

H.E. NO. 2023-4

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2021-269

AFSCME COUNCIL 63,
LOCAL 3724,

Charging Party.

SYNOPSIS

A Hearing Examiner grants AFSCME Council 63, Local 3724's (AFSCME) motion for summary judgment and denies the City of Paterson's (City) cross-motion for summary judgment. The charge alleges that the City violated subsections 5.4a(1), (5), and (7) of the Act by negotiating salary and other terms and conditions of employment directly with AFSCME unit members Maria Beltre (Beltre), Yezenia Green (Green), Alicia Cooper (Cooper), Aracelo Rosario (Rosario), and Tangy Thorpe (Thorpe). The Hearing Examiner found that the City violated subsection 5.4a(5), and derivatively 5.4a(1), of the Act when its Tax Collector and Finance Director negotiated directly with Beltre during the period March-June 2021 and reach a verbal agreement about a title change, retroactive compensation, and a salary increase; when it unilaterally implemented a title change/salary increase for Green in excess of the parties' contractually-agreed amount in/about November 2021; and when its Program Manager for School-Based Youth Services Program directly contacted Thorpe in May-June 2021 regarding terms and conditions of employment including a title change, salary increase, change from part-time to full-time status, and change from "just-cause" to "at-will" employment. The charge was withdrawn with respect to Cooper and Rosario only.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the 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.

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Appearances:

For the Respondent,
O'Toole Scrivo, LLC, attorneys
(Marlin G. Townes, III, of counsel)

For the Charging Party,
AFSCME New Jersey Council 63, Local 3724
(Seth Gollin, Staff Attorney)

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT &
CROSS-MOTION FOR SUMMARY JUDGMENT

On June 24, 2021, AFSCME Council 63, Local 3724 (AFSCME) filed an unfair practice charge against the City of Paterson (City). The charge alleges that the City violated subsections 5.4a(1), (5), and (7)^{1/} of the New Jersey Employer-Employee

^{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
(continued...)

Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by negotiating salary and other terms and conditions of employment directly with AFSCME unit members Maria Beltre (Beltre), Yezenia Green (Green), Alicia Cooper (Cooper), Aracelo^{2/} Rosario (Rosario), and Tangy Thorpe (Thorpe).

On January 6, 2022, the Director of Unfair Practices (Director) issued a Complaint and Notice of Pre-Hearing with respect to AFSCME's 5.4a(1) and (5) allegations; declined to issue a Complaint with respect to AFSCME's 5.4a(7) allegations; and assigned the matter to me as Hearing Examiner. On January 18, 2022, the City filed an Answer (in the form of a position statement) denying that it violated the Act and asserted the following:

To set this plan in motion, the City sought to promote Maria Beltre ("Beltre") and Yezenia Green ("Green") to the position of Cashier. Beltre and Green were ideal candidates for this promotion. Each was an existing employee with years of experience and both knowledgeable of the inner workings of the Department. However, the salary was not discussed with either employee.

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- 1/ (...continued)
refusing to process grievances presented by the majority representative"; and "(7) Violating any of the rules and regulations established by the commission."
- 2/ "Aracelis" Rosario appears to be inaccurately pled as "Aracelo" in AFSCME's charge. Compare AFSCME's charge with Hughes Supplemental Certification, ¶4, Ex. C and Pabon Certification, ¶5. Accordingly, I will refer to said individual as "Aracelis" Rosario throughout the balance of this decision.

While the Tax Department sought to hire new talent, the City's Director of Finance, Javier Silva ("Silva"), faced a similar staff shortage within his Department. With the intent to improve the quality of services, Silva approached Alicia Cooper ("Cooper"), and Aracelis Rosario ("Rosario"), two experienced employees, and inform them of promotional opportunities within the Department. Like Beltre's and Green's situations, Cooper and Rosario were good fits for the positions. But unlike Beltre and Green, however, Cooper and Rosario were each informed of the salaries for their respective positions. Then, on or about June 1, 2021, the City extended a qualifying-offer letter to Tangy Thorpe ("Thorpe") for a position as the full-time coordinator for the City's School-Based Youth Services Program (the "Program"). The state-funded program required the City to hire a qualified professional to provide counseling and support to local high-school students. Thorpe's qualifications exceeded the requirements outlined for the position. Thorpe was highly educated, lived in the City, and already worked for the Program as a part-time employee. Further, Thorpe was aware of the salary of the position because the City included the amount in her qualifying letter.

[City's Answer.]

On July 22, 2022, AFSCME filed a motion for summary judgment, together with a brief, exhibits, and the certification of its President, Hazel D. Hughes (Hughes). On August 8, 2022, the City filed opposition to AFSCME's motion for summary judgment and a cross-motion for summary judgment, together with a brief, exhibits, and the certification of its Assistant Business Administrator (Ass't BA), Jennifer Hirschmanner (Hirschmanner). On August 19, 2022, AFSCME filed a reply brief. On August 29,

2022, the City filed a sur-reply brief, exhibits, and the supplemental certification of Ass't BA Hirschmanner.

On August 19, 2022, the Commission referred AFSCME's motion for summary judgment and the City's cross-motion for summary judgment to me for a decision. See N.J.A.C. 19:14-4.8(a). On August 30, 2022, counsel engaged in oral argument during a telephone conference call. At the conclusion of oral argument, I asked counsel to meet/confer with the parties regarding further mediation efforts. After unsuccessful settlement conferences on September 27, 2022 and December 6, 2022, and the unsuccessful exchange of draft settlement agreements thereafter, it became clear that it was necessary to render a decision with respect to the instant cross-motions.

On December 27, 2022, I directed counsel to file supplemental certifications regarding the five AFSCME unit members named in the charge. On January 6, 2023, AFSCME filed the supplemental certification of its President, Hazel Hughes. Also on January 6, 2023, the City filed the certification of its Director of Personnel, Stephanie Pabon (Pabon). On January 12, 2023, the City also filed the certification of its attorney, Marlin G. Townes, III (Townes).

Accordingly, I have reviewed the parties' submissions. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. I take administrative notice^{3/} that in City of Paterson & AFSCME Council 52, Local 3724, H.E. No. 2018-8, 44 NJPER 362 (¶102 2018) (final agency decision), the same parties litigated a nearly identical direct dealing claim (albeit pertaining to different employees); and the hearing examiner determined that the "City violated subsection 5.4a(5) of the Act by directly dealing with individual employees represented by AFSCME concerning compensation tied to promotion and/or additional duties"
2. I take administrative notice that the City of Paterson (City) is a Civil Service jurisdiction^{4/} that the State of New Jersey (State) has determined to be a "transitional aid" municipality - i.e., eligible to receive State aid (since approximately fiscal year 2014) to balance its budget^{5/}.
See also Townes Certification, ¶¶4-7.
3. I take administrative notice that in order for the City to receive transitional aid, the State requires the City's

3/ See N.J.A.C. 19:14-6.6(a) ("[n]otice may be taken of administratively noticeable facts").

4/ See <https://www.state.nj.us/csc/about/divisions/slo/jurisdictions.html>

5/ See H.E. No. 2018-8; see also https://www.nj.gov/dca/divisions/dlgs/resources/muni_stateaid_2022trans_aid.html

governing body (i.e., City Council) to pass a resolution acknowledging a Memorandum of Understanding (MOU) with the State and, thereafter, for appropriate City officials to execute same.^{6/} See also N.J.S.A. 52:27D-118.42a^{7/}; Townes Certification, ¶¶4-7, Ex. 2.

4. On July 21, 2021, City Council passed Resolution No. 21:398 "acknowledging the content and effects of the MOU between the State and the City for Transitional Aid in TY 2020 and

6/ See H.E. No. 2018-8; see also <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/28636/f4912011f.pdf?sequence=1&isAllowed=y>

7/ N.J.S.A. 52:27D-118.42a, entitled "State oversight of municipalities in the Transitional Aid to Localities program," provides in pertinent part:

a. The Director of the Division of Local Government Services in the Department of Community Affairs shall determine conditions, requirements, orders, and oversight for the receipt of any amount of grants, loans, or any combination thereof, provided to any municipality through the Transitional Aid to Localities program or any successor discretionary aid programs for municipalities in fiscal distress. Conditions, requirements, or orders deemed necessary by the director may include, but not be limited to, the implementation of government, administrative, and operational efficiency and oversight measures necessary for the fiscal recovery of the municipality, including but not limited to requiring approval by the director of personnel actions, professional services and related contracts, payment in lieu of tax agreements, acceptance of grants from State, federal or other organizations, and the creation of new or expanded public services.

CY 2021 including any applicable supplements"; and on July 22, 2021, appropriate City officials and the Director of the Division of Government Services (DLGS) executed an MOU for Transition Year (TY) 2020/Calendar Year (CY) 2021.^{8/} See Townes Certification, ¶¶4-7, Ex. 2.

- 5. The City's TY2020/CY2021 MOU with the State provides in pertinent part:

Transitional Aid Program Mission Statement

The Division allocates its limited discretionary funds to ameliorate structural municipal budget shortfalls, ensuring that recipient municipalities can adopt a balanced budget during periods of distress. In addition to providing supplemental state aid to municipalities with documented need, the Division establishes a partnership with each recipient municipality, providing technical assistance and fiscal oversight that empowers the recipient municipality to achieve fiscal stability through operational reform, adoption of best practices, and sound financial planning.

* * *

RECITALS

* * *

WHEREAS, provided the Legislature has appropriated, and the Governor has approved; sufficient Transitional Aid funding, an

^{8/} See https://www.nj.gov/dca/divisions/dlgs/resources/muni_st_docs/2022_data/2022_tran_aid/CY2021_Paterson_TA_Application.pdf; see also https://www.patersonnj.gov/egov/documents/1626470942_1005.pdf; see also <https://www.youtube.com/watch?v=rpiXlBb-bKw>; see also <https://www.northjersey.com/story/news/paterson-press/2021/08/17/paterson-nj-state-aid-4-7-million/8165813002/>

amount not to exceed 75% of the applicant's total Transitional Aid award shall be disbursed upon execution of the Memorandum. The balance of Transitional Aid shall be disbursed on a timetable consistent with approval by the Director, provided the Municipality is in substantial compliance with this Memorandum and all laws, regulations, Local Finance Notices, and any government, administrative and operational efficiency and oversight measures necessary for the fiscal recovery of the Municipality as the Director may order from time to time pursuant to the State Budget or any other law. Other than purposeful withholding of funds due to non-compliance with this Memorandum, all moneys will be transferred by year end. The Municipality may be deemed not to be in substantial compliance if it has hired personnel without appropriate approvals or otherwise knowingly violates any provision of the Memorandum. Additionally, the Municipality may be deemed not to be in substantial compliance if the Municipality or its officials have failed to attend meetings or produce documents as directed by DLGS. DLGS may, at its sole discretion, withhold funds from the final payments where the Municipality is in substantial compliance, but has otherwise violated certain terms of the Memorandum. For example, in addition to any other sanctions, DLGS may withhold aid in an amount equal to no less than the amount of funds expended in support of hires or activities not approved in strict compliance with the terms and timeframes set forth in this Memorandum.

* * *

F. Restrictions on Hiring and Assignment of Individuals in Acting Capacities

* * *

3. Hiring All Employees Other than Employees Requiring Governing Body Advice and Consent or Senior Level and Confidential Employees.

A "Request to Hire Employee Waiver Form" (Attachment C) shall be completed and submitted to the Director prior to the Municipality filling any position not covered

by either of the two processes described in the preceding paragraphs, unless the Municipality has submitted to the Division, and received Director approval of, a Table of Organization and salary ranges for all municipal positions within this employee category contained therein. A Municipality that has received Director approval of a Table of Organization and salary ranges may hire candidates for the approved positions and ranges without individual waivers, except those positions described in provisions one and two above. Tables of Organization and ranges may be submitted for individual departments. The Municipality must certify that the appropriate background checks were completed for any hires within this category and that the municipality remains in compliance with State and federal labor laws. Waivers are required for any hiring or salary adjustments outside approved Tables of Organization and ranges. All waivers approved by the Municipal Technical Advisor for the hiring of personnel expire 6 months after the date of approval if the position has not been filled. The Municipality must resubmit new waiver requests for each expired waiver.

* * *

H. Restrictions on Longevity Pay, Overtime, Salary Increases, Promotions and Transfers

* * *

6. Promotions, Transfers, and Title Changes:

Absent approval by DLGS, the Municipality shall not approve any promotions, transfers, and/or title changes including but not limited to "backfilling" unless contractually obligated to do so.

* * *

R. Individual and Collective Negotiation Agreements

1. Limitations on Annual Increases: The Municipality acknowledges that the State will not provide Transitional Aid in cases where the Municipality allows or approves compensation increases that are not sustainable. The Municipality understands that if it approves any individual employment

contract or any collective negotiation agreement that increases annual compensation for the employee or group of employees by more than 2% annually, on average during the term of the agreement, the Municipality may become ineligible for future aid. For purposes of calculating the 2% annual increase referenced above, the Municipality shall provide an analysis guided by decisions of the New Jersey Public Employment Relations Commission (see Borough of New Milford, PERC No. 2012-53 and City of Atlantic City, PERC No. 2013-82). Prior to final approval of the Collective Negotiations Agreement (CNA) or of any Memorandum of Understanding/Agreement (MOU/A) setting forth the negotiated terms of settlement, the Municipality shall provide to the State, for its review, the following:

A. Establishment of base salary costs upon which the total annual and aggregate costs shall be calculated:

1. A list of all bargaining unit members, their base salary step in the last year of the expired agreement and their anniversary date of hire;
2. Cost of increments and the specific date on which they are paid;
3. Cost of longevity and the calculation by which it was derived;
4. The total cost of all base salary items for the last year of the expired agreement. For unit members retiring in the last year of the expired agreement, base salary shall be prorated to that actually paid to the unit member; and
5. The sum total of all costs identified above.

B. Establishment of the total

contract cost over the proposed contract period, to include a scattergram of each employee listed in the base year (last year of the expiring agreement - see above) moving each employee through the salary guide proposed for the proposed term of the agreement (the potential future retirement of unit members shall not be considered as part of this analysis). The scattergram shall include the annual dollar and percentage increases for each year of the contract along with the total aggregate dollar and percentage increase compared to the base year. A hard copy and an electronic copy (in MS Excel format) are required.

C. Analysis of the cost of any proposed changes to health benefits including the methodology by which the costs were calculated including any assumptions.

D. Requirement for an analysis of the cost of any other non-salary financial impacts proposed including the methodology and assumptions used in the calculation.

E. Maintain no less than current chapter 78 employee health benefits premium contributions.

2. DLGS Presence During Negotiations

Sessions: The Municipality agrees to include the State Fiscal Oversight Officer or designee in collective bargaining negotiations/mediation/arbitration, to include providing copies of draft agreements and authorizing them to participate as an observer who may offer comments or recommendations to the negotiation team in closed session.

3. DLGS Prior Approval of all Agreements: The Municipality shall provide a copy of any proposed employment contract, collective

bargaining agreement, or settlement agreement to the Division for review at least ten days prior to ratification. A "Contract Request Form" (Attachment D) shall be submitted to and approved by the Director prior to the Municipality authorizing execution of the Collective Negotiations Agreement.

* * *

V. Good Faith Exceptions

The Municipality may apply in writing to the Director for a good cause exception of any condition or requirement contained in this Memorandum. The Director may also issue *sua sponte* exceptions from any condition or requirement contained in this Memorandum for good cause shown, as determined within her exclusive discretion.

[Townes Certification, Ex. 2.]

6. AFSCME Council 63, Local 3724 (AFSCME) represents all white collar employees, all clerical and white collar employees employed by the municipal court, and all civilian employees employed by the Public Safety Department of the City of Paterson (City), excluding all other employees, managerial executives, uniformed police, fire fighters, confidential employees, all employees represented in other bargaining units, and supervisors within the meaning of the Act. See 2014-2019 CNA, Art. I, Section A (Townes Certification, ¶3, Ex. 1).
7. The City and AFSCME are parties to an expired collective negotiations agreement (CNA) in effect from July 1, 2014 through June 30, 2019. See 2014-2019 CNA, Art. XXVI (Townes Certification, ¶3, Ex. 1). The parties are in negotiations

for a successor agreement.

8. Article V, entitled "Discharge and Discipline", of the parties' 2014-2019 expired CNA provides in pertinent part:

A. The City shall not discharge an employee nor discipline such employee involving a monetary loss through suspension or fine up to and including five (5) days only without just cause.

[Townes Certification, Ex. 1.]

9. Article XI, entitled "Hours of Work", of the parties' 2014-2019 expired CNA provides in pertinent part:

A. Work Day

The regular work day shall consist of eight (8) consecutive hours within a twenty-four (24) hour period, inclusive of meal periods.

B. Work Week

1. The regular work week shall be Monday through Friday.

* * *

C. Work Schedules

Work schedules showing each employee's hours and workweek and whether employed on a full or part time basis shall be made available to the union upon request. Except in cases of emergency, employee(s) and the Union will be notified not less than one (1) week in advance of any change in work schedule or hours. In cases of emergency, the Union will be notified of the change within the pay period following the implementation of the new work schedule of hours.

[Townes Certification, Ex. 1.]

10. Article XIX, entitled "Salaries and Wages", of the parties' 2014-2019 expired CNA provides in pertinent part:

E. Out of Title Pay

Effective upon the signing of this Agreement,

employees designated by their supervisor and verified by their Department Head to perform duties in a higher title will be compensated as follows: For the first five (5) consecutive working days in the higher title, there will be no additional compensation. From the 6th working day to the 20th consecutive working day, the employee will be compensated \$1,500 (pro rated), or 20% of the difference in wage rates between the two positions (pro-rated), whichever is greater, in addition to his/her regular pay. Beginning with the 21st consecutive working day in the higher title, the employee will be compensated at the rate of pay of the higher title.^{9/}

F. Promotion Rate-of-Pay

Upon promotion of an employee, an increase of \$1,500.00 will be given.

G. New Hire Rate

The starting salary for this bargaining unit shall be as referenced in Section A.

* * *

J. The parties agree that during the term of this Agreement they shall meet to discuss options for alternative salary structures (i.e. salary ranges, etc.). These meeting[s] shall not constitute negotiations nor shall they bind either party to implementing any type of salary structure.

K. The parties agree to meet at least three (3) times before March 31, 2019 to discuss the possible development of a salary and title structure.

[Townes Certification, Ex. 1.]

- 11. The parties' 2014-2019 expired CNA does not include a salary guide or salary ranges. See Townes Certification, Ex. 1.

^{9/} See also Hughes Certification, Ex. F (the parties' November 30, 2017 Memorandum of Agreement adds paragraphs to Article XIX, Section E after the existing language).

12. As of March 1, 2021, City employee/AFSCME unit member Maria Beltre (Beltre) had a base salary of \$37,090.00 working in the title of Principal Cashier. See Hughes Supplemental Certification, ¶2; accord Pabon Certification, ¶2. Since March 1, 2021 and up to the present, Beltre has remained employed by the City with the same base salary and title. See Hughes Supplemental Certification, ¶2; accord Pabon Certification, ¶2. However, since June 24, 2021 and up to the present, Beltre has been working out-of-title as a Supervising Cashier and receiving out-of-title pay pursuant to the parties' CNA. See Hughes Supplemental Certification, ¶2. It is undisputed that the titles Principal Cashier and Supervising Cashier are within AFSCME's unit.
13. As of March 1, 2021, City employee/AFSCME unit member Yezenia Green (Green) had a base salary of \$30,090.00 working in the title of Keyboarding Clerk 1. See Hughes Supplemental Certification, ¶5; accord Pabon Certification, ¶3. In or about November 2021, Green's base salary had been increased by approximately \$10,000.00 to \$40,000.00 working in the title Clerk 2. See Hughes Supplemental Certification, ¶5; accord Pabon Certification, ¶3. Since November 2021 and up to the present, Green has remained employed by the City with the same base salary and title. See Hughes Supplemental Certification, ¶5; accord Pabon

Certification, ¶3. It is undisputed that the titles Keyboarding Clerk 1 and Clerk 2 are within AFSCME's unit.

14. As of March 1, 2021, City employee/AFSCME unit member Alicia Cooper (Cooper) had a base salary of \$30,000.00 working in the title of Customer Service Representative. See Hughes Supplemental Certification, ¶3; accord Pabon Certification, ¶4. Since March 1, 2021 and up to the present, Cooper has remained employed by the City with the same base salary and title. See Hughes Supplemental Certification, ¶3; accord Pabon Certification, ¶4.
15. As of March 1, 2021, City employee/AFSCME unit member Aracelis Rosario (Rosario) had a base salary of \$30,000.00 working in the title of Keyboarding Clerk 1. See Hughes Supplemental Certification, ¶4; accord Pabon Certification, ¶5. Since March 1, 2021 and up to the present, Rosario has remained employed by the City with the same base salary and title. See Hughes Supplemental Certification, ¶4; accord Pabon Certification, ¶5.
16. As of March 1, 2021, City employee/AFSCME unit member Tangy Thorpe (Thorpe) had a base salary of \$16,078.36 working in the title of part-time Account Clerk. See Hughes Supplemental Certification, ¶6; accord Pabon Certification, ¶6. Effective June 30, 2022, Thorpe's employment with the City was terminated. See Hughes Supplemental Certification,

¶6; accord Pabon Certification, ¶6. It is undisputed that the titles Account Clerk (part-time), Account Clerk (full-time), and Clerk 2 are within AFSCME's unit.^{10/}

17. On March 15, 2021, AFSCME's counsel Seth Gollin (Gollin) sent an email to the City's Assistant Business Administrator (Ass't BA) Jennifer Hirschmanner (Hirschmanner), copying (among others) AFSCME President Hazel Hughes (Hughes), that provides:

The Union learned that Finance Director Javier Silva has recently offered salary increases directly to employees in the AFSCME Local 3724 bargaining unit without negotiations with the Union and, possibly without approval of the B.A.'s office, specifically \$3,000 for cashier duties to Ara Aracelis (Keyboard Clerk 1 Bilingual) and Alicia Cooper (Customer Service Representative). We recognize that Mr. Silva is new in the Director position, but want to make sure that he is aware . . . that directly negotiating with bargaining unit members is prohibited under the Act and of the administration's memorandum that was distributed to department directors concerning the proper procedures in this regard. Please let me know if you have nay questions or wish to discuss this further.

[Hughes Certification, ¶2, Ex. A.]

18. Also on March 15, 2021, Ass't BA Hirschmanner sent an email to AFSCME President Hughes that provides:

Hazel, here is the email I sent to Director Silva. I also had a formal conversation as well.

^{10/} See infra ¶¶19-22; see also Hughes Certification, ¶8, Ex. H.

[Hughes Certification, ¶2, Ex. A.]

19. On June 2, 2021, AFSCME unit member Tangy Thorpe (Thorpe) received an email from the City's Program Manager for School-Based Youth Services Program, William Smallwood (Smallwood), that provides:

Please see attached^{11/} City of Paterson Memorandum requiring your signature for a Temporary position for the City of Paterson. The salary is \$35,000.00 and you will be required to work 35 hours a week. Your signature is required to complete the process of hiring you for this position. Any questions please don't hesitate to contact me.

[Hughes Certification, ¶8, Ex. H.]

20. On June 4, 2021, Thorpe forwarded Smallwood's June 2nd email to AFSCME President Hughes and wrote the following in the body of her email:

I am forwarding you the letter from our conversation this morning about the change in title and change to full time. Currently, my title is Account Clerk part-time. It was initially suggested that it be kept the same and just changed to full time, by Lydia. My duties will stay the same, but also include

11/ The attachment is a letter dated June 1, 2021 from Oshin Castilo, the City's Director of the Department of Health & Human Services, to Thorpe that provides in pertinent part:

This employment is an at-will employment that may be terminated without cause and without advance notice. Your salary will be \$35,000.00 and will work a 35 hour week to be compensated every two weeks.

[Hughes Certification, Ex. ¶8, Ex. H.]

some of the duties of the former Youth Aide. Now the title is to be changed to Clerk 2. My problem is the salary. There is a Clerk 2 position posted now at \$40,000 with 1 year experience. They want to pay me \$35,000 and I have 6 years experience with the City in the Account Clerk position, 1 year as a revenue collections clerk for the City and several years of accounting and clerical experience at other places. I also have a BS degree in Finance. I believe the salary should be in the higher range. It was suggested by Lydia in an earlier meeting that it should be at least \$42,900. I was supposed to have signed this by yesterday, but I didn't get a response from a question that was supposed to be answered by the director, Castillo. Please advise.

[Hughes Certification, ¶8, Ex. H.]

21. On June 10, 2021, AFSCME President Hughes forwarded Thorpe's June 4th email to (among others) Ass't BA Hirschmanner and wrote the following in the body of her email:

The Union needs to know, why is Direct Dealing still going on?

[Hughes Certification, ¶8, Ex. H.]

22. AFSCME President Hughes certifies that "[t]o the exclusion of [her] and any other union representative, the City negotiated with Thorpe about prospectively moving from a part-time position within the bargaining unit to a full-time position within the bargaining unit along with a title change and a salary increase"; "[t]he City prepared and sent Thorpe and requested [Thorpe] to sign an agreement dated June 1, 2021 indicating that she would be an 'at-will'

employee and [that] she 'may be terminated without cause and without advance notice'"; and "[t]he City gave Thorpe until June 3, 2021 to sign the agreement for the prospective position." See Hughes Certification, ¶8, Ex. H.

23. Ass't BA Hirschmanner certifies that "[t]he City contracts with the New Jersey Department of Children and Families (NJDCF) to implement and operate the New Jersey School Based Youth Services Program (NJSBYSP)" and "NJSBYSP provides an operational manual as a guideline for the City to manage human resources services and the distribution of finances affecting the program." See Hirschmanner Supplemental Certification, ¶¶5-6, Ex. C. Hirschmanner also certifies that "Thorpe's . . . position [was] paid through a federal[ly]-funded program issued through NJDCF" and that "[t]he State or federal government determine[d] the salary for Thorpe's position, not the City." See Hirschmanner Certification, ¶¶12-13, Exhs. G-H.

24. On June 24, 2021, AFSCME filed the underlying unfair practice charge. See AFSCME's Charge.

25. On July 8, 2021, AFSCME filed with the City a grievance on behalf of Beltre that included a written statement from Beltre dated June 30, 2021; the written statement provides in pertinent part:

I want to file a grievance because what was agreed upon for my new position as head

cashier/supervisor was not what was submitted to personnel. The verbal agreement that I made with the tax collector and the finance director was that I would start my new duties as of March 1, 2021 and that I would get retro pay for it because the person doing the job was going to be on medical leave for several months. Thereafter, once she retired on June 1, 2021 I would get her current salary. Also initially when I was offered the position and accepted it the tax collector told me that the position was due for a salary increase; so the tax collector asked me to give her a number of my desired salary. Then a few weeks into me performing my new duties she told me that the salary would stay the same as the current person doing the job. I've been an employee of the City of Paterson since 2004 and I have never complained about anything. Day in and day out I come to work with a smile and go above and beyond to perform my duties. So that's why at this time I am writing this complaint because I don't think it is fair for me to get a lower salary then the current salary of the person that was previously doing the job.

[Hughes Certification, ¶6, Ex. F; accord
Hirschmanner Certification, Ex. M.]

26. On November 18, 2021, Ass't BA Hirschmanner sent an email to AFSCME President Hughes that provides:

Please be advised that the following employee is pending a title change and salary increase:

-Maria Beltre (Finance): The City wishes to change Ms. Beltre's title to Supervising Cashier with a salary increase to \$40,000. DCA approved the position via waiver #PAT21-107 (TBD). The position was posted on the City website, to which Ms. Beltre applied.

Please advise if you require any additional information.

[Hughes Certification, ¶3, Exhs. B-E; accord
Hirschmanner Certification, Ex. K.]

27. Also on November 22, 2021, AFSCME President Hughes sent an email to (among others) Ass't BA Hirschmanner that provides:

The Union will not be approving the paperwork provided shows additional instances of the City not negotiating salaries with the Union before requesting approval from DCA and that these instances will be part of the pending Unfair practice charge.

[Hughes Certification, ¶3, Exhs. B-E; accord
Hirschmanner Certification, Ex. K.]

28. AFSCME President Hughes certifies that "[p]rior to the City preparing [certain] documents (City's 3.80 Personnel Requisition Forms, Job Posting, and Attachment C form submitted to DCA), the City did not negotiate with [her] or any other representative of the Union the salary increase for Beltre that was submitted to and approved by the New Jersey Department of Community Affairs (DCA)." See Hughes Certification, ¶5, Exhs. C-E.

29. Also on November 18, 2021, Ass't BA Hirschmanner sent an email to AFSCME President Hughes that provides:

Please be advised that the following employee is pending a title change and salary increase:

-Yezenia Green (Finance): The City wishes to change Ms. Green's title to Clerk 2 with a salary increase to \$40,000. DCA approved the position via waiver #PAT21-105 (TBD). The position was posted on the City website, to which Ms. Green applied.

Please advise if you require any additional information.

[Hughes Certification, ¶7, Ex. G; accord Hirschmanner Certification, Ex. L.]

30. Also on November 22, 2021, AFSCME President Hughes sent an email to (among others) Ass't BA Hirschmanner that provides:

The Union will not be approving the paperwork provided shows additional instances of the City not negotiating salaries with the Union before requesting approval from DCA and that these instances will be part of the pending Unfair practice charge.

[Hughes Certification, ¶7, Ex. G; accord Hirschmanner Certification, Ex. L.]

31. AFSCME President Hughes certifies that "[p]rior to the City preparing the Attachment C form submitted to and approved by DCA, the City did not negotiate with [her] or any other representative of the Union the salary increase for [Yezenia] Green (Green)." See Hughes Certification, ¶7, Ex. G.

32. On January 19, 2023, AFSCME withdrew its charge with respect to Cooper and Rosario only.

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); see also, Judson v. Peoples Bank & Trust Co., 17

N.J. 67, 73-75 (1954).^{12/} 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 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).

While a party is not required to file an affidavit or certification in support of summary judgment, where a “party opposing the motion [for summary judgment] does not submit any affidavits or documentation contradicting the moving party’s

^{12/} 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.

affidavits and documents, then the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant's pleadings." State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) (citing CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) ("[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding"). As the New Jersey Supreme Court explained in Judson:

[I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature . . . he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

[17 N.J. at 7.]

ANALYSIS

I. Exclusivity & Direct Dealing

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.

[55 N.J. at 426.]

N.J.S.A. 34:13A-5.3 establishes 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.

[N.J.S.A. 34:13A-5.3 (emphasis added).]

N.J.S.A. 34:13A-5.3 (emphasis added) also 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, New Jersey courts and the Commission 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); 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 terms may constitute an unfair practice in violation of subsections 5.4a(1) and (5) of the Act. See, e.g., In re Atlantic Cty., 230 N.J. 237 (2017); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989). 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).

The Commission has consistently held that "[b]ecause compensation is mandatorily negotiable, a public employer cannot unilaterally set or change salaries." Camden Cty., P.E.R.C. No. 94-121, 20 NJPER 282, 283 (¶25143 1994) (citing N.J.S.A. 34:13A-5.3; Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973)).

The Commission has also consistently 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); Camden Cty., H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) (final agency decision) (employer dealt directly with employees about merit pay program); Matawan Aberdeen Reg. School Dist. Bd. of Ed., H.E. 89-41, 15 NJPER 356 (¶20159 1989), adopted P.E.R.C. 89-130, 15 NJPER 411 (¶20168 1989) (employer engaged in direct dealing by negotiating with individual employees and entering into agreements affecting their terms and conditions of employment despite knowing that the union president was the union’s officially designated representative); 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); 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)).

In J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), the U.S. Supreme Court remarked upon the specter of individual agreements in the context of a collective bargaining agreement:

. . . [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are 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. Such discriminations not infrequently amount to unfair labor practices. . . . Individual contracts cannot subtract from collective ones

[321 U.S. at 338-339 (emphasis added).]

See also Mount Holly Tp. Bd. of Ed. v. Mount Holly Tp. Ed. Ass'n, 199 N.J. 319, 327-329 (2009) ("[r]epresentatives are charged with protecting and advancing the interests of the majority in collective negotiations . . . [while] [i]ndividual employees retain no separate negotiating rights"; "[b]anding together in a union . . . provided 'strength and a means of achieving an equitable balance of bargaining power with employers" and "[t]he Act helped achieve that purpose 'through the medium of collective agreement,' which was intended 'to supersede separate agreements with employees and to substitute a single compact with terms

which reflect the strength, negotiating power and welfare of the group'").

In City of Paterson & AFSCME Council 52, Local 3724, H.E. No. 2018-8, 44 NJPER 362 (¶102 2018) (final agency decision), the hearing examiner held the following:

. . . AFSCME as the majority representative had the exclusive right to negotiate compensation such as salary increases tied to promotions and/or additional duties In none of the instances of the salary increases which were beyond the \$1,500 amount set forth in the parties' collective agreement did the City seek negotiations with AFSCME. Whether the City went first to DCA for approval of compensation increases and then "informed" the employee of its offer or the City went first to the employee and then DCA, the City ignored its obligation to exclusively negotiate compensation for unit members with the majority representative. The City had no unilateral right to set that term and condition of employment without doing so. . . . [T]he DCA's approval, if any, for a salary increase not covered by the parties' collective agreement is at most a condition precedent for receiving future aid not a release from the duty to negotiate presently. [FN8 - This pre-condition is akin to the post-condition of ratification after the parties negotiate a successor agreement. Such pre-or post-approval requirements do not preempt the employer's duty to negotiate.] Indeed, the memorandum of understanding between the City and the State setting forth conditions for receiving transitional aid contemplates that the parties will negotiate compensation. It provides, under subheading "Individual and Collective Negotiations Agreements," at paragraph 4, the following:

The Municipality acknowledges that the State will not provide Transition Aid in cases where the

Municipality allows or approves compensation increases that are not sustainable. The municipality understands that if it approves any individual employment contract or any collective negotiation agreement that increases annual compensation for the employee or group of employees by more than 2% annually, on average during the term of the agreement, the Municipality may become ineligible for future aid.

This paragraph specifically provides that if the collectively negotiated compensation exceeds a certain average annual percentage, the City risks receiving future aid. Such a stricture does not allow the City to deal directly with employees to the exclusion of the majority representative.

[44 NJPER at 365; compare City's TY2020/CY2021 MOU, Section (R)(1) (Townes Certification, Ex. 2) (identical language to that quoted above from the City's MOU with the State from fiscal year 2014).]

A. Maria Beltre

With respect to AFSCME's direct dealing allegations regarding Maria Beltre (Beltre), I find that AFSCME has established that the City engaged in direct dealing with Beltre. Although it is undisputed that the City did not implement a title change/salary increase for Beltre (i.e., she is working out-of-title and being compensated pursuant to Art. XIX, Section E of the parties' 2014-2019 expired CNA), AFSCME provided un rebutted evidence that the City's Tax Collector and Finance Director negotiated directly with Beltre during the period March-June 2021

and reached a verbal agreement about a title change, retroactive compensation, and a salary increase. See Hughes Certification, ¶6, Ex. F; accord Hirschmanner Certification, Ex. M; see also Camden Cty., H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) (final agency decision) (“[w]hen [an employer] met and dealt directly with employees . . . it undermined [the union’s] representative status”; “[even if] negotiations between [employees] and the [employer] did not take place, the discussion and solicitation of suggestions about a mandatorily negotiable subject violate the Act”); accord Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) (“the Board’s solicitation of suggestions from individual employees about the nature of [a] reward program violated the Act . . . [because] [t]hese matters . . . are mandatorily subjects for negotiations”; “[t]he Board . . . violated the Act when, rather than negotiate, it solicited individual employee input and thus undermined the Union’s right to exclusive representative status” (emphasis added)).

Contrary to the City’s assertion, the alleged direct dealing involving Beltre during the period June 2018-August 2019 that was part of AFSCME’s unfair practice charges bearing docket nos. CO-2019-015 and CO-2020-043 (and the parties’ related settlement agreement) is unrelated to the City’s direct dealing with Beltre during the period March-June 2021 that is part of AFSCME’s instant charge.

Also contrary to the City's assertion, I find that AFSCME did not refuse to negotiate in good faith nor did the City file an unfair practice charge alleging a violation of section 5.4b(3) of the Act. The Commission has held that "[n]egotiations require dialogue between two parties with an intent to achieve common agreement rather than an employee organization presenting its view and the employer considering it and later announcing its decision"; and vice versa. Piscataway Tp., P.E.R.C. No. 2005-55, 31 NJPER 102 (¶71 2005)44 2005), recon. den. P.E.R.C. No. 2005-79, 31 NJPER 176 (¶71 2005). After complying with Civil Service regulations and receiving approval from DCA,^{13/} the City provided AFSCME with notice of the terms/conditions of a "pending" title change/salary increase that the City "wishe[d]" to implement for Beltre and inquired if AFSCME "require[d]" any additional

^{13/} I find that the City seeking "pre-approval" from DCA is not a per se violation of the Act; neither party cited any preemptive legal authority demonstrating that the City was obligated to negotiate in good faith with AFSCME before seeking pre-approval from DCA. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982) (in order to preempt, a statute or regulation must be express, specific and comprehensive); but see, e.g., N.J.S.A. 52:27D-188.42a; City's TY2020/CY2021 MOU with the State. However, if the City seeks/obtains DCA "pre-approval," the City is still obligated to negotiate in good faith with AFSCME about mandatorily negotiable subjects and, upon reaching a negotiated agreement, return to DCA seeking (to coin a phrase) "post-approval" or "ratification." DCA's role in a transitional aid municipality does not relieve the City of its obligation to negotiate in good faith with AFSCME about mandatorily negotiable subjects. Contrast N.J.S.A. 52:27BBBB-1 et seq., entitled the "Municipal Stabilization and Recovery Act."

information"; AFSCME responded that it would not be providing approval. See Hughes Certification, ¶3, Exhs. B-E; accord Hirschmanner Certification, Ex. K. I find that the City's notice/inquiry to AFSCME insufficiently communicated an invitation to negotiate and is not indicative of a genuine desire to engage in dialogue or achieve agreement; rather, it appears to be a fait accompli seeking AFSCME's approval to go through the motions. See Glassboro Housing Auth., H.E. No. 89-45, 15 NJPER 439 (¶20180 1989), adopted P.E.R.C. No. 90-16, 15 NJPER 524 (¶20216 1989) (after an employer set a salary range and starting salary for a unit position, the employer "sought [the union's] approval . . . and then offered the position to [an individual] . . . at [the pre-established starting salary]"; "[w]hat [the employer] was presenting [the union] with was a fait accompli" and "[w]hen [the union] responded that it wanted to negotiate about the salary, the [employer] was then forced into negotiations about the starting salary just four days prior to the employee's starting date . . . and after they had offered [the individual] the position at [the pre-established salary]"; "the [employer's] conduct was not indicative of a genuine desire to achieve agreement with [the union], but rather to go through the motions"); contrast New Jersey Highway Auth., H.E. No. 90-50, 16 NJPER 342 (¶21141 1990), adopted P.E.R.C. No. 91-19, 16 NJPER 486 (¶21211 1990) (an employer fulfilled its contractual duty not

to allow taped music without seeking prior permission from the union by informing the union that it "had a deadline to 'finalize' the booking", emphasizing that "it needed a prompt decision [from the union] so that advertisements . . . could be mailed", and asking "is it okay"; after "the employer sought permission the burden shifted to the [union] to come forward with proposals to resolve the issue"); Butler Bd. of Ed., H.E. No. 2010-12, 36 NJPER 277 (¶104 2010) (final agency decision) (holding that there was no direct dealing when unrepresented employees requested to meet with the Superintendent to discuss rumors about health benefits changes; also holding that there was no direct dealing when the Superintendent held a voluntary meeting with unrepresented employees immediately before a representation petition was filed, particularly because the Superintendent "[did not seek] to negotiate . . . [but] only . . . announc[ed] decisions that the Board had made relative to health benefits changes").

Under these circumstances, I find that AFSCME has established that the City engaged in direct dealing with Beltre. Even when viewed in the light most favorable to the City, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019),

adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that summary judgment must be granted in AFSCME's favor regarding this aspect of the charge.

B. Yezenia Green

With respect to AFSCME's direct dealing allegations regarding Yezenia Green (Green), I find that AFSCME has established that the City engaged in direct dealing with Green. Specifically, it is undisputed that the City implemented a title change/salary increase for Green in excess of the contractually-agreed amount of \$1,500.00 (Art. XIX, Section F of the parties' 2014-2019 expired CNA) without negotiating with AFSCME - i.e., as of March 1, 2021, Green had a base salary of \$30,090.00 working in the title of Keyboarding Clerk 1; and in or about November 2021, Green's base salary had been increased by approximately \$10,000.00 to \$40,000.00 working in the title Clerk 2. See Hughes Supplemental Certification, ¶5; accord Pabon Certification, ¶3; see also Camden Cty., H.E. No. 94-10, 19 NJPER 30 (¶25011 1993), adopted P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994) (employer's implementation of a unilateral salary increase was a violation of 5.4a(1) and (5)); accord City of Paterson, H.E. No. 2018-8, 44 NJPER 362 (¶102 2018).

Again, contrary to the City's assertion, I find that AFSCME did not refuse to negotiate in good faith nor did the City file an unfair practice charge alleging a violation of section 5.4b(3)

of the Act. The Commission has held that “[n]egotiations require dialogue between two parties with an intent to achieve common agreement rather than an employee organization presenting its view and the employer considering it and later announcing its decision”; and vice versa. Piscataway Tp., P.E.R.C. No. 2005-55, 31 NJPER 102 (¶71 2005)44 2005), recon. den. P.E.R.C. No. 2005-79, 31 NJPER 176 (¶71 2005). After complying with Civil Service regulations and receiving approval from DCA,^{14/} the City provided AFSCME with notice of the terms/conditions of a “pending” title change/salary increase that the City “wishe[d]” to implement for Green and inquired if AFSCME “require[d] any additional information”; AFSCME responded that it would not be providing approval. See Hughes Certification, ¶7, Ex. G; accord Hirschmanner Certification, Ex. L. I find that the City’s notice/inquiry to AFSCME insufficiently communicated an invitation to negotiate and is not indicative of a genuine desire to engage in dialogue or achieve agreement; rather, it appears to be a fait accompli seeking AFSCME’s approval to go through the motions. See Glassboro Housing Auth., H.E. No. 89-45, 15 NJPER 439 (¶20180 1989), adopted P.E.R.C. No. 90-16, 15 NJPER 524 (¶20216 1989) (after an employer set a salary range and starting salary for a unit position, the employer “sought [the union’s] approval . . . and then offered the position to [an individual]

^{14/} See n.13.

. . . at [the pre-established starting salary]"; "[w]hat [the employer] was presenting [the union] with was a fait accompli" and "[w]hen [the union] responded that it wanted to negotiate about the salary, the [employer] was then forced into negotiations about the starting salary just four days prior to the employee's starting date . . . and after they had offered [the individual] the position at [the pre-established salary]"; "the [employer's] conduct was not indicative of a genuine desire to achieve agreement with [the union], but rather to go through the motions"); contrast New Jersey Highway Auth., H.E. No. 90-50, 16 NJPER 342 (¶21141 1990), adopted P.E.R.C. No. 91-19, 16 NJPER 486 (¶21211 1990) (an employer fulfilled its contractual duty not to allow taped music without seeking prior permission from the union by informing the union that it "had a deadline to 'finalize' the booking", emphasizing that "it needed a prompt decision [from the union] so that advertisements . . . could be mailed", and asking "is it okay"; after "the employer sought permission the burden shifted to the [union] to come forward with proposals to resolve the issue"); Butler Bd. of Ed., H.E. No. 2010-12, 36 NJPER 277 (¶104 2010) (final agency decision) (holding that there was no direct dealing when unrepresented employees requested to meet with the Superintendent to discuss rumors about health benefits changes; also holding that there was no direct dealing when the Superintendent held a voluntary

meeting with unrepresented employees immediately before a representation petition was filed, particularly because the Superintendent “[did not seek] to negotiate . . . [but] only . . . announc[ed] decisions that the Board had made relative to health benefits changes”).

Under these circumstances, I find that AFSCME has established that the City engaged in direct dealing with Green. Even when viewed in the light most favorable to the City, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that summary judgment must be granted in AFSCME’s favor regarding this aspect of the charge.

C. Alicia Cooper & Aracelis Rosario

With respect to AFSCME’s direct dealing allegations regarding Alicia Cooper (Cooper) and Aracelis Rosario (Rosario), it is undisputed that the City did not implement a title change/salary increase for Cooper or Rosario (Hughes Supplemental Certification, ¶¶3-4; accord Pabon Certification, ¶¶4-5). The City has admitted that its Finance Director “approached” Cooper and Rosario and “informed them” about “promotional opportunities” and “the salaries for their respective positions.” See City’s

Answer. AFSCME also provided un rebutted evidence that the City's Finance Director offered salary increases in excess of the contractually-agreed amount of \$1,500.00 directly to Cooper and Rosario in/about March 2021. See Hughes Certification, ¶2, Ex. A; Townes Certification, Ex. 1 (Art. XIX, Section F of the parties' 2014-2019 expired CNA); see also Camden Cty., H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) (final agency decision) ("[w]hen [an employer] met and dealt directly with employees . . . it undermined [the union's] representative status"; "[even if] negotiations between [employees] and the [employer] did not take place, the discussion and solicitation of suggestions about a mandatorily negotiable subject violate the Act"); accord Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) ("the Board's solicitation of suggestions from individual employees about the nature of [a] reward program violated the Act . . . [because] [t]hese matters . . . are mandatorily subjects for negotiations"; "[t]he Board . . . violated the Act when, rather than negotiate, it solicited individual employee input and thus undermined the Union's right to exclusive representative status" (emphasis added)); contrast Butler Bd. of Ed., H.E. No. 2010-12, 36 NJPER 277 (¶104 2010) (final agency decision) (holding that there was no direct dealing when unrepresented employees requested to meet with the Superintendent to discuss rumors about health benefits changes; also holding that there was no direct

dealing when the Superintendent held a voluntary meeting with unrepresented employees immediately before a representation petition was filed, particularly because the Superintendent "[did not seek] to negotiate . . . [but] only . . . announc[ed] decisions that the Board had made relative to health benefits changes").

AFSCME has withdrawn its charge with respect to Cooper and Rosario only, so I need not reach a determination as to whether AFSCME's motion for summary judgment and/or the City's cross-motion for summary judgment is granted/denied.

D. Tangy Thorpe

With respect to AFSCME's direct dealing allegations regarding Tangy Thorpe (Thorpe), I find that AFSCME has established that the City engaged in direct dealing with Thorpe. Although it is undisputed that the City did not implement a title change/salary increase for Thorpe (i.e., her employment was terminated on June 30, 2022), AFSCME provided un rebutted evidence that the City's Program Manager for School-Based Youth Services Program directly contacted Thorpe in May-June 2021 regarding terms and conditions of employment including a title change, salary increase, change from part-time to full-time status, and change from "just-cause" to "at-will" employment. See Hughes Certification, ¶8, Ex. H; see also Camden Cty., H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) (final agency decision) ("[w]hen [an

employer] met and dealt directly with employees . . . it undermined [the union's] representative status"; "[even if] negotiations between [employees] and the [employer] did not take place, the discussion and solicitation of suggestions about a mandatorily negotiable subject violate the Act"); accord Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) ("the Board's solicitation of suggestions from individual employees about the nature of [a] reward program violated the Act . . . [because] [t]hese matters . . . are mandatorily subjects for negotiations"; "[t]he Board . . . violated the Act when, rather than negotiate, it solicited individual employee input and thus undermined the Union's right to exclusive representative status" (emphasis added)).

Even assuming, arguendo, "[t]he State or federal government determine[d] the salary for Thorpe's position" as the City asserts (Hirschmanner Certification, ¶¶12-13, Exhs. G-H; Hirschmanner Supplemental Certification, ¶¶5-6, Ex. C) - a point which I do not concede given that the City has not cited any preemptive legal authority^{15/} - same does not preempt the City's duty to negotiate in good faith regarding other mandatorily negotiable subjects, particularly when an "[i]ndividual

15/ See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982) (in order to preempt, a statute or regulation must be express, specific and comprehensive).

[agreement] . . . conflict[s] with [a] collective agreement” Hillsborough Bd. of Ed., H.E. No. 2005-5, 30 NJPER 449 (¶150 2004), adopted P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005) (citing Troy v. Rutgers, 168 N.J. 354, 372-376 (2001)); see also Englewood Bd. of Ed. v. Englewood Teachers Ass’n, 64 N.J. 1, 8-9 (1973) (holding that working hours and compensation are terms and conditions of employment); Delran Bd. of Ed., P.E.R.C. No. 87-155, 13 NJPER 578 (¶18212 1987) (“just cause provisions are mandatorily negotiable”). Clearly, the individual agreement that the City offered to Thorpe conflicts with AFSCME’s collective agreement with respect to salary increases for promotion (\$1,500.00), work hours (notice to union re: change from part-time to full-time status), and “at-will” employment (“just-cause” employment). Compare Hughes Certification, ¶8, Ex. H with Article V, Section A, Article XI, Sections A-C, and Article XIX, Section F of the parties’ 2014-2019 expired CNA (Townes Certification, Ex. 1); see also Mount Holly Tp. Bd. of Ed. v. Mount Holly Tp. Ed. Ass’n, 199 N.J. 319, 327-329 (2009) (“[r]epresentatives are charged with protecting and advancing the interests of the majority in collective negotiations [while] [i]ndividual employees retain no separate negotiating rights”); J.I. Case Co. v. NLRB, 321 U.S. 332, 338-339 (1944).

Under these circumstances, I find that AFSCME has established that the City engaged in direct dealing with

Thorpe.^{16/} Even when viewed in the light most favorable to the City, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that

^{16/} Although Thorpe's employment with the City was terminated on June 30, 2022, the City has not argued that this aspect of the charge is moot. See City of East Orange, P.E.R.C. No. 2020-36, 46 NJPER 318 (¶78 2020) (citing Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) (party asserting mootness must persuade court that challenged conduct cannot reasonably be expected to recur)). Moreover, I find that the issue of direct dealing, including within the context of an individual agreement, is a continuing/recurring source of labor-relations strife between the City and AFSCME that has presented past (CO-2017-104 resolved via H.E. No. 2018-8), present (CO-2021-269), and future (CO-2022-149 & CO-2023-056) issues given that the same parties have, are, and will be litigating nearly identical direct dealing claims (albeit pertaining to different employees). Contrast Hudson Cty., D.U.P. No. 2011-8, 37 NJPER 160 (¶50 2011) ("[a] case will be found moot where 'continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future'; "[o]ther considerations are whether there remain open issues which have practical significance; whether there is a continuing chilling effect from the earlier conduct which has not been erased; whether, after a respondent's corrective action, a cease and desist order is necessary to prevent other adverse action against the same or other employees; and, whether the offending conduct is likely to recur"); accord Ramapo Indian Hills Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581, 582 (¶21255 1990)); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., H.E. No. 87-69, 13 NJPER 517 (¶18195 1987), adopted P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd NJPER Supp.2d 225 (¶196 App. Div. 1990).

summary judgment must be granted in AFSCME's favor regarding this aspect of the charge.

CONCLUSION

For these reasons, I grant AFSCME Council 63, Local 3724's (AFSCME) motion for summary judgment and deny the City of Paterson's (City) cross-motion for summary judgment. I find that the City violated 5.4a(5), and derivatively 5.4a(1), of the Act by directly dealing with AFSCME unit members Maria Beltre, Yezenia Green, and Tangy Thorpe regarding mandatorily negotiable subjects (including, but not limited to, salary increases, work hours, and "just cause"/"at-will" employment status).

RECOMMENDED ORDER

I recommend that the Commission order the City of Paterson 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 directly dealing with individual employees represented by AFSCME concerning mandatorily negotiable subjects (including, but not limited to, salary increases, work hours, and "just cause"/"at-will" employment status) rather than AFSCME.

2. Refusing to negotiate in good faith with AFSCME concerning terms and conditions of employment of employees in its unit, particularly by directly dealing with individual employees

represented by AFSCME concerning mandatorily negotiable subjects (including, but not limited to, salary increases, work hours, and "just cause"/"at-will" employment status) rather than AFSCME and unilaterally increasing the salary of AFSCME unit member Yezenia Green.

B. Take this affirmative action:

1. Return the salary of AFSCME unit member Yezenia Green to the amount existing prior to the City's increase in or about November 2021, subject to any adjustments required by the parties' 2014-2019 expired collective negotiations agreement and/or any subsequent negotiated agreement.^{17/}

2. Immediately negotiate in good faith with AFSCME regarding Yezenia Green's prospective salary.

3. Negotiate in good faith with AFSCME concerning mandatorily negotiable terms and conditions of employment of employees in its unit (including, but not limited to, salary increases, work hours, and "just cause"/"at-will" employment status).

^{17/} See Camden Cty., H.E. No. 94-10, 19 NJPER 30 (¶25011 1993), adopted P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994) (having found that an employer unilaterally increased a unit employee's salary, as a remedy the Commission ordered the employer to rescind the salary increase, return the employee's salary to its former level plus any interim increases she would have regularly been entitled to, and immediately being negotiations over the employee's prospective salary); accord City of Union City, H.E. No. 90-8, 15 NJPER 537 (¶20222 1989), adopted P.E.R.C. 90-37, 15 NJPER 626 (¶20262 1989).

4. 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.

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

/s/Joseph P. Blaney
Joseph P. Blaney
Hearing Examiner

DATED: January 19, 2023
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by January 30, 2023.



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 its employees in the exercise of the rights guaranteed to them by the Act, particularly by directly dealing with individual employees represented by AFSCME concerning mandatorily negotiable subjects (including, but not limited to, salary increases, work hours, and "just cause"/"at-will" employment status) rather than AFSCME.

WE WILL cease and desist from refusing to negotiate in good faith with AFSCME concerning terms and conditions of employment of employees in its unit, particularly by directly dealing with individual employees represented by AFSCME concerning mandatorily negotiable subjects (including, but not limited to, salary increases, work hours, and "just cause"/"at-will" employment status) rather than AFSCME and unilaterally increasing the salary of AFSCME unit member Yezenia Green.

WE WILL return the salary of AFSCME unit member Yezenia Green to the amount existing prior to the City's increase in or about November 2021, subject to any adjustments required by the parties' 2014-2019 expired collective negotiations agreement and/or any subsequent negotiated agreement.

WE WILL immediately negotiate in good faith with AFSCME regarding Yezenia Green's prospective salary.

WE WILL negotiate in good faith with AFSCME concerning mandatorily negotiable terms and conditions of employment of employees in its unit (including, but not limited to, salary increases, work hours, and "just cause"/"at-will" employment status).

Docket No. CO-2021-269

City of Paterson
(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