

Paula Geletei

From: James Armstrong <opra+request-2813-50032e36@requests.opramachine.com>
Sent: Thursday, October 25, 2018 6:12 PM
To: Paula Geletei
Subject: OPRA request - Arbitration Decision

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CITY OF ATLANTIC CITY
CLERKS OFFICE
2018 OCT 26 AM 8:37

Dear Atlantic City,

This is a request for public records made under OPRA and the common law right of access. Please acknowledge receipt of this message.

Records requested:

Please provide me with a copy of the arbitration decision concerning sick leave payments to Deputy Police Chief James Sarkos and Deputy Police Chief Jerry Barnhart. This arbitration decision was from their respective promotions to the rank of Captain. Upon being promoted to the rank of Captain they were supposed to be paid for all of their accumulated "sick" time. The case was arbitrated and a decision was issued recently. The decision was arbitrated between the city and PBA local #24.

Yours faithfully,

James Armstrong

Please use deliver records electronically via email to the below UNIQUE address for all replies to this request:
opra+request-2813-50032e36@requests.opramachine.com

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STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of THE CITY OF ATLANTIC CITY And ATLANTIC CITY POLICE SUPERIOR OFFICERS ASSOCIATION (Failure to Pay Captions Barnhart and Sarkos Accumulated Sick Leave)	Docket No. AR 2017-599 Before Ruth M. Moscovitch, Arbitrator
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OPINION AND AWARD

Pursuant to Article V, Step 4 of the agreement collectively bargained between the parties ("Agreement"), the parties – the City of Atlantic City ("City") and the Union representing Jerry Barnhart and James A. Sarkos ("Grievants") – designated me as the neutral third party arbitrator to hear and decide this matter. I conducted a hearing on May 25, 2018 at City Hall in Atlantic City, New Jersey. The City was represented by counsel. In addition, both Grievants were present and represented by counsel. Both sides were afforded full opportunity to present all necessary proofs and evidence. The Union presented the testimony of Grievants, who were sworn and subjected to direct and cross-examination. In addition, the Union placed in evidence seven exhibits. The City called no witnesses, but placed in evidence five exhibits. Both sides submitted post-hearing briefs to the arbitrator by August 1, 2018. No objection has been made to the fairness of this proceeding.

ISSUE PRESENTED

Whether the City, by failing to pay Grievants their accumulated sick leave upon their promotions to the rank of Captain on July 1, 2016, violated the terms of the collectively bargained agreement between the parties, in light of the Municipal Stabilization Recovery Act ("MSRA") signed into law on May 27, 2016, the June 7, 2017 Implementation Memorandum, and/or the Superior Court supervised settlement agreement of January 11, 2018. If so, what shall the remedy be?

RELEVANT AUTHORITIES

1. AGREEMENT BETWEEN THE CITY OF ATLANTIC CITY AND THE ATLANTIC CITY POLICE SUPERIOR OFFICERS' ASSOCIATION

ARTICLE XXVII Sick and Injured

B. 1. Any officer promoted to the rank of Captain after July 1, 2004, will be paid for all his/her accumulated sick leave as a lump sum as of the date the officer is promoted to Captain. The lump sum shall be compensated at the full rate of pay in effect for that officer as a Lieutenant on the date of the officer's promotion to Captain. The full lump sum shall be paid within thirty (30) days of the date the officer is promoted to Captain; or at the exclusive option of the officer, over a four (4) year period beginning with the first payment being made within thirty (30) days of the date the officer is promoted to Captain.

(Jt. Ex. 1)

2. MUNNICIPAL STABILIZATION AND RECOVERY ACT P.L. 2016, Chapter 4

C:52:27BBBB-4 Determination of whether municipality is in need of stabilization and recovery.

4. a*** If the director ascertains that a municipality should be deemed a municipality in need of stabilization and recovery, the director shall recommend that the commissioner make that determination. Within 7 days of receipt of the director's recommendation, the commissioner shall make the final determination of whether to deem the municipality a municipality in need of stabilization and recovery and subject to the provisions of P.L. 2016, c. 4 (C.52:27BBBB-! Et al.).

... A municipality in need of stabilization and recovery shall be subject to the provisions of P.L. 2016, c. 4 (C.52:27BBBB-1 et al.) until the end of the recovery plan adopted pursuant to subsection b. of this section and approved by the commissioner pursuant to subsection c. of this section. ***

b. Not later than 150 days next following the commissioner's final determination that a municipality is in need of stabilization and recovery, the governing body of the municipality in need of stabilization and recovery shall prepare and adopt a resolution containing a five-year recovery plan ... that is sufficient to effectuate the financial stability of the municipality. ***

c. The recovery plan shall be submitted by the governing body to the commissioner. The commissioner, within five business days next following the day of receipt of the plan, shall determine, in the commissioner's sole and exclusive discretion, whether the recovery plan is likely or is not likely to achieve financial stability for the municipality. *** if the commissioner determines that the plan is not likely to achieve financial stability for the municipality *** the municipality shall be immediately subject to the requirements and provisions of sections 5 through 11, 14, 16, and 17 of P.L. 2016, c. 4 ... for as long as the municipality is deemed a municipality in need of stabilization and recovery.

(C. 5)

3. MEMORANDUM OF AGREEMENT CITY OF ATLANTIC CITY/ATLANTIC CITY POLICE SUPERIOR OFFICERS ASSOCIATION¹

1. Notwithstanding the provisions of the relevant collective negotiations agreements regarding salary adjustments for promotions, the parties agree that the City may effectuate such promotions as it deems necessary from Sergeant to Lieutenant, and/or Lieutenant to Captain with no increase in pay until a salary increase including rank deferential [sic] and any other increase, is ratified between the City, the State Monitor and the SOA, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16 et seq. All increases shall be retroactive to the date of promotion.
2. This Memorandum of Agreement is limited to the terms set forth herein and does not apply to any other term or condition of the collective negotiations agreement.
3. The terms and conditions set forth in the collective negotiations agreement shall remain in full force and effect.

(C.1)

¹ Exhibit C1 is undated and does not contain signatures on behalf of the City. The City represents (see p. 2 of its post-hearing brief) and the Union appears to agree (see p. 15 of the Union's post-hearing brief) that this Agreement was entered into in May of 2016.

4. NOTICE OF IMPLEMENTATION - ATLANTIC CITY POLICE SUPERIOR OFFICERS ASSOCIATION

On May 23, 2017, the Honorable Julio L. Mendez, Assignment judge of the Superior court of New Jersey in Atlantic County upheld the right of the State to implement the majority of the modifications to the collective bargaining agreement and issued an Order denying the PBA's petition for temporary injunction with the exception of certain proposals. In doing so, the court recognized that in enacting the MSRA, the State Legislature determined that the current salaries and benefits are no longer sustainable. Therefore, the Director and his Designee find that the following modifications to the collective negotiations agreement are necessary to achieve financial stability.

- Effective June 7, 2017, all pending and prospective Terminal Leave payments over \$15,000 shall be eliminated for all employees. The State reserves the right to modify or entirely eliminate the payment of terminal leave payments in accordance with future rulings or interpretations by the court.

- Effective June 7, 2017, a new salary guide is hereby established for **all** employees, (including future promotions to the rank of Lieutenant and Captain. The below salaries shall be the entire compensation for each employee. There shall be no supplemental compensation exception for overtime where applicable.

<u>RANK</u>	<u>2017 Salaries</u>
CAPTAIN	\$125,000
LIEUTENANT	\$115,000

- Effective June 7, 2017, the City shall no longer be required to pay any officer promoted to the rank of Captain after July 1, 2004 for his/her accumulated sick leave in a lump sum payment or over a four (4) year period at the rate of pay in effect as a Lieutenant on the date of his/her promotion to Captain.

(U. 3, Dated June 7, 2017)

**5. SETTLEMENT AGREEMENT BETWEEN THE
CITY OF ATLANTIC CITY AND PBA LOCAL 24 AND
ATLANTIC CITY POLICE SUPERIOR OFFICERS ASSOCIATION**

6. While the City contends that it had the right under the MSRA and all other applicable laws to terminate all terminal leave payments, and will continue to litigate this issue in other pending litigation, for purposes of settling this lawsuit, the parties agree that the terminal leave payouts for all police officers and superior officers will be a maximum of \$15,000 at the time of retirement in accordance with N.J.S.A. 11A:6-19.2.

9. The parties agree that the Implementation Memoranda dated June 7, 2017, which modified the collective negotiations agreement with PBA Local 24 and the SOA shall remain in full force and effect except as modified by this Settlement Agreement. All terms contained in the Implementation Memoranda dated June 7, 2017 as modified by this Settlement Agreement shall be incorporated into the Collective Negotiations Agreement between PBA Local 24 and the Atlantic City Police Superior Officers Association including, but not limited to, that the Settlement Agreement is in effect through December 31, 2021.

11. The terms of this Settlement Agreement and its modifications to the Implementation Memorandum dated June 7, 2017 are subject to ratification by the members of PBA 24 and the SOA and, if so ratified, shall be from the date of execution of this Agreement, through and including December 31, 2021.

(U. 4)

5. PUBLIC LAW 2010, CHAPTER 3

AN ACT concerning benefits for public employees and amending and supplementing various parts of the statutory law.

C. 11A:6-19.2. Cap on compensation for unused sick leave under Title 11A.

1. Notwithstanding any law, rule or regulation to the contrary, a political subdivision of the State, or an agency, authority or instrumentality thereof, that has adopted the provisions of Title 11A of the New Jersey Statutes, shall not pay supplemental compensation to any officer or employee for accumulated unused sick leave in an amount in excess of \$15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-

administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the political subdivision of the State or the agency, authority or instrumentality thereof, on or after the effective date of P.L. 2010, c. 2. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date.

14. This act shall take effect on the 60th day following enactment.

Approved March 22, 2010.

(C. 4)

FACTUAL BACKGROUND

This matter arises out of actions taken by the City and the State of New Jersey to address the financial exigencies facing Atlantic City in 2016 and the years following. There is no dispute that Atlantic City was in dire financial straits at the time these actions were taken. That matter has been thoroughly and clearly described by, among others, Superior Court Judge Julio L. Mendez in his decision dated May 23, 2017. I see no reason to supplement or recapitulate his findings, which I hereby adopt.

The factual basis of the present grievance is also undisputed. The City failed to pay Grievants, Jerry Barnhart and James Sarkos, sums of money due to them upon their promotions from Lieutenant to the rank of Captain of the police force on July 1, 2016. (U. 2) Under the terms of the Agreement between the parties then in effect (Jt. 1), any officer promoted to the rank of Captain “will be paid for all his/her accumulated sick leave as a lump sum as of the date the officer is promoted to Captain.” (Jt. 1, Art. XXVII, Sec. b) The City “shall” pay the amount due within 30 days of the date of promotion, unless the officer opts for a four-year payout, which the Grievants did not do. (Id.) The City did not

make the required payments within 30 days of July 1, 2016, and has not made them up to the present time. The sums of money involved are substantial: Captain Barnhart is due \$132,046.43 and Captain Sarkos is due between \$97,586.95 and \$110,252.98.²

The Agreement at issue covered the period January 1, 2013 through December 31, 2015. At the time of Grievants' promotions, no successor Agreement had been reached. However, by the terms of the Agreement, Article XLII, the Agreement continued "in force until such time that a successor contract goes into effect." (Jt. 1, p. 59)

In anticipation of state action to rescue the City from fiscal exigency, the parties entered into a brief Memorandum of Agreement in May 2016 permitting the City to make promotions from Sergeant to Lieutenant and/or Lieutenant to Captain with no increase in pay until a successor agreement would be ratified, at which time increases would be retroactive. (C.1) Shortly thereafter the legislature passed the Municipal Stabilization and Recovery Act on May 27, 2016. Ultimately, after litigation and mediation, a successor Agreement was approved by the parties and by Superior Court Judge Julio L. Mendez in January of 2018 and, by its terms runs "from the date of execution of this Agreement, through and including December 31, 2021." (U. 4, , par. 11, p. 3)

The City argues that it is excused, if not prohibited, from making the accumulated sick payments to Grievants under one or more state and municipal laws and agreements, including:

² The parties agree that in the event I find in the Grievant's favor and they are unable to resolve among themselves the precise amount due to Captain Sarkos, I may take additional evidence on this issue.

1. Memorandum of Agreement, dated May 2016, between the Atlantic City Police Superior Officers Association and Atlantic City. (C1)
2. Implementation Memorandum from the Director of the Division of Local Government Services (Director) and his designee (Designee) pursuant to the MSRA modifying the Agreement effective June 7, 2017. (U. 3)
3. Mediated Settlement Agreement reached between the parties on November 17, 2017 and filed with the Superior Court of New Jersey in Atlantic County on January 26, 2018 and ratified by the parties. (U. 4)
4. The terms of P.L. 2010, c. 3 referenced and incorporated into the settlement agreement. (C. 4)

I discuss these authorities and their application to this grievance in the Discussion section below.

POSITIONS OF THE PARTIES

The Union argues that it has met its burden to prove by a preponderance of the credible evidence that the City has violated the provisions of the collective negotiations agreement by failing to pay Grievants their accumulated sick leave upon their promotion to the rank of Captain on July 1, 2016, in that (1) the accumulated sick leave payout was in full force and effect when Grievants were promoted on July 1, 2016; the MSRA had been enacted prior to that date, but the process it established for altering collective negotiations agreements was not completed until November 9, 2016, several months thereafter; therefore the City was obligated to follow the terms of that Agreement and pay Grievants their contractually mandated accumulated sick leave; (2) the Memorandum of Agreement (MOA) of May 2016 allowing the promotion of individuals to the rank

of Lieutenant and/or Captain with no increase in pay until a salary increase would be ratified is irrelevant to the issues in this case: accumulated sick pay is not a salary increase; further, the MOA is limited on its face to the “terms set forth herein” and doesn’t affect any other term of the Agreement which “shall remain in full force and effect” including the provision granting Grievants accumulated sick leave upon promotion; (3) the Director and Designee did not eliminate payout of accumulated sick leave upon promotion in their Implementation Memorandum dated June 7, 2017 except prospectively, effective June 7, 2017; by contrast, in that Memorandum, they did eliminate “all pending and prospective” Terminal Leave payments; the use of that specific language for terminal leave and its absence for pay upon promotion was a knowing and deliberate decision by the City and must be given effect; (4) the Settlement Agreement of January 2018 merely left in place the modifications of the collective negotiations agreement set forth in the Implementation Memorandum; because the Implementation Memorandum did not eliminate Grievants’ entitlement to accumulated sick leave pay upon their promotions, neither did the Settlement Agreement; (5) the City’s argument that N.J.S.A. 11A:6-19.2 makes payment of accumulated sick leave upon promotion illegal and unenforceable is wrong: on its face that statute applies “only to officers and employee who commence service ...on or after the effective date of P.L. 2010, c. 3” which was May 21, 2010; it is undisputed that Grievants began their service with the City long before that (Barnhart in 1996 and Sarkos in 2000); further, that statute expressly states that it shall not be construed to affect the terms of an collective negotiations agreement “with a relevant provision in force on” May 21, 2010; it cannot be

disputed, and the City has not disputed, that the relevant provision regarding payouts of accumulated sick leave upon retirement has remained the same since May of 2004; accordingly, N.J.S.A. 11A:6-19.2 is irrelevant to the dispute here; (6) the City should be estopped from arguing that Grievants are not entitled to their accumulated sick leave because City representatives took a contrary position during a grievance meeting in the fall of 2016 and acknowledged Grievants were entitled to that compensation. Accordingly, this Grievant should be granted, and Grievants should be awarded the sums of money due and owing them for accumulated sick leave payable upon their promotion on July 1, 2016.

The City, on the other hand, argues that the Union has not met its burden in this case in that: (1) Grievants were not entitled to a payout of their accumulated sick pay upon their promotions to the rank of captain because prior to Grievants' promotions that clause was eliminated from the Agreement by the Union in its Memorandum of Agreement dated May 2016, wherein the Union agreed to suspend any and all increases for lieutenants being promoted to captain including salary, rank differential or other increase, until a new contract might be ratified between the parties; the payment of accumulated sick leave would have been an increase in Grievants' earnings and thus had to be suspended; the new contract was not ratified until January of 2018 and, when ratified, no longer contained the clause in question; so the City has appropriately continued to refuse to pay Grievants accumulated sick leave; (2) the MSRA granted the City and designated State officials power to make drastic reductions in the terms and conditions of employment of highly paid public employees, such as Grievants, such reductions being necessary because the City was in such dire economic

condition that it could not afford compensation agreed to in earlier, more prosperous days; that Act had already become effective prior to Grievants' promotions and they and their Union were well aware of its consequences for the compensation of highly paid public employees; (3) the contractual provision at issue in this arbitration was lawfully removed from the collective negotiations agreement by the Director and Designee pursuant to the power vested in them by the MSRA in their Implementation Memorandum dated June 7, 2017; that action was upheld as lawful by Judge Julio L. Mendez in his decision of May 23, 2017; (4) the Union agreed to the incorporation of the relevant provisions of the Implementation Memorandum into the collective negotiations agreement by ratifying the Settlement Agreement of January 2018; accordingly, the elimination of the contractual clause regarding payout of accumulated sick leave upon promotion is binding upon the Union and its members; (5) as even Grievant Barnhart admitted in his testimony in this case, terminal sick leave is based upon accumulated sick leave; accordingly, in Atlantic City, terminal leave and accumulated sick leave are one and the same; since the enactment of N.J.S.A. 11A:6-19.2 unpaid sick leave is to be paid to employees only upon their retirement; accordingly the provision for a payout of accumulated sick leave upon promotion in Article XXVII, Par. B is unenforceable and illegal. Accordingly, this Grievance should be denied.

DISCUSSION

On the entire record before me, including my assessment of witnesses' credibility and the probative value of evidence, and after reviewing the statutes, agreements, other documents, written briefs, and case law provided by the

parties, I find that the Union has met its burden and established that the Employer violated the collective bargaining agreement when it withheld payment of accumulated sick leave from the Grievants upon their promotion to the position of captain. My reasons for this conclusion are set forth below.

General Observations. There is no doubt that the New Jersey legislature granted the City and the administrators charged with overseeing the City's affairs, including the Commissioner, the Director and his Designee (collectively the Director) broad powers to change terms and conditions of employment for many of its employees, including Grievants, in order to address the fiscal exigencies facing the City in 2016. The Director exercised that power and took many specific steps in the following years to drastically reduce pay and benefits for many employees, including Grievants, for example, by reducing their base pay from \$170,000 to \$125,000. The City cites a number of those and other actions, including Agreement of the parties, as having also taken away the accumulated sick day payout.

But after examining each action in turn, I find that although the City and the Director *had the power* to take away the payment of accumulated sick leave to Grievants upon their promotion, they *never exercised that power*. They were careful and deliberate in the many actions they took to reduce the City's obligations to its employees. Where such actions were taken, they must be honored. However, where the City and the Director refrained from taking action, I must conclude that too was careful and deliberate and must be honored.

One proposition central to the City's arguments is that the payout upon promotion is a form of "terminal pay." Thus, wherever the City or the Director or

the parties by Agreement eliminated “terminal pay,” they also eliminated the payout of accumulated sick pay upon promotion. I cannot agree. Terminal pay is, by definition, a payout upon termination, typically by retirement. The term is defined in Article XIXA of the collective negotiations agreement: “upon retirement the employee shall be entitled to terminal leave ... with full pay.” The Article goes on to explain how terminal leave can be taken, but the word “terminal” is fixed - it refers to the event of retirement only. Judge Mendez also recognized that terminal leave refers to officers “leaving the police force.” (Decision on injunction relief dated May 23, 2017, p. 22, Section IV.f.)

When Grievants were promoted on July 1, 2016, they did not leave the police force, but were promoted, and in fact they are still members of the police force. Consequently, and as discussed in more detail below, any provision regarding “terminal leave” does not apply to them.

Indeed, even the Director on behalf of the City recognized the distinction between terminal leave and the payout of accumulated sick leave at the time of promotion by addressing those issues in two separate paragraphs in his Implementation Agreement of June 7, 2017. The second bullet on page 2 pertains to terminal leave, while the fifth bullet in on page 3 pertains to accumulated sick leave payable upon promotion. In short, these are distinct contractual provisions that continued to be treated differently by the parties in the various documents under review here.

Modifications to Agreement Before Grievants’ Promotions. The City cites two actions taken prior to Grievants’ promotions on July 1, 2016 as authorizing the withholding of accumulated sick pay. One of these actions was an

agreement between the Union and the City; the other an act of the New Jersey legislature.

The Memorandum of Agreement of May 2016. As mentioned above, the parties signed a Memorandum of Agreement in May of 2016 (MOA) permitting the promotion of individuals to the rank of Lieutenant and/or Captain “with no increase in pay” until “a salary increase, including rank differential [sic] and any other increase” might be awarded or ratified. (C.1) The City argues that this language allowed the City to make promotion “without paying any of the contractual benefits including salary increases, the lump sum payment for accumulated sick leave upon promotion to Captain, *or any other increase*, until a new contract was ratified by the City, the ACSOA and the State.” (City brief, p. 3) The City goes on to assert that the MOA was designed to “delay the implementation of all benefits associated with promotions...” (Id.)

The problem with the City’s argument is that it misreads the very simple and plain language of the MOA. On its face, the MOA is concerned only with salary increases, “including rank differential and any other increase.” There is no reference in the MOA to the term “benefit” or other form of compensation associated with promotion. (C. 1)

Further, a payout of accumulated sick pay, is not a pay increase: it is a form of compensation based upon past service: the officers earned sick days that they could take if needed for illness, or bank for future illness, or for payout upon promotion or upon retirement. Of course the payout would mean additional compensation when paid, but it was and is not in any way a salary increase.

The MOA is explicitly “limited to the terms set forth herein, and does not apply to any other term or condition of the collective negotiations agreements.” (C. 1, par. 2) All other terms and conditions of the Agreement were explicitly to remain “in full force and effect,” (C. 1, par. 3) including, necessarily, the sick day payout upon promotion provision. The MOA therefore, does not pertain to other forms of compensation for officers being promoted and, as the Union points out, is irrelevant to the issues here. (See Union post-hearing brief, at p. 15-16)

The City further argues that the 2016 MOA is significant because it delayed implementation of payments that it argues were ultimately removed in subsequent administrative actions and by the Agreement between the parties that became effective beginning in 2018. I address the significance of the subsequent administrative actions and the parties’ 2018 Agreement below. However, I note here, as explained above, that the City is wrong in characterizing the 2016 MOA as delaying the payment of “benefits upon promotion;” it only delayed salary and other “increases.” And, accumulated sick pay is not an “increase.”

The Municipal Stabilization and Recovery Act (MSRA or Act).

The MSRA, as noted above, was enacted by the legislature on May 27, 2016, that is, prior to Grievants’ promotions. The City argues that passage of the Act authorized modifications to the collective negotiations agreement including the elimination of the sick leave payout upon promotion, and was upheld as lawful by Judge Mendez in his decision dated May 23, 2017.

The Act, however, did not in and of itself make changes to Grievants’ collective negotiations agreement. Rather, it created a process for altering the collective negotiations agreements of Grievants and other public employees.

That process first authorized the Director of the Division of local Government Services in the Department of Community Affairs to ascertain if a municipality was in need of stabilization and recovery; if so, the Director “shall recommend” to the Commissioner of Community Affairs who would expeditiously make the final determination of whether the municipality would be subject to the provisions of the act. (C. 5, par. 4.a.) Such municipalities then had the opportunity to submit a rehabilitation plan to the state; if the State rejected the municipality’s rehabilitation plan, the Department of Community Affairs Local Finance Board was then authorized to vote to exercise the powers under the MSRA and designate an administrator, the Designee, to assume “the functions, powers, privileges, and immunities” of the municipality.

With respect to the City, it was duly designated as in need of stabilization and recovery. It did propose a rehabilitation plan, but the State rejected it. The Department appointed a Designee to take over. But all of that did not happen until November 9, 2016, well *after* Grievants were promoted. Only then did the Designee begin to take steps to alter Grievants’ collective negotiations agreement.

Thus at the time of Grievants’ promotion, there had been no change in the terms and conditions of their collective negotiations agreement, and Article XXVII, B. governing payout for accumulated sick leave upon promotion was still in full force and effect.

In short, no action taken before their retirement, whether legislative, administrative, or by agreement of the parties, took away Grievants’ contractual right to sick leave payout upon promotion. Changes to that provision were

eventually made after the fact. Whether those subsequent changes applied to Grievants is discussed below.

Modifications to Agreement After Grievants' Promotions. The City cites two actions taken after Grievants' promotions as eliminating their rights to accumulated sick leave payout upon promotion. The first of these was the promulgation of the Implementation Memorandum dated June 7, 2017 by the Director and Designee pursuant to their authority under the MSRA, modifying the collective negotiations agreement. (U. 3) The second was the agreement reached between the Union and the City and approved by Superior Court Judge Mendez on January 16, 2018 modifying and extending their collective negotiations agreement. (U. 4)

The Implementation Memorandum of June 7, 2017. The Union's representatives and the City spent several months, from December 2016 through March 13, 2017, trying to reach an amicable resolution reformulating the terms of the collective negotiations agreement. When the negotiations failed, the Union filed suit trying to stop unilateral changes to their Agreement, and the Director and Designee decided to exercise their powers under the MSRA to modify the Agreement. Their modifications were announced in a Memorandum dated June 7, 2017. (U. 3)

Of relevance to this proceeding, the Memorandum made all compensation changes effective June 7, 2017, including new salaries, which "shall be the entire compensation for each employee." (U. 3, p. 2) Further, the City would no longer be required to pay out accumulated sick leave upon promotion:

“Effective June 7, 2017, the City shall no longer be required to pay any officer promoted to the rank of Captain after July 1, 2004 for his/her accumulated sick leave in a lump sum payment or over a four (4) year period at the rate of pay in effect as a Lieutenant on the date of his/her promotion to Captain.”

(Id., p. 3)

The City argues that this Implementation Memorandum removed the sick leave payout provision from the collective negotiations agreement. (City brief, p.

6) I cannot agree for three reasons.

First, on its face, the Implementation Agreement removed the sick leave payout provision, but only prospectively, “effective June 7, 2017.” Thus it took effect well after Grievants’ promotions and after the date they should have been paid their accumulated sick leave.

Second, there is no mention here of reaching back in time and eliminating the provision retroactively. Retroactive application of such a change would have to be explicit. As the Union points out, the City, the Director and the Designee knew full well how to make a provision retroactive: they did so with regard to “all pending and prospective Terminal Leave payments over \$15,000” in the second bullet on page 2 of the Implementation Memorandum: “Effective June 7, 2017, all pending and prospective Terminal Leave payments over \$15,000 shall be eliminated for all employees.” The absence of such explicit elimination of “all pending” sick leave payouts for promoted individuals as compared with terminated individuals is dispositive. The administrators knew of Grievants’ pending claims, having received requests for the payouts on August 24, and August 25, 2016 (U. 1). Further, as Captain Barnhart testified without contradiction, he, his fellow Grievant, Captain Sarkos, and Union president Frank

Brennan met with City administrator Jason Hold and Assistant Solicitor, Eileen Lindiger to discuss this grievance in the fall of 2016.³ There can be no doubt that the City knew Grievants had a “pending” claim for promotional sick leave payouts. Therefore, the City’s failure to include language about “pending” sick leave payouts comparable to the language about pending termination payments, must be deemed a deliberate choice and must be given effect.

Third, the Implementation Memorandum was challenged in court and ultimately modified and, in part, superceded by the Settlement Agreement of 2018.⁴ Therefore the Implementation Memorandum, by itself, is not the final word on sick leave payouts.

The City argues that the Implementation Memorandum and its modification of the parties’ collective negotiations agreement was ratified in the 2018 Settlement without any change to the paragraph quoted above that eliminated sick leave payouts upon promotion effective June 7, 2017. That confirms the Union’s position rather than the City’s since the sick leave payout paragraph as written and ratified can only be read as prospective from June 7, 2017; there simply is no language that reaches back - as the Memorandum does with regard to Terminal leave - to eliminate payments that accrued prior to June 7, 2017.

³ The Union has also argued that the City should be estopped from arguing that Grievants are not entitled to their accumulated sick leave because it took a contrary position in that grievance meeting. I will not impose estoppel upon the City based upon its representatives’ statements during a grievance meeting, which must be regarded as a settlement discussion.

⁴ I discuss the Settlement Agreement as it applies to this grievance below.

Settlement Agreement of January 16, 2018. Ultimately the parties did reach agreement on modifying and extending their collective negotiations agreement. That Settlement Agreement was approved by the Union's membership and by the Director and was also approved by Superior Court Judge Julio L. Mendez. The City argues that this Agreement removed the sick leave payout from the collective negotiations agreement, rendering it "null and void." (City brief, p. 8)

The problem with that position is that the Settlement Agreement, as the Union notes, expressly states that the Implementation Agreement of June 7, 2017 "shall remain in full force and effect except as modified by this Settlement Agreement." (U. 4, par. 9, p. 3) And the Settlement Agreement does not modify – indeed makes no reference to – payouts of accumulated sick leave upon promotion. Therefore, the provisions of the Implementation memorandum remain in full force and effect. As discussed above, those eliminate sick leave payouts upon promotion, but only prospectively, as of June 7, 2017.

Again, it is instructive to compare the treatment of Terminal leave payouts and sick leave payouts upon promotion in the Settlement Agreement. Paragraph 6 of the Settlement Agreement acknowledges that the parties agreed to disagree about whether the City had the right under the MSRA to eliminate all terminal leave payouts, leaving that issue to future resolution through litigation; in the meantime, they agreed to cap terminal leave payouts at \$15,000 at the time of retirement. (U. 4, par. 6, p. 2-3) By contrast, there is no reference at all to payouts of accumulated sick leave upon promotion. The City's silence on the

issue must be regarded as a deliberate decision to leave the issue as it had been addressed in the Implementation Memorandum.

Thus with the ratification and approval of the Settlement Agreement on January 16, 2018, the collective negotiations agreement was extended to December 31, 2021, with Article XXVII, Par. B modified as follows: “Effective June 7, 2017, the City shall no longer be required to pay any officer promoted to the rank of Captain after July 1, 2004 for his/her accumulated sick leave in a lump sum...” (U. 3, p. 3, bullet 5) Because Grievants were promoted before the effective date of this provision, the provision in effect prior to that date applies to them: the City was required to pay Grievants their accumulated sick leave within 30 days of their promotion on July 1, 2016.

The City makes one further argument regarding the application of the Agreement to Article XXVII Par. B., namely that by eliminating terminal leave over \$15,000 in accordance with N.J.S.A. 11A:6-19.2, the parties also agreed to the elimination of the payout of accumulated sick leave since “terminal leave and accumulated sick leave are one and the same” in Atlantic City. This argument has no merit.

As discussed above, the plain language of the collective negotiations agreement and common sense recognize that termination is not the same as promotion. Judge Mendez recognized that as well in his decision of May 23, 2017, explaining that terminal leave was paid to officers “upon leaving the police force. (See p. 22) While N.J.S.A. 11A:6-19.2 (the Act) did put a cap of \$15,000 on accumulated unused sick leave, it explicitly provided that the cap would apply “only to officers and employees who commence service with the political

subdivision of the State...on or after the effective date” of the Act, which was May 21, 2010. Grievants were hired well before 2010: Captain Barnhart in or around 1996 and Captain Sarkos in or around 2000. Further, the Act also explicitly exempted “terms in any collective negotiations agreement with a relevant provision in force” on the effective date in 2010. It is undisputed that Article XXVII, B. has been in force since 2004. Accordingly, the Act never applied to Grievants’ situation, and nothing in the Agreement of 2018 changed that.

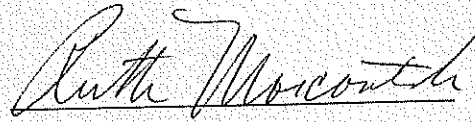
In sum, neither the City nor the State, nor the Director acting on behalf of the City, ever eliminated Grievants’ right to accumulated unused sick leave upon their promotions to the rank of Captain in 2016. Nor did the Union agree to the elimination of that right when it ratified the Agreement in 2018 adopting modifications to its collective negotiations agreement as set forth in the Implementation Memorandum. Many other terms and conditions of Grievants’ employment status, including their pay, were modified, but not the particular provision at issue here. Nor did the New Jersey legislature in 2010 (N.J.S.A. 6a:19.2) or in 2016 (MSRS) eliminate that provision. Finally, Judge Mendez did not ever issue any court order regarding the elimination of that provision, either by force of law, or by administrative action or by agreement of the parties.

Accordingly, I find the City owes Grievants for their accumulated sick leave as of the date of their promotions, namely July 1, 2016.

AWARD

For all of the foregoing reasons, this grievance is granted. The City is ordered to pay Grievants the sums they are owed as accumulated sick leave as of the dates of their promotion, July 1, 2016. I shall retain jurisdiction over the

implementation of this award in the event the parties are not able to resolve the exact amount of money due Captain Sarkos.

A handwritten signature in cursive script, reading "Ruth Moscovitch".

Ruth Moscovitch, Arbitrator

Dated: August ²¹, 2018

SEE ATTACHED
FOR NOTARY ACKNOWLEDGEMENT.



All-purpose Acknowledgment California only

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

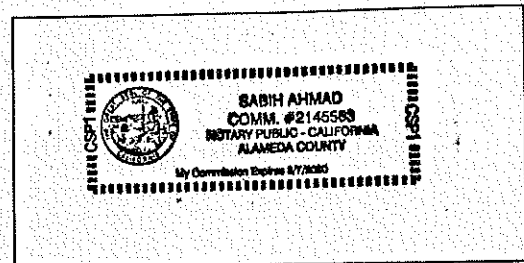
County of ALAMEDA

On 08/21/2018 before me, SABIA AHMAD, NOTARY PUBLIC (here insert name and title of the officer),

personally appeared RUH M MOSCOVICH

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.



Notary Seal

WITNESS my hand
and official seal.

Signature

For Bank Purposes Only

Description of Attached Document

Type or Title of Document OPINION AND REWARD

Document Date 08/21/2018 Number of Pages 1

Signer(s) Other Than Named Above

