

I.R. NO. 2022-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2022-004

FRATERNAL ORDER OF POLICE,
LODGE NO. 62, a/w NJFOP LABOR COUNCIL,

Charging Party.

SYNOPSIS

A Commission Designee grants, in large part, an application for interim relief based upon an unfair practice charge alleging that the public employer repudiated a provision of a stipulated Interest Arbitration Award signed by the employer and charging party on April 16, 2021, resulting in a collective negotiations agreement, specifying that fiscal year 2022 increments will be paid to unit employees on July 1, 2021. The charge alleges that the employer unilaterally determined and advised that the payments will be issued on October 1, 2021, thereby violating section 5.4a(1) and (5) of the Act.

The Designee agreed that the provision appeared to be repudiated, warranting the Commission's exercise of jurisdiction over the dispute under longstanding precedent. See State of New Jersey (Dept. of Human Services), PERC No. 84-148, 10 NJPER 419 (¶15191 1984). The Designee ordered that the increments be paid promptly and not later than two weeks from the date immediately following the issuance of the Order.

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Appearances:

For the Respondent,
(Timothy D. Cedrone, Associate General Counsel
Rutgers, the State University of New Jersey
Syrion Jack, Associate General Counsel, on the brief)

For the Charging Party,
Markowitz and Richman, attorneys
(Matthew D. Areman, of counsel)

INTERLOCUTORY DECISION

On July 6 and 13, 2021, Fraternal Order of Police, Lodge No. 62, a/w NJFOP Labor Council (FOP) filed an unfair practice charge and amended charge against Rutgers, the State University of New Jersey (Rutgers), together with an application for interim relief, a brief, certification and exhibits. The charge alleges that FOP and Rutgers are parties to a collective negotiations agreement (CNA) extending from July 1, 2019 through June 30, 2023, ". . . which was the result of an April 19, 2021 Interest Arbitration Award" (Award or Stipulated Award). The charge, as

amended, alleges that the Award and CNA provide for certain salary increases and increments payable on certain dates, including July 1, 2021 and October 1, 2021. On June 23, 2021, Rutgers allegedly advised the FOP “. . . that it was ignoring the salary provisions of the Award and resulting CNA, and instead would attempt to make the required payments on an alternative schedule unilaterally created by Rutgers, thus repudiating the salary provisions of the Award/CNA.” On June 24, 2021, FOP replied to Rutgers, allegedly advising that refusal to comply with the Award/CNA was “unacceptable” and requesting “certain information” for the purpose of exploring possible actions to administer and enforce the CNA. Rutgers has allegedly not provided the requested information. Rutgers’ conduct allegedly violates section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The FOP seeks an Order requiring Rutgers to cease and desist from repudiating the terms of the Award/CNA; requiring Rutgers to effectuate the required salary adjustments and payment to unit employees; and adding any other appropriate relief.

^{1/} These provisions prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

On July 13, 2021, I issued an Order to Show Cause, setting forth dates for Rutgers' response, FOP's reply and argument on the application in a conference call. On August 3, 2021, the parties' Counsel argued their respective cases.

Rutgers denies that it repudiated the Award, writing that, ". . . it began implementing [it] within 5 calendar days of [it's] execution. . ." (brief at 18). Rutgers contends that "numerous operative facts are sharply disputed," including a past practice of implementing salary increases, ". . . as soon as operationally feasible;" that it regularly communicated with the FOP about implementing the salary provisions; and that implementing salary increases for 17,000 employees in several units didn't provide it "a reasonable amount of time to respond to the [FOP's] information request" (brief at 22). Rutgers avers that it maintained "transparency and good faith" with [FOP] concerning implementation and scheduling of the payment date. Rutgers contends that the dispute is "contractual" and should be deferred to the parties' negotiated grievance procedure. It denies that FOP unit employees will suffer irreparable harm if relief isn't granted.

The following facts appear.

The FOP is the certified majority representative of about 72 police officers employed by Rutgers. The parties have negotiated

CNAs for many years; the immediate predecessor CNA extends from 2014 through 2019 (FOP Pres. Martin Roman cert., para. 3, 4).

On February 3, 2021, FOP filed a Petition to Initiate Compulsory Interest Arbitration (Dkt. No. IA-2021-015) with the Commission. On April 9, 2021, the assigned Interest Arbitrator conducted a mediation session with the parties (FOP and Rutgers) to achieve a voluntary resolution of their impasse in negotiations. On April 16, 2021, following discussions with the Arbitrator, the parties signed a "Stipulated Award" that the Arbitrator also signed (Roman cert., para. 8; Agnostak cert., para. 4).

The Award provides in pertinent parts:

Following discussion with the parties and recommendations made by the undersigned [Interest Arbitrator], the parties, in order to set forth the terms of a successor CNA and to resolve the pending Interest Arbitration proceeding filed pursuant to the Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-15 et seq., bearing Docket No. IA-2021-015, the University [Rutgers] and the Union [FOP] agree to modify the CNA in effect for the term July 1, 2014 to June 30, 2019 and enter into the stipulated award as follows:

Rutgers and the FOP agree to the following stipulated changes to their 2014-2019 CNA. The remainder of the 2014-2019 agreement will remain unchanged (with the exception of minor corrections identified in preparation of the final agreement) in the successor contract.

* * *

Article 19- Salaries

Subject to the appropriation and allocation to the University by the State of adequate funding for the specific purpose identifiable in this article for the full period of this agreement, the following salary increases will be granted to officers in the unit during the term of this agreement.

* * *

1. Salary Guides. The salary guides in Appendix _____ reflect across-the-board percentage increases, exclusive of increments, for the fiscal years as follows:

FY20- 3.0% increase effective July 1, 2019 to the senior step of the senior police officer salary guide (Range 22, step 8) only.

FY21- 0.0% across-the-board

FY22- 2.0% increase effective October 1, 2021 to the senior step of the senior policy officer salary guide (Range 22, step 8) only.

FY23 - 1.75% across-the-board increase effective January 1, 2023.

Step increments shall be paid for FY20 on the eligible officer's anniversary date. No step increments shall be paid for FY21. Step increments shall be paid in FY22 on July 1, 2021 for all officers (emphasis added). For purposes of step increments in FY22, all officers shall be deemed to have a July 1 anniversary date. No step increments shall be paid after July 1, 2021.

[Rutgers Exhibit A; FOP Exhibit]

On April 21, 2021, Rutgers Deputy Police Chief Michael Rein emailed a memorandum to police supervisors advising of the successor agreement to the parties' 2014-2019 CNA. Numerous

[unspecified] provisions of the "stipulated award" were implemented immediately (Rein cert., para. 3).

On April 26th, FOP President Roman issued an email to Rein regarding expected dates for the implementation of salary increases, and movement on guides of those unit employees previously represented by another FOP local at UMDNJ. Rein responded promptly, advising that Rutgers was in the process of implementing the stipulated award and that he will reply again regarding other issues.

Rein emailed police supervisors on several dates in May, 2021 regarding administering accrual and use of vacation time for FOP unit employees in accord with the modified vacation Article in the stipulated award (Rein cert., para. 5). On June 8, 2021, Rein emailed Roman about prospective salary placements of FOP unit members under the Award, including a spreadsheet for each officer's prospective placement. Roman and Rein promptly spoke about placement of 13 unit employees on the salary scale (Rein cert., para. 6, 7, 8). They again discussed placement on June 18, 2021, with Roman expressing his amenability to a "side letter" of agreement with Rutgers regarding such placement (Rein cert., para. 9).

The parties' predecessor 2014-2019 CNA was based on terms of an interest arbitration award issued in October, 2016. The salary provisions of that award were implemented in the January

27, 2017 pay cycle, pursuant to an email issued by Vice President of Labor and Employee Relations and Director of the Office of Labor Relations Harry Agnostak to then-FOP President Ruditsky (Agnostak cert., para. 7, 8).

In letters dated June 8, 2020, Rutgers notified 14 of its unions of significant financial losses caused by COVID-19 pandemic and its related impact on it. Rutgers invoked the "subject to" language in each of those letters and "declared a fiscal emergency." As a result, the University withheld contractually negotiated salary increases that were set to take effect in fiscal year 2021 for each union that received the letter (Agnostak cert. para. 9).

Between June, 2020 and March, 2021, Rutgers and several of its unions reached separate memoranda of agreement resolving the fiscal emergency and the withholding of fiscal year 2021 salary increases. Each increase required separate unexpected payroll implementation processes and new, unexpected payroll implementation dates to be effectuated. For example, CWA Local 1040 agreed with Rutgers on February 18, 2021 for payment of fiscal year 2021 increases retroactive to July 1, 2020. Those increases went into effect in May 14, 2021 paychecks (Agnostak cert., para. 11).

In another example, Rutgers and HPAE Locals 5089 and 5094 reached agreement on March 3, 2021. The CNA provides for fiscal

year 2021 increases retroactive to July 1, 2020. The increases went into effect in the May 14, 2021 paychecks (Agnostak cert., para. 12).

Before April, 2021, Rutgers and 17 of its unions agreed mid-contract to negotiate and reach agreement on the offering of a new health plan under SHBP. The offering required Rutgers to administer an open enrollment period from May 3, 2021 to May 14, 2021 (Agnostak cert., para. 16).

On June 30, 2021, FOP filed a grievance contesting an alleged violation of the terms of the "Stipulated Award," when it informed the FOP of dates on which the salary provisions of that award would be implemented. FOP and Rutgers scheduled a step 2 meeting on the grievance for August 2, 2021 (Agnostak cert., para. 17, 18). The results of that meeting are unknown.

More specifically, on June 23, 2021, Rutgers advised FOP that it would make required payments on an alternative schedule in which July 1, 2019 anniversary increments would be paid by September 17, 2021; July 1, 2021 anniversary increments would be paid on October 1, 2021; and the October 1, 2021 salary increase would be paid on October 15, 2021 (Roman cert., para. 10, 11).

The FOP objected to the unilaterally revised timeline (Roman cert., para. 12). FOP Counsel requested from Rutgers a spreadsheet listing unit members and amounts payable to each officer for each component of the Award; the department and

individuals responsible for implementing the salary adjustments; the process of implementation for unit employees; and explanations for delays in the July 1, 2021 and October 1, 2021 increment and salary adjustments (FOP Exhibit 3).

Rita Evans-Walker is a Senior Human Resources Project Specialist employed by Rutgers for many years. She certifies that Rutgers, ". . . generally implements salary increases as soon as operationally feasible" (Evans-Walker cert., para. 1, 5). She certifies her knowledge of the Stipulated Award's ". . . limited across-the-board increases and step increments for fiscal year 2020 and fiscal year 2022" (Evans-Walker cert., para. 9). Rutgers is implementing about 24 other pay increases affecting about 17,000 other employees. To ensure accuracy, Rutgers ". . . staggered implementation of pay increases for different groups across different pay periods." She certifies:

Accordingly, the [FOP's] pay implementation was scheduled later than other Rutgers employees whose agreements had been executed before April 16, 2021.
[Evans-Walker cert., para. 14]

She also certifies that implementation of FOP step increments that were effective July 1, 2019 is "more complicated" because it requires a "look back" of two years' work and overtime, which is time-consuming. For this reason, step increments that are "effective, July 1, 2021, cannot be calculated and implemented

until the July 1, 2019 salary increases are completed" (Evans-Walker cert., para. 19, 20).

During the conference call, FOP Counsel conceded that Rutgers had provided the requested spreadsheet of prospective unit employee salaries and increments during the current contractual period. Counsel also acknowledged that FOP was reviewing Rutgers' responses to its other information requests.

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. Also, 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 Gioia, 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).

The FOP argues that Rutgers is repudiating the salary provision of the April 16, 2021 Stipulated Award, having unilaterally announced its decision to pay the increments in October, 2021, ". . . barely a week before the contractual

payments were due" (brief at 7). It relies on Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018), among other cases. In that case, the public employer refused to pay negotiated and scheduled wage increases (and other benefits) mid-contract, following the exclusive representative's refusal to reopen negotiations. The Designee determined that the employer, ". . . provided no justification for its action, nor cited any contractual defense." The Designee also determined that such a "mid-contract repudiation upsets the balance required for good faith negotiations and chilled the negotiation process at a time when cooperation between labor and management is imperative to address [existing] circumstances." Id., 45 NJPER at 135.

N.J.S.A. 34:13A-5.3 requires a public employer to negotiate in good faith over terms and conditions of employment. It also requires that agreements over terms and conditions of employment be reduced to writing. N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for an employer to refuse to negotiate in good faith. A mere breach of contract doesn't warrant the exercise of the Commission's unfair practice jurisdiction and will not be found to be a refusal to negotiate in good faith. The Commission will find an unfair practice in cases where an employer has repudiated a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it. Bridgewater Tp., P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), aff'd 21 NJPER

401 (¶26245 App. Div. 1995); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

"Where the alleged unfair practice turns on whether the employer flouted an unambiguous contract term, no more is needed to carry the charging party's burden of proof" Bridgewater, App. Div., 21 NJPER at 402.

It appears that on June 23, 2021, Rutgers advised the FOP that July 1, 2021 anniversary increments for unit employees would be paid by October 1, 2021. The earlier date is memorialized in the parties' Stipulated Award they signed on April 16, 2021, that also was signed by the Interest Arbitrator: "Step increments shall be paid in FY22 on July 1, 2021 for all officers."

Rutgers has provided an extensive context for its admitted and delayed payment, including the processing of many thousands of other pay increases to employees in many collective negotiations units.

It admits processing contractually-obligated payments in an approximate order in which successor CNAs were negotiated, with the FOP's Stipulated Award and resulting CNA having been consummated relatively late in sequence. This circumstance provides some meaning to Rutgers' averment that increment payments to FOP unit members will occur when "operationally feasible" (brief at 26). Rutgers acknowledges implementing certain and other unspecified provisions of the successor

Award/CNA and has apparently agreed to the placement of 13 new unit employees on a salary scale. It has also provided details about belated increment payments under the parties' predecessor award/CNA, ostensibly signaling an anticipated or even binding accommodation in this matter. But the context set forth in Rutgers' responsive papers doesn't appear to include a described good faith effort to comply with the July 1, 2021 window date for fiscal year 2022 increment payments to which Rutgers expressly agreed on April 16, 2021. But see City of Camden, I.R. No. 2019-24, 45 NJPER 396 (106 2019).

Under all the circumstances, I find that Rutgers' unilateral decision to delay fiscal year 2022 increment payments until October appears to strip the Stipulated Award/CNA provision in Article 19 of its undisputed meaning and effect. Rutgers' conduct appears to repudiate its written agreement to pay the increments on July 1, 2021. Accordingly, the FOP has a substantial likelihood of proving that Rutgers violated sections 5.4a(5) and (1) of the Act.

I also find that the unilateral decision to delay the increment payments, conveyed to the FOP about one week before they were to be paid and more than two months after Rutgers expressly agreed to the payment date has a chilling effect on the negotiations process that is irreparably harmful. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978); Ocean

Cty., I.R. No. 2010-20, 36 NJPER 180 (¶65 2010) and Ocean Cty. Sheriff's Office, I.R. No. 2010-23, 36 NJPER 191 (¶72 2010. recon. den. P.E.R.C. No. 2011-6, 36 NJPER 303 (¶115 2010) (granting interim relief when failure to pay contractual salary increments, pursuant to unambiguous provision of parties' expired CNA would irreparably harm the negotiations process); Egg Harbor Tp., I.R. No. 2011-14, 36 NJPER 336 (¶131 2010) (granting interim relief based upon a mid-contract repudiation of the parties' contractually-negotiated salary increase that irreparably harms the negotiations process). Allowing Rutgers to renege on the contractual increment payment date adversely impacts the negotiations process and harms the parties' ability to negotiate in good faith. "Monetary damages will not satisfy the damage to the process" Egg Harbor Tp.

The FOP has demonstrated relative hardship and the public interest will not be harmed by an interim relief order. Enforcement of the Award/CNA allows Rutgers to seek concessions as the need arises in the future. Any risk of computational error in increment payments may properly be addressed later and overpayment may be recouped if appropriate and necessary. It appears that after August 6, 2021, the hardship on Rutgers to pay increments to about 70 police officers is relatively slight and can be implemented by August 20, 2021, when it admittedly intends to pay salary increases to several thousand non-aligned employees

(brief at 38). Finally, the public interest is furthered by requiring Rutgers to adhere to its contractual commitment.

ORDER

The FOP's application for interim relief is granted, in part.^{2/} Rutgers shall pay fiscal year 2022 increments that were payable on July 1, 2021 to all officer unit employees promptly and not later than August 20, 2021.

This matter shall be returned to regular case processing.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED; August 5, 2021
Trenton, New Jersey

^{2/} The facts on the record before me indicate that certain requested information has been provided and that other provided information was being reviewed by the FOP. These circumstances do not warrant a grant of interim relief.