I.R. No. 2019-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF COLTS NECK,

Respondent,

-and- Docket No. CO-2019-160

CWA LOCAL 1075,

Charging Party.

SYNOPSIS

A Commission Designee denied an application for interim relief based upon an amended unfair practice charge alleging that the public employer discriminated against unit employees by laying off those employees without notice; avoiding proposed mediation sessions in advance of the layoff; not providing the exclusive representative economic of factual justification for the layoff; and sought to deal directly with unit employees by soliciting their signatures on "severance agreements," the terms of which had not been collectively negotiated. The charge alleges that the employer's conduct violates section 5.4a(1), (2), (3) and (5) of the New Jersey Employer-Employees Relations Act, N.J.S.A 34:13A-1 et seq. (Act).

The Designee denied the application because material factual disputes precluded interim relief. The Designee determined that no direct evidence of discrimination was alleged; that circumstantial evidence, to the extent it was alleged, was contested by the employer, including matters of notice, pursuant to standards set forth in Bridgewater Tp. v. Bridewater Public Works Assn, 95 N.J. 235 (1984); cost savings from entering and using shared service agreements, pursuant to standards in Local 195, IFPTE v. State, 88 N.J. 393 (1982) and Borough of Collingswood, P.E.R.C. No. 2019-8, 45 NJPER 111(¶29 2018). Although the Designee determined that the exclusive representative had demonstrated by a substantial likelihood of success that the public employer had dealt directly with unit employees following the decision to lay off unit employees, that determination did not warrant an order granting the requested relief of maintaining the laid-off unit employees' salaries and benefits.

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Appearances:

For the Respondent, Cleary, Giacobbe, Alfieri, Jacobs, LLC (Matthew J. Giacobbe, attorney)

For the Charging Party, Barry D. Isanuk, attorney

INTERLOCUTORY DECISION

On January 18, 2019, CWA Local 1075 (CWA) filed an amended unfair practice charge against the Township of Colts Neck (Township), together with an application for interim relief, a proposed order to show cause and certification. Its unfair practice charge, filed on December 24, 2018, alleges that the Township, since July 17, 2018, refused to negotiate terms and conditions of employment and interfered with unit employees' choice of representative by ". . . creating disharmony" and bypassing CWA officials and refusing to abide by the notice and grievance procedures set forth in the parties' collective negotiations agreement. The charge specifically alleges that after July 26, 2018, the Township refused to provide CWA with,

". . . requested discovery concerning an upcoming grievance;" on November 20, 2018, it ". . . postponed mediation because it suspended the [CWA shop] steward"; and that on December 12, 2018, the Township called a meeting with CWA shop stewards and denied their request for union representation in violation of their Weingarten[1/] rights; and on unspecified date(s), it unilaterally changed unspecified terms and conditions of employment without notice.

The amended charge alleges that on January 7, 2019, all unit CWA members received Rice[2/] notices for a January 9, 2019 Township Council meeting and, ". . . were not told what the matter was about." On January 9th, employees and CWA President were allegedly informed that the Council meeting was postponed. On January 10, 2019, unit employees reporting to work were allegedly met on Township property by several police officers who informed them that they had been laid off and must immediately leave the premises.

The amended charge alleges that on an unspecified date after January 10th, unit employees received ". . . a letter and severance agreement" and were told to return the agreement by January 31, 2019 or the omission would be considered "a rejection

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1/ NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). See also, UMDNJ and CIR, 144 N.J. 511 (1996).

2/ Rice v. Union Cty. Reg. H.S. Bd. of Education, 155 N.J. Super. 64 (1977).

of the severance offer." CWA alleges that the conduct described is "one-on-one bargaining." The amended charge alleges that the Township "put off" contract mediation sessions proposed on December 7 and 12, 2018 and January 4 and 9, 2019 and advised the mediator of its unavailability on several other specified dates. The amended charge alleges that the Township has not provided CWA, ". . . any economic or factual basis for the layoff" and has not complied with the WDEA (Workplace Democracy Enhancement Act, N.J.S.A. 34:13A-5.11, et seq.) by employing persons performing unit work, ". . . who are not in the uni[t]." The amended charge alleges that beginning January 31, 2019, unit employees will no longer receive salaries and medical benefits.

The Township's conduct allegedly violates section 5.4a(1), 2), (3) and (5)[3/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The application seeks an order directing the Township,

3/ 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

". . . to cease and desist and to continue to pay CWA workers salary and medical benefits until the unfair practice [charge] is resolved."

On January 18, 2019, I issued an Order to Show Cause, setting forth dates for the receipt of CWA's brief and supporting documents; for the receipt of the Township's response; for CWA's reply; and for argument in a telephone conference call. On February 13, 2019, Counsel argued their respective cases.

The Township admits that on January 9, 2019, it unanimously approved a "reorganization plan" for its department of public works that included a reduction in force. It denies that its decision was the result of anti-union animus or in retaliation for any union activities. It asserts that the decision to reorganize, ". . . was made for reasons of economy and efficiency." The Township contends that CWA has failed to demonstrate a substantial likelihood of success on the merits of its unfair practice charge.

The following facts appear:

The most recent collective negotiations agreement signed by the parties extended from January 1, 2015 through December 31, 2017. The recognition provision (Article I) identifies CWA as the "exclusive bargaining agent" for the Township's full-time "blue-collar department of public works employees and all custodians." The agreement includes, among many articles, a

grievance procedure (Article III) ending in binding arbitration; a seniority provision (Article IV) obligating the Township to give "twenty (20) days' notice of layoff to affected employee(s)" and to apply recall and bumping rights; and a "management rights" provision (Article XXIII) reserving to the Township, "the right to reduce the size of the work force" (no. 5); and the right ". . . to take any actions considered necessary to establish and maintain efficiency and cost effective operations and maintenance" (no. 10).

On June 19, 2018, CWA filed a Notice of Impasse with the Commission (Dkt. No. I-2018-190). The document reports that the parties met for negotiations on five dates between October, 2017 and May, 2018.

On July 17, 2018, the parties signed a memorandum of agreement comprised of eleven enumerated paragraphs, one of which specifies CWA's withdrawal of five grievance arbitration cases and one unfair practice charge, (Dkt. no. CO-2017-226). CWA President Kevin Tauro certifies that the Township ". . . reneged on [the agreement] and did not abide by [it]." He certifies that CWA subsequently filed unspecified grievances against the Township and that on July 26, 2018, CWA requested unspecified "discovery" to which the Township has not replied.

On September 5, 2018, the Township authorized and signed in a public meeting a "municipal assistance/shared services

agreement" with Monmouth County. Monmouth County, by terms of the agreement, agreed to provide the Township these "available services:" mowing, plowing, salting and sanding, street sweeping, sign and guardrail installation, towing, traffic signal installation, equipment use, vehicle repairs, etc. The "procedure" specifies:

> If the local government entity [Township] is interested in procuring services through the Municipal Assistance/Shared Services Agreement, [the Township] will submit a completed request form to the County. If the County is able to honor the request, the County will approve the request and isue either a fixed or estimated price quotation. The Township will then decide, at its option, whether or not to accept the services offered by the County. [Township Exhibit 1]

Also on September 5, 2018, the Township approved in the same public meeting a resolution authorizing "the execution of a commodity resale agreement between Monmouth County and Colts Neck Township." An attached exhibit to the agreement identifies these "available commodities:" gasoline, diesel fuel, snow removal chemicals, public works materials and supplies, including road and roadway construction materials, and other unspecified materials approved by the Director of the Division of Local Government Services.

On September 26, 2018, the Township approved and signed in a public meeting a "shared services agreement" with the Township of Howell, authorizing the sale of the same panoply of services to

the Township that were offered in the agreement signed by the Township and Monmouth County. On November 28, 2018, the Township approved and signed in a public meeting a "shared services agreement" with the Township of Holmdel, ". . . for the use of Holmdel Township's transfer station for recycled materials" (Township Exhibits 3, 4).

CWA President Kevin Tauro certifies that on and after November 20, 1018, the Township did not accept any of nine dates offered for a proposed contract mediation session. Township Administrator Capristo certifies that the Township, ". . . has not avoided or delayed mediation," asserting that CWA requested the postponement to allow a member of its team who had been suspended from work for disciplinary reasons to be reinstated (Capristo cert. Para 23). On or about December 12, 2018, the Township, ". . . called in [CWA Shop] stewards for discipline, but refused them union representation when they requested [it]." Township Administrator Capristo certifies that no unit employee was denied a right to union representation.

On January 7, 2019, the Township Clerk authored a (form) letter (or Rice notice) on Township letterhead, the copies of which were addressed to each of fifteen named department of public works employees, including unit employees, advising that the Township governing body will convene in executive session on January 9th, ". . . at which time the terms and conditions of

your employment may be discussed" (Township Exhibit 6). The notices advise that discussion will ensue in "closed session" unless the respective employee(s) requests in writing and in advance of the session to discuss the matter in "open public session." Each letter specifies that it's, ". . . via hand delivery." The Director of the department of public works distributed the notices to the employees (Capristo cert., para. 16).

CWA President Tauro certifies that on January 9, 2019, the Director of public works advised unspecified unit employees that the Township meeting scheduled for later that day was "postponed" (Tauro cert., para. 14). Unit employee Dennis Jenzer certifies (in CWA's reply) that on January 9, 2019, Director Louis Bader told him that the meeting had been cancelled and instructed him, ". . . [to] call your union; they know all about it." (Jenzer cert., January 28, 2019). Other unit employees filed certifications to the effect that Director Bader advised them that the meeting was cancelled or that their employment status would not be discussed at the meeting. Township Administrator Capristo certifies that the Director did not inform employees that the meeting that day was postponed (Capristo cert., para. 16).

On January 9, 2019, the Township unanimously approved a "reorganization plan" for the department of public works. The

meeting minutes shows that the Township committee convened in executive session for about 45 minutes, following which the Acting Mayor commented in a reconvened public session:

> Over the past several months, we've been evaluating the Department of Public Works in order to determine the most operational and cost-effective way to provide quality services to our residents.
>
> We have just reviewed and finalized a Reorganization Plan that includes the use of Shared Services Agreements with Monmouth County, the Colts Neck Board of Education, and neighboring municipalities, as well as the use of private contractors.
>
> The plan also includes the very difficult decision to eliminate certain positions within the Department of Public Works, which will affect nine (9) employees. The Committee is also authorizing pay, benefits and a voluntary severance package to assist these nine employees with their transition.
>
> In anticipation of this potential action, our Township Attorney has prepared the following Resolution for our consideration:
>
> > WITHIN THE DEPARTMENT OF PUBLIC WORKS AND APPROVING ASSOCIATED SEVERANCE PACKAGES was read by title by Acting Mayor Rizzuto. Hearing no comment, Acting Mayor Rizzuto called for a motion. Mr. Macnow made a motion to approve, seconded by Mr. Bartolomeo and unimously carried.

The Township filed a chart identifying nine employees by name and title included in the unit that were subject to the approved reduction in force. The chart sets forth their hiring dates and the separate and cumulative costs of their salaries and

benefits for calendar year, 2018. The cumulative total for all nine employees was about $886,000, $413,000 of which were benefits costs (Township Exhibit 5). Township Administrator Kathleen Capristo certifies that by implementing the "reorganization," the Township will deliver to residents, "... the same services and save at least approximately, $450,000 per year" (Capristo cert., para. 14). No facts indicate when the chart was prepared or if it was provided to CWA on or before January 9, 2019.

On January 10, 2019, nine unit employees were informed that the Township had approved a reorganization plan and that their job positions consequently would be eliminated. Specifically, Township Administrator Capristo authored a (form) letter on Township letterhead, with an attachment, the copies of which were addressed to each of nine named unit employees, advising that part of the "reorganization plan" included the elimination of "certain positions" and a reduction in force in the department. The letter advised the employees that, in lieu of working during the 20-day period [pursuant to Article IV of the collective negotiations agreement], the Township, ". . . will continue to pay you your normal salary through January 31, 2019" and would also pay employees their unused and accrued vacation and sick leave compensation.

Each letter also advises of an attached "severance agreement" for review that provides one week's pay for each year of service to a maximum of eight weeks. Employees were requested to sign and return the attached severance agreement by January 31, 2019. Severance payments offered to each affected employee ranged from $3,400 to $10,000 (Township Exhibit 8). Each severance agreement mandates, among numerous requirements, a unit employee's,

> full and final release, waiver and discharge of any and all claims, rights or causes of action whether known or unknown, which [named employee]
> . . . may have against the Township . . . This release shall apply to any and all claims, rights, demands, causes of action, obligations, damages, expenses, compensation or action of any kind . . .

The proposed severance agreements had not been collectively negotiated with CWA.

On January 16, 2019, CWA Counsel wrote a letter to Township Counsel, confirming a meeting among the parties on January 29th to discuss or negotiate, ". . . the impact of the reduction in the workforce" and an extension of time until February 15, 2019 for "union members to sign a severance agreement" (Township Exhibit 9).

During the February 13, 2019 conference call, and confirmed later in the day, the Township and CWA agreed to another extension of time, until March 8, 2019, for laid-off unit

employees to consider the proposed severance agreement. The parties also confirmed that the extension will allow them to continue "impact negotiations."

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Giora, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

CWA contends that it has demonstrated a substantial likelihood of success on its allegations that the Township discriminated against it and unit employees for engaging in protected conduct. It asserts that the Township's, ". . . anti-union animus culminated in its attack on the union and its members by its Wednesday morning [January 9, 2019] 'massacre' wherein it utilized Gestapo tactics to eviscerate the union and terminate 90% of its members without proper notice and without

negotiations on the impact of same" (brief at 6). CWA also contends that the Township negotiated in bad faith by ". . . bargaining one-on-one with workers, adjourning mediation and unfair practice [charge] conferences. . ." Its reply brief contests the validity of the "reorganization plan," including the purported cost savings. CWA asserts that the Township has not provided, ". . . an estimate of what cost there will be for outside contractors, shared services, etc."

N.J.S.A. 34:13A-5.3 guarantees public employees the right to engage in union activities, including making their concerns known to their employer and negotiating collectively. It also guarantees that a majority representative of public employees shall be entitled to act for and represent the interest of public employees. Section 5.4a(3) of the Act prohibits an employer from retaliating against employee(s) for exercising his/her/their rights guaranteed by section 5.3.

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) established the test for determining if an employer's conduct is discriminatory and violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proved by a preponderance of the evidence that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity,

the employer knew of that activity and the employer was hostile toward the exercise of protected rights. Id. at 246. If the employee(s) has/have established a prima facie case, the burden shifts to the employer to demonstrate by preponderance of the evidence that the adverse action occurred for a legitimate business reason and not in retaliation for protected activity. Id. This affirmative defense need not be considered unless the charging party has established that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs will be resolved by the fact finder. Id. at 244.

Claimed retaliation(s) for protected conduct violating section 5.4a(3) do not normally lend themselves to interim relief because only rarely is there direct and uncontroverted evidence of a public employer's motives. State of New Jersey (Dept. of Human Svcs.) I.R. No. 2018-13, 44 NJPER 434 (¶122 2018); City of Passaic, I.R. No. 2004-7, 30 NJPER 5 (¶2 2004), recon. den., P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004); Newark Housing Auth., I.R. No. 2008-2, 33 NJPER 223 (¶84 2007); City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003); Compare Chester Borough, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den., P.E.R.C. No. 2002-59,28 NJPER 220 (¶33076 2002) (employer's retaliatory motive for making a schedule change demonstrated in interim relief proceeding by direct evidence of police chief's

state of mind and intent revealed in a memorandum placed in evidence stating that union's grievance was to blame for scheduled change and that the change would be rescinded only if union withdraws its grievance). Also in rare instances, uncontested or compelling circumstantial evidence, such as the timing of certain events, can be decisive in assessing employer motivation, enabling an inference of hostility or anti-union animus to the exercise of protected rights. Township of Little Falls, I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den., P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005) (interim relief granted when a mayoral-ordered police schedule change was "suspicious and lends itself to an inference of hostility," given the timing soon after two grievances were filed and despite police chief's strenuous objections to the change).

This case is not that rarity. It does not appear that any direct evidence shows that the Township's decision to "eliminate [nine] positions in the department of public works," resulting in a layoff of nine unit employees, was motivated by anti-union animus. Nor does it appear that the facts alleged in CWA's December 24, 2018 unfair practice charge reveal suspicious timing, angry statements by Township representatives, shifting reasons, a departure from established practice or other circumstantial indicia of unlawful motive permitting an inference

of hostility or establishing a nexus to the January 9, 2019 layoff decision.

Attached to the amended charge is CWA President Tauro's certification that the Township's conduct described in the earlier charge, ". . . pales in comparison to the current actions of [the Township] that show an extreme anti-union animus and retaliation for union activities" (Tauro cert., para. 13). Tauro is referring to the Township's actions commencing on January 7, 2019 that are more specifically set forth in the apparent facts of this decision. Considering those facts, I disagree that CWA has demonstrated by a substantial likelihood of success that the Township's decisions to sign shared service agreements with nearby public employers and to lay off nine unit department of public works employees was the result of anti-union animus or a refusal to negotiate in good faith.

Our Supreme Court and the Commission have held that the decision to subcontract is a "non-negotiable matter of managerial prerogative." Local 195, IFPTE v. State,88 N.J. 393, 408 (1982); Helmetta Bor., P.E.R.C. No. 2016-16, 42 NJPER 184 (¶47 2015). However, " . . . in cases where subcontracting would result in layoffs, a public employer may agree to engage in pre-subcontracting discussions with the majority representative." Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2017-36, 43 NJPER 243, 245 (¶75 2016); Middlesex Cty. Coll., P.E.R.C. No. 2010-85,

36 NJPER 189 (¶70 2010). The Commission has distinguished shared service agreements[4/] from other subcontracting and unit work cases because shared service agreements are neither an assignment of work to a private employer, nor the assignment of unit work to non-unit employees of the same public employer. Borough of Collingswood, P.E.R.C. No. 2019-8, 45 NJPER 111 (¶29 2018); Union Cty., P.E.R.C. No. 2010-82, 36 NJPER 183 (¶67 2010). In both cited cases, the employer's interest in determining the services to provide the public and how those services will be provided outweighed competing union interests.

CWA doesn't dispute that twice in September, 2018, the Township approved in separate public meetings shared service agreements with Monmouth County and Howell Township to provide the Township with multiple services performed by CWA unit employees. In a November, 2018 public meeting, the Township signed another shared services agreement with Howell Township enabling the former to use the latter's transfer station for recyclables. No facts indicate that protected activity in or around this specific period of time motivated the Township's decision to solicit and sign those agreements.

4/ Uniformed Shared Services and Consolidation Act, N.J.S.A. 40A:65-1, et seq. Public employers may contract with other public employers, " . . . to provide or receive any service that each local unit participating in the agreement is empowered to provide or receive within its own jurisdiction, including services incidental to the primary purposes of any of the participating local units." N.J.S.A. 40A:65-4.

The apparent facts on this record regarding the Township's conduct in November and December, 2018 are equivocal or disputed. That the Township did not "accept" any of nine proposed dates to engage in mediation for a successor agreement with CWA could imply its refusal to negotiate or its simple unavailability on those dates. Similarly, the certifications of CWA President Tauro and Township Administrator Capristo regarding denials of a right to union representation are irreconcilable.

The Township filed a chart setting forth its 2018 salary and health benefits costs for each of the nine effected unit employees and Administrator Capristo certifies that its projected 2019 savings under the shared services agreements shall be about one-half ($450,000) of those costs. Although CWA contests the veracity of the projected savings, I glean only a material factual dispute from the parties' papers regarding the "economy and efficiency" of the Township's action.

The parties also dispute whether on January 9, 2019, unit employees were advised by the Director of the department of public works that the Township meeting that night (at which the Council voted on the "reorganization plan") was postponed.

Section 5.4a(5) prohibits a public employer from refusing to negotiate with the majority representative concerning terms and conditions of employment of unit employees. An employer violates this section and 5.4a(1) by dealing directly with certain unit

employees and signing agreements affecting their terms and conditions of employment. Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed. and Matawan-Aberdeen Reg. Teach. Ass'n, P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989) [app. dism. App Div. Dkt. No. A-6054-88T5 (12/5/89)]; Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984). CWA has demonstrated by a substantial likelihood of success that the Township dealt directly with unit employees by seeking their signatures on individual severance agreements that included additional compensation. Inasmuch as this conduct followed the Township's decision to lay off nine unit employees, I find that it neither implicates the Township's motive for its earlier decision to sign shared services agreements nor suffices to demonstrate anti-union animus in the layoff.

For all these reasons, CWA has not demonstrated a substantial likelihood of success on the merits of its charge. Accordingly, I deny the application for interim relief. This case shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: February 15, 2019
Trenton, New Jersey