

D.U.P. NO. 2015-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TOWNSHIP OF LIVINGSTON,

Respondent,

-and-

Docket No. CO-2015-021

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 469,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging the Township of Livingston (Township) violated 5.4a(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., when the Township excluded merit pay from base salary when it calculated and paid base salary increases under a collective negotiations agreement (CNA) with Teamsters Local 469. Prior to ratification of the agreement, the Township notified Local 469 of its intention to exclude merit pay from base salary when calculating base salary increases. Local 469 did not request negotiations over this issue and ratified the agreement. The agreement did not define "base salary" and was silent as to whether merit pay was included in base salary for purposes of calculating base salary increases. When the Township paid base salary increases that excluded merit pay, Local 469 filed an unfair practice charge contending the Township negotiated in bad faith. The Director disagreed and concluded that Local 469 waived its right to challenge the Township's implementation of base salary increases by not requesting negotiations over the issue prior to ratifying the agreement. The Director also noted that the filing of an unfair practice charge is not a substitute for requesting negotiations and that the Commission lacked jurisdiction to resolve this dispute since it centered around the parties' conflicting interpretations of the phrase "base salary" in the agreement.

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Appearances:

For the Respondent,
Genova, Burns, Giantomasi & Webster, LLC, attorneys
(Jennifer Roselle, of counsel)

For the Charging Party,
Law Offices of Timothy R. Hott, PC, attorneys
(Timothy R. Hott, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 5, 2014, the International Brotherhood of Teamsters, Local 469 (Charging Party or IBT) filed an unfair practice charge against the Township of Livingston (Respondent or Township). The charge alleges that the Respondent violated sections 5.4a(1), (3), (5) and (7)^{1/} of the New Jersey Employer-

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this
(continued...)"

Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by excluding merit pay from base salary when calculating base salary increases. Specifically, IBT alleges the Township did not negotiate in good faith with IBT by failing to notify IBT that merit pay would be excluded from base salary when calculating salary increases.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

On November 26, 2014, I issued a letter to the parties tentatively dismissing the charge and inviting responses. No responses were filed.

I find the following facts.

1/ (...continued)
act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

IBT is the exclusive majority representative of non-supervisory blue collar employees within the Township's Department of Public Works (DPW).^{2/} The IBT and Township are parties to a collective negotiations agreement (Agreement) extending from January 1, 2012 through December 31, 2015.

On February 28, 2012, IBT and the Township commenced collective negotiations for the 2012-2015 Agreement. Michael Broderick, the IBT's Business Agent, represented IBT during the negotiations. Collective negotiations sessions occurred on February 28, May 16 and July 24, 2012. On September 22, 2012, IBT filed a notice of impasse with the Commission and requested mediation. The Commission appointed a mediator on November 27, 2012.

The Commission's appointed mediator conducted four mediation sessions on May 6, May 13, July 2 and August 5, 2013. On March 14, 2014, Jennifer Roselle, counsel to the Township in collective negotiations and mediation, e-mailed Broderick the Township's position on calculating salary increases. At that time, the Township paid several unit employees a merit pay stipend in recognition of meritorious job performance.^{3/} In the e-mail,

^{2/} The Director of Representation certified IBT as the majority representative of this unit on November 1, 2011.

^{3/} The merit pay stipend appears to have been phased out by the Township.

Roselle explained how base salary increases are calculated for employees who receive merit pay. She wrote:

As a follow up to our discussion about how merit pay was historically calculated, I've attached a sample form that was given to the employees explaining how the benefit works. Each of your unit members should have received an individual version of the attached.

This document reiterates the Township's position during negotiations-merit pay would come off the top every year, the salary would be adjusted by a cost of living increase and, in the event the employee got merit [pay] the next year, it would be added in on the back end. The following year, the merit [pay] would come off the top, the base would be adjusted, and merit [pay], if any would get added in.

This was the Township's position all along as to how to handle merit [pay] through its abolishment for all employees. If you have questions, feel free to give me a call.

Broderick responded by asking Roselle to verify that the agreement was on the Township Council's agenda for its March 24, 2014 meeting, which Roselle confirmed. IBT does not allege any facts indicating the IBT sought negotiations or responded to the Township's position on the calculation of base salary increases. IBT never requested negotiations over whether or not base salary should include merit pay for purposes of calculating salary increases.

The Agreement was ratified by the Township and IBT.

Broderick signed the Agreement on behalf of IBT on March 19, 2014.

Township Manager Michelle Meade signed the Agreement on behalf of the Township on April 8, 2014. The Agreement does not define "base salary" and does not set forth language addressing whether or not merit pay is included in base salary.^{4/}

Section 5.3 of the Act imposes an obligation on a public employer to negotiate with a majority representative prior to implementing proposed new rules or modifications of existing rules governing working conditions. N.J.S.A. 34:13A-5.3. Compensation is a mandatorily negotiable subject. Trenton Bd. of Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987).

When an employer notifies a majority representative of a proposed change in working conditions, the majority representative has an obligation to request negotiations with the employer over the proposed change. Monroe Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984); New Jersey Highway Authority, H.E. No. 90-50, 16 NJPER 342 (¶21141 1990), adopted at P.E.R.C. No. 91-19, 16 NJPER 486 (¶21211 1990). The filing of a grievance or unfair practice charge is not a substitute for requesting negotiations. Monroe Bd. of Ed.; Secaucus Tp., H.E. No. 87-41, 13 NJPER 219 (¶18094 1987), adopted at P.E.R.C. No. 87-104, 13 NJPER 258 (¶18105 1987). Absent a prior request or demand to negotiate,

^{4/} Article 7 of the Agreement, entitled "Compensation", provides that an "employee's base salary shall be adjusted as follows" and then lists the agreed-upon percentage increases to base salary during each calendar year of the Agreement.

the majority representative waives the right to challenge the employer's implementation of the proposed change. Secaucus Tp.; Upper Saddle River Bd. of Ed., D.U.P. No. 2004-7, 30 NJPER 263 (¶91 2004).

In Monroe, the Commission held that the Monroe Board of Education (Board) did not violate section 5.4a(5) of the Act when it subcontracted cafeteria operations without prior negotiations with the Monroe Education Association (Association). During successor contract negotiations, the Board informed the Association that it was "probably" going to subcontract cafeteria operations and the collective negotiations agreement signed by both parties specifically conditioned the availability of cafeteria employee benefits "upon the maintenance of the then present type of cafeteria operation." Monroe, 10 NJPER at 570 (fn.5). The collective negotiations agreement also recognized the Board's right to subcontract services to a management company that would replace the Board as employer of cafeteria employees. Id. The Association did not request negotiations over alternatives to subcontracting and the Board subcontracted cafeteria operations after the agreement was executed. Id. at 570.

While the Commission recognized that a contractual provision obligating an employer to discuss subcontracting proposals and related matters with the Association is mandatorily

negotiable^{5/}, the Commission held that the Board did not negotiate in bad faith with the Association by deciding to subcontract cafeteria operations without prior discussion with the Association. In reaching that conclusion, the Commission emphasized that, "the Association had the obligation to request negotiations on severance pay and related matters, and the Board had the right to an opportunity to respond, before the filing of an unfair practice charge." 10 NJPER at 570 (fn. 6).

Monroe is analogous to this case. IBT did not request negotiations in response to the Township's stated position on calculating base salary increases. The Township notified IBT on March 14 that it intended to exclude merit pay from base salary when calculating base salary increases. In response, IBT only requested verification that the agreement was on the Township council's agenda for approval. IBT did not request or demand to negotiate over the disputed matter and executed the collective negotiations agreement on March 19, five days after receiving notice of the Township's position. By providing advance notice of its position to IBT, the Township fulfilled its obligation to negotiate in good faith. The burden shifted to IBT to demand

^{5/} The Commission noted that the final decision to subcontract was a managerial prerogative, but related matters resulting from subcontracting, such as severance pay and recall rights for employees who lose their jobs, are mandatorily negotiable.

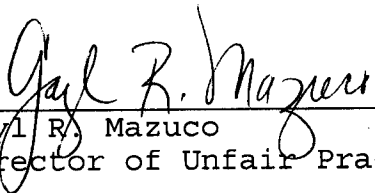
negotiations. It did not demand negotiations. IBT's filing of this unfair practice charge cannot substitute for that omission.

IBT's unfair practice charge also raises a contractual dispute we do not have jurisdiction to resolve. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). IBT interprets "base salary" under Article 7 of the Agreement to include merit pay. The Township interprets base salary under Article 7 as excluding merit pay. These competing contractual interpretations implicate the parties' grievance procedures and are not within the Commission's jurisdiction to decide. Human Services.

Accordingly, I find that IBT's 5.4a(5) and derivative (a)(1) allegations do not satisfy the complaint issuance standard.^{6/}

ORDER

The unfair practice charge is dismissed.



Gayl R. Mazuco
Director of Unfair Practices

DATED: December 30, 2014

^{6/} IBT does not allege facts to support a 5.4a(3) or (7) violation. I dismiss those allegations, also.

Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by January 12, 2015.