC's allegations that the City violated sections 5.4a(1) and (5) of the Act.^{1/}

On November 15, 2021, the SOA filed a motion for summary judgment, supported by a brief, exhibits and the certification of its president, John J. Chrystal III. On December 10, 2021, the City filed opposition to the motion, supported by a brief, exhibits and the certifications of its Assistant Corporation Counsel/Labor Section Chief, France Casseus, and its Deputy Business Administrator, Kecia Daniels. The SOA did not file a reply brief.

We have reviewed the record, and we summarize the undisputed material facts as follows.

SUMMARY OF FACTS

- The City and the SOA are, respectively, public employer and public employee representative within the meaning of the Act, and are subject to its provisions.
- The SOA is the exclusive collective negotiations representative for all

^{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, or refusing to process grievances presented by the majority representative." The Director found the SOA presented insufficient facts to support the issuance of a complaint on allegations that the City's implementation of the VSIP violated sections 5.4a (2), (3), (4) and (7) of the Act.

sergeants, lieutenants and captains employed by the Newark Police Department.

- The City and the SOA are parties to a collective negotiations agreement (CNA) effective from January 1, 2013 through December 31, 2015, Article XXX, Section 3 of which provides that its terms shall continue in effect during negotiations between the parties.
- The parties have a memorandum of agreement (MOA) in place from 2016 to 2017, which includes a provision that all terms of the CNA not otherwise modified by the MOA shall remain in full force and effect.
- The parties are in negotiations for a successor agreement.
- Article X, Section 6 of the CNA provides for paid health insurance for eligible retirees with 25 years of continuous service. The MOA did not modify Article X, Section 6 of the CNA.
- Article XVIII of the parties' expired CNA, entitled "Maintenance of Standards," provides:

All rights, privileges and benefits existing prior to this Agreement are retained with the following exceptions:

- (a) Those benefits abridged or modified by this Agreement, or
 - (b) Those changes in benefits which are not substantial and unreasonable.
- Article XIX of the CNA, entitled "Management Rights," provides:

Section 1: The City hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to signing of this Agreement by the laws and Constitution of the State of New Jersey and of the United States, including but without limiting the generality of the foregoing, following rights:

(a) To the executive management and administrative control of the City Government and its properties and facilities. . .

- As a result of the COVID-19 pandemic, the City experienced a dramatic reduction in revenue collections, including in property, parking and payroll taxes, as well as in utility payments, permits and licences.
- Together with a decrease in revenue collections as a result of the pandemic, the City had an increase in overtime costs for first responders and public works employees, as well as unexpected costs for workers and residents, including approximately \$6,330,000.00 in costs for medical supplies, personal protective equipment (PPE) and emergency sheltering. The City certifies that it was also facing over 7,500 confirmed COVID-19 cases and 618 deaths (highest among all New Jersey municipalities).
- To address the impending financial crisis, and in order to continue the efficient delivery of essential services to residents, on May 6, 2020, the City submitted for approval to the Civil Service Commission (CSC) a temporary layoff plan affecting non-

essential employees. The CSC approved the layoff plan.

- The City announced the VSIP program (also referred to as a Buyout) by memorandum to City employees dated June 30, 2020. The memorandum stated that it was "being offered due to the economic impact of the Coronavirus (COVID-19)" and "to ensure economic stability during these tough economic times in order to minimize the forcible reduction in the labor force." Among other things, the VSIP offered a \$25,000.00 (maximum) Buyout to eligible employees upon retiring or separating from the City by October 31, 2020.
- The VSIP contains the following provision regarding health benefits available to those accepting a Buyout:

Health Benefits. Employees that have twenty-five (25) years or more of service with the City or have been enrolled in ERS [(Employees' Retirement System of the City of Newark)], PERS [(Public Employees' Retirement System)] or PFRS [(Police and Firemens' Retirement System)] pension systems for twenty-five (25) years or more are eligible for healthcare coverage through the State Health Benefits Program (SHBP).
- The VSIP includes a "Release" provision that requires employees, in exchange for accepting a Buyout, to "irrevocably and unconditionally waive, release and forever discharge" the City "from any and all known and unknown, actions, causes of action, claims or liabilities of any kind," arising out of their employment or separation from employment with the City, including, among other things, claims under the New Jersey Employer-Employee Relations Act, and claims under "any collective negotiations agreement" brought by or on behalf of employees.

- On July 1, 2020, Chrystal wrote to the City's Business Administrator, Eric Pennington, demanding to negotiate over the VSIP or Buyout as a new term and condition of employment and a mandatory topic of negotiations, and over any associated severable impact issues. The SOA's letter also stated that it was a violation of the Act for the City to deal directly with individual employees or groups rather than with the majority representative, and to unilaterally change terms and conditions of employment during an expired agreement. The SOA further demanded that the City rescind the Buyout program pending negotiations with the SOA.
- On July 1, 2020, the City's Deputy Administrator, Kecia Daniels, responded to Chrystal by letter, asserting the City's managerial rights to implement the VSIP "as a tool to reduce staff and offset the budget gap as a result of the Coronavirus pandemic," denying that the voluntary program was a term or condition of employment or mandatorily negotiable as it was being "offered City wide, to eligible employees, rather than a specific union member," and stating that the City would not rescind the program.
- Between August 1 and November 1, 2020, three SOA members accepted the VSIP Buyout, retired from the Newark Police Department, and were provided with retirement health benefits paid by the City. Each officer retired with 25 aggregate years in the PFRS, but less than 25 years of service with the City.

STANDARD OF REVIEW

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); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). 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.

In determining whether there exists a “genuine issue” of material fact that precludes summary judgment, we must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill, 142 N.J. at 540. We “must grant all the favorable inferences to the non-movant.” Id. at 536. No credibility determinations may be made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill, Judson, supra. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

ANALYSIS

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative 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.

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. See, e.g., Atlantic Cty., 230 N.J. 237, 252 (2017); 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, 337-338 (1989); and Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978).

We have further 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." City of Hackensack, P.E.R.C. No. 2018-54, 45 NJPER 18 (¶5 2018) (citing 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

Cty., 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., P.E.R.C. No. 85-24, 10 NJPER 545 (§15254 1984) (employer created incentive program through direct dealing with individual employees); Camden Cty., 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)).

Health benefits are mandatorily negotiable unless preempted by statute or regulation. State of New Jersey, P.E.R.C. No. 2000-12, 25 NJPER 402, 403 (§30174 1999); Bor. of Woodcliff Lake, P.E.R.C. No. 2004-24, 29 NJPER 489 (§153 2003); West Orange Bd. of Ed. and West Orange Ed. Ass'n, P.E.R.C. No. 92-114, 18 NJPER 272 (§23117 1992), aff'd NJPER Supp.2d 291 (§232 App. Div. 1993).

Likewise, health benefits for future retirees are mandatorily negotiable so long as the particular benefit at issue is not preempted by statute or regulation. Twp. of Piscataway, P.E.R.C. No. 2020-53, 46 NJPER 525 (§117 2020) (citing, Essex Cty. Sheriff, P.E.R.C. No. 2006-86, 32 NJPER 164 (§73 2006); Watchung Bor., P.E.R.C. No. 2000-93, 26 NJPER 276 (§31109 2000); Atlantic Cty., P.E.R.C. No. 95-66, 21 NJPER 127 (§26079 1995)).

Disputes over unilateral changes to health insurance benefits that current employees may receive upon retirement may be adjudicated under the Commission's unfair practice jurisdiction. Cumberland Cty Bd. of Soc. Svcs., D.U.P. No. 2018-10, 44 NJPER 433 (¶121 2018) (citing, New Jersey Turnpike Authority, P.E.R.C. No. 2006-13, 31 NJPER 284, 285 (¶111 2005)).

The SOA argues that the VSIP program, which expanded eligibility for retiree health benefits, created a monetary stipend or retirement bonus, and required a waiver of rights under the CNA and the Act, are mandatory subjects of negotiation. The City's refusal to negotiate with the SOA over these subjects was a per se violation of the Act, and an unfair practice, as was the City's decision to deal directly with individual employees regarding the VSIP program. The City unilaterally altered terms and conditions of employment when it implemented the VSIP program during negotiations for a successor agreement, causing the SOA irreparable harm through its chilling effect on rights guaranteed by the Act. As a remedy, the SOA seeks an order directing the City to cease and desist from dealing directly with its members, negotiate with the SOA over terms and conditions of employment, delete any illegal "waivers" of SOA members' rights as outlined in the VSIP, and provide current members with 25 aggregate years of service in the PFRS with City-paid retiree health benefits.

The City argues that the VSIP, is not mandatorily negotiable under the third prong of the negotiability test set forth in In re IFPTE, Local 195 v. State, 88 N.J. 393, 404-405 (1982)^{2/}, because doing so would significantly interfere with the determination of government policy, specifically its need to protect the health, safety and continued operation of the City during the economic hardships and uncertainty brought on by the COVID-19 pandemic. The City contends that the VSIP program does not intimately and directly affect the work and welfare of public employees, as it is geared towards those seeking voluntary retirement with the City, and decisions concerning reductions in a workforce for reasons of economy and efficiency are non-negotiable. The City further contends that the VSIP program falls within its discretion under the Managerial Rights and Maintenance of Standards clauses of the CNA.

^{2/} The Local 195 standard states:

[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.

The City argues that its implementation of the VSIP program did not interfere with employees' rights under the Act, and denies that it dealt directly with SOA unit members, because it was a voluntary program available to all eligible City employees, with no specified union membership or exclusions. The VSIP was narrowly tailored to address government policy during the height of the pandemic, and was a direct result of the City's attempt to address a looming financial deficit by reduction in work force due to economy and efficiency. The employees who accepted the terms of the VSIP had a right to do so, and the City did not interfere with their right to confer with the SOA before doing so. The VSIP's terms were not unreasonable, and the City has no obligation to rescind their resignations. Finally, the City argues that the SOA's requested remedy (the grant of paid retiree health benefits to all eligible unit members with 25 aggregate years in the PFRS, and the "deletion" of illegal waivers) is inequitable.

Here, the fact that the City implemented the VSIP/Buyout program without negotiating with the SOA, and while the parties were in negotiations for a successor contract, is not in dispute. Nor is there any dispute that the City then refused the SOA's demand to negotiate over the program, and refused its request to rescind it pending such negotiations. It is also clear that the City unilaterally expanded eligibility for paid retiree health

benefits to SOA members who accepted a Buyout under the VSIP, to a degree not available under the parties' CNA. That is, the VSIP provides such benefits both to those with at least 25 years of City service and to those with 25 or more aggregate years in various pension systems; whereas under the CNA paid retiree health benefits are available only to those with at least 25 years of continuous City service. There is also no dispute that the VSIP agreement was presented directly to all City employees, including SOA members, and required those signing it to waive their rights under the CNA and the Act. The City does not argue that negotiations are preempted by statute or regulation.

Under these circumstances, we grant the SOA's motion for summary judgment. We find: 1) there are no genuine issues of material fact; 2) the SOA is entitled to relief as a matter of law on its allegations that the City violated sections 5.4a(1) and (5) of the Act when, during negotiations for a successor agreement, it unilaterally implemented the VSIP program; 3) the VSIP program changed mandatorily negotiable terms and conditions of employment; and 4) the City dealt directly with individual SOA unit members rather than with their exclusive majority representative regarding the VSIP program.

We find the City's economic, operational and policy justifications for not negotiating with the SOA over these issues to be unpersuasive. While the City has a prerogative to reduce

its workforce for economic reasons, and it appears the City sought and obtained CSC approval to do so here, the employees who resigned under the VSIP program, which is the subject of this dispute, were not laid off. And, although it contends it had a need to protect the health, safety and continued operation of the City during the COVID-19 pandemic, the City offers no specific facts explaining how its unilateral implementation of the VSIP program was necessary to achieve those ends, or how negotiation with the SOA would have frustrated those objectives.^{3/}

Nevertheless, we find that under the circumstances here a sufficient remedy need not include rescission of the resignations of the three SOA members who, the record indicates, retired under the VSIP program, or of the City-paid retiree health benefits they received under that plan. It would unduly punish those individuals for the City's unfair practice, as it was the City's duty to negotiate with the SOA over the VSIP. Edison Bd. of Ed., P.E.R.C. No. 2020-26, 46 NJPER 238 (¶56 2019), citing, Camden County, P.E.R.C. No. 94-121, 20 NJPER 282, 284 (¶25143 1994).

^{3/} We have held that while public employers may require employees to take leaves of absence to mitigate COVID-19 workplace safety issues, issues of compensation and reimbursement of sick leave for such an absence are mandatorily negotiable. See City of East Orange, P.E.R.C. No. 2022-15, 48 NJPER 213 (¶47 2021) (citing, Millburn Tp., P.E.R.C. No. 2021-30, 47 NJPER 373 (¶87 2021) (reimbursement of sick leave for COVID-19 quarantine period is negotiable); Edison Tp., P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021) (issue of compensation during absence due to COVID-19 travel quarantine policy is negotiable)).

Nor do we order the "deletion" of the waivers under the VSIP plan. That issue is essentially moot, as the three members who signed the waivers are no longer employed by the City or in the negotiations unit, and we are ordering the City to negotiate in good faith with the SOA with respect to all current members, going forward.

Finally, we find that it is a sufficient remedy to order the City to cease and desist from directly dealing with SOA unit members, and to negotiate in good faith with the SOA over mandatorily negotiable subjects, including the issue of unit member retiree health benefits.^{4/}

^{4/} We add that although the SOA does not seek such relief, we also do not order the City to negotiate with the SOA over the issue of the retirement incentive Bonus payment. In Fair Lawn Education Asso. v. Fair Lawn Board of Education, 79 N.J. 574 , 581 (1979), the New Jersey Supreme Court held that contractual early-retirement incentive plan payments, "being unrelated to service, do not constitute 'compensation' or 'customary fringe benefits' with respect to which negotiation is permissible," therefore the contract provision was ultra vires and unenforceable. The court also found the payments tended to "undermine the actuarial assumptions upon which the pension scheme was based." Id., 583. In Bor. of Butler, P.E.R.C. No. 2000-69, 26 NJPER 119 (¶31051 2000), we held that a union's contract proposal "to provide a flat payment of 20% of salary upon the retirement of an employee who has worked 25 years" was not mandatorily negotiable, because "in essence, [it was] a retirement benefit that contravenes Fair Lawn by supplementing State-established pension benefits . . . [and it] does not share the characteristics of negotiable benefits such as longevity pay, terminal leave, or payment for accumulated sick leave." Thus, according to Fair Lawn and Butler, that subject is not mandatorily negotiable, and any agreement on that subject would be ultra vires and unenforceable.

ORDER

The City of Newark is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by dealing directly with Newark Police Superior Officers' Association unit members.

B. Take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Negotiate in good faith with the Newark Police Superior Officers' Association over mandatorily negotiable subjects, including the issue of unit member retiree health benefits.

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

BY ORDER OF THE COMMISSION

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

ISSUED: February 24, 2022

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 this Act, particularly by dealing directly with Newark Police Superior Officers' Association unit members.

WE WILL negotiate in good faith with the Newark Police Superior Officers' Association over mandatorily negotiable subjects, including the issue of unit member retiree health benefits.

Docket No. CO-2021-095

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"