

H.E. NO. 2020-5

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

In the Matter of

BOROUGH OF BERGENFIELD,

Respondent,

-and-

Docket No. CO-2019-288

PBA LOCAL 309,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Borough of Bergenfield (Borough) violated N.J.S.A. 34:13A-5.4a(6) by refusing to sign a collective negotiations agreement that was modified by an interest arbitration award. The PBA Local No. 309 (PBA) submitted the draft agreement to the Borough after an interest arbitration award was issued and neither the Borough nor the PBA appealed the award. The Borough refused to sign the agreement, citing inconsistencies between the award and the draft agreement. The Hearing Examiner disagreed and held that the agreement was consistent with the award and the Borough violated the Act by not signing the agreement.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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PBA LOCAL 309,

Charging Party.

Appearances:

For the Respondent,
McCusker Anselmi Rosen and Carvelli, PC, attorneys
(John L. Shahdanian II, of counsel)

For the Charging Party,
Lockke, Correia & Bukosky, attorneys
(Michael A. Bukosky, of counsel)

**HEARING EXAMINER'S DECISION ON MOTION
FOR SUMMARY JUDGEMENT**

On May 29 and September 11, 2019, the Bergenfield Police Officer's Benevolent Association, Local No. 309 (PBA or Charging Party) filed an unfair practice charge and amended charge against the Borough of Bergenfield (Borough or Respondent). The charge, as amended, alleges the Borough violated sections 5.4a (3), (4) and (6)^{1/} of the New Jersey Employer-Employee Relations Act,

1/ These provisions prohibits public employers, their representatives or agents from: "(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...)"

N.J.S.A. 34:13A-1 et seq. (Act), by refusing to sign a collective negotiations agreement, as modified by an interest arbitration award.

On October 25, 2019, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on the 5.4a(6) allegation. The Director declined to issue a complaint on the 5.4a (3) and (4) allegations because there were insufficient facts pled to support those allegations.

The PBA filed a Motion for Summary Judgment, accompanied by a brief and certification from David Tortora ("Tortora Cert."), the PBA's President, with the Chair of the New Jersey Public Employment Relations Commission (Commission) on December 23, 2019. On December 30, 2019, the Borough filed a brief and certification from Corey Gallo, the Borough Administrator ("Gallo Cert."), in opposition to the PBA's motion. The Commission referred the motion to me for decision on January 10, 2020.

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

1/ (...continued)
act;" "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Based on the parties' submissions and this standard of review, I make the following:

FINDINGS OF FACT

1. The PBA is the exclusive majority representative of all Borough police officers, except for the Borough's Chief of Police and Deputy Chief of Police. (Tortora Cert., Exhibit C, Page 2).

2. The PBA and Borough are parties to a collective negotiations agreement extending from January 1, 2017 through December 31, 2017 ("2017 CNA"). (Gallo Cert., Paragraph 4).

3. Article III, Section 2 of the 2017 CNA provides that salary "increments shall be paid in accordance with past

practice." Appendix A-2 of the 2017 CNA sets forth a six step salary schedule, effective January 1, 2017, for employees hired after January 1, 2014 and defined the anniversary date for the payment of increments to officers in training as ". . . the date following academy certification." The salary schedule also lists salaries for sergeants, lieutenants and captains. (Tortora Cert., Exhibit C, Pages 6 and 35).

4. On September 29, 2017, the parties commenced negotiations for a successor collective negotiations agreement (CNA). (Gallo Cert., Paragraph 6). On or about February 20, 2018, the PBA filed a Notice of Impasse with the Commission. (Gallo Cert., Paragraph 7).

5. After filing for impasse, the PBA and Borough participated in two mediation sessions on May 9 and July 9, 2018. Unable to reach agreement, the Borough filed an interest arbitration petition with the Commission on August 2, 2018. (Tortora Cert., Paragraph 9; Gallo Cert., Paragraphs 7 and 8).

6. The PBA and Borough participated in one mediation session before an Interest Arbitrator. The parties did not reach agreement, and the Borough withdrew its interest arbitration petition and filed another interest arbitration petition on

September 20, 2018.^{2/} (Tortora Cert., Paragraph 13; Gallo Cert., Paragraph 9).

7. On October 1, 2018, the Commission designated another Interest Arbitrator on the second petition. The Interest Arbitrator conducted a mediation session with the parties on October 22, 2018. Unable to resolve all issues at the mediation session, a hearing was conducted on November 20, 2018. At the hearing, both parties were represented by counsel and were afforded a "full and complete opportunity to present evidence and offer testimony in support of their respective positions." On December 3, 2018, the PBA and Borough submitted post-hearing briefs and other documents in support of their positions. (Tortora Cert., Paragraphs 15 and 16; Gallo Cert., Paragraphs 10 and 11, Exhibit A).

8. During interest arbitration proceedings, the PBA and Borough each presented their "last and final offer" for contract settlement. As part of its last offer, the PBA proposed a CNA for a one year term to begin on January 1, 2018 and a "1.8% wage increase applied across the board to the salary schedules." (Gallo Cert., Exhibit A, IA Award, Page 6). As part of its final offer, the Borough proposed a CNA whose duration would extend

^{2/} According to the Borough, the PBA suggested withdrawing the petition and re-filing a new petition "to allow the parties additional time for scheduling" a mediation or hearing. (Gallo Cert., Paragraph 9).

from January 1, 2018 through December 31, 2021 and which provides a zero percent salary increase, "no step increases" and placement of "all bargaining unit members still in step" at the same salary guide step they were on as of December 31, 2017 for the duration of the 2018-2021 proposed CNA. (Gallo Cert., Exhibit A, IA Award, Page 5).

9. On December 27, 2018, the Arbitrator issued a fifty-four (54) page Interest Arbitration Award (Award). (Gallo Cert., Exhibit A). In the Award, the Arbitrator discussed and analyzed arguments and evidence presented by the PBA and the Borough on permissible salary increases under the 2% "hard cap" on base salaries in interest arbitration awards. (Gallo Cert., Exhibit A, IA Awards, Pages 32 - 41). After considering the parties' submissions, the Arbitrator issued the following award on salary:

2018: 0% salary increase, full step increases, longevity and senior officer differential.

2019: 0% salary increase, step increases on October 1, 2019, longevity compensation and senior officer differential in accordance with the terms of the Agreement.

2020: 0% salary increase, no step movement, longevity and senior officer differential in accordance with the terms of the agreement.

(Gallo Cert., Exhibit A, IA Award, Page 41). The Arbitrator also delineated his calculations of the "net, annual economic change in base salary over the three year agreement" and awarded a contract duration of "January 1, 2018 through December 31, 2020."

The Arbitrator noted that "all other proposals by the Borough and PBA not awarded herein are denied and dismissed" and that "all provisions of the existing agreement [2017 CNA] shall be carried forward except for those which have been modified by the terms of this Award." (Gallow Cert., Exhibit A, IA Award, Page 54).

Neither party appealed the award. (12/30/19 Borough Brief, Page 3).

10. In his IA Award, the Arbitrator found that the "*status quo* terms and conditions of employment . . ." for the PBA and Borough encompassed salary "step increases based on year of hire." (Gallo Cert., Exhibit A, IA Award, Page 27). The Arbitrator's award does not address salary step increments in 2021 and beyond. (Gallow Cert., Exhibit A).

11. On January 22, 2019, the PBA provided the Borough with a draft CNA memorializing the IA Award. (Gallo Cert., Paragraph 13). After reviewing the draft CNA, Borough counsel notified PBA's counsel on March 1, 2019 that ". . . there appears to be inconsistency between the proposed CBA and the Interest Arbitration Award." (Gallo Cert., Paragraph 14; Attachment C to Unfair Practice Charge). The Borough asserted approximately six (6) inconsistencies between the IA Award and the draft CNA concerning draft provisions covering salary increments, insurance, death benefits and the retroactive payment of increments. (Attachment C to Unfair Practice Charge). Pertinent

to this dispute, the Borough asserted that the language in Article III, Section 2 of the CNA concerning the payment of salary increments "in accordance with past practice should be removed" and that PBA unit employees are not entitled to salary increments under the IA Award. (Gallo Cert., Paragraph 14; Attachment C to Unfair Practice Charge). The Borough acknowledged that all other draft provisions, including the salary schedules or appendix, were acceptable. (Attachment C to Unfair Practice Charge).

12. On April 15, 2019, the Borough received a response from PBA counsel to the Borough's March 1, 2019 objections to the draft CNA. (Gallo Cert., Paragraph 16; Attachment D to Unfair Practice Charge). The PBA resubmitted a draft CNA to the Borough addressing two of the Borough's objections, but otherwise disagreed with the Borough's remaining objections and contended the draft CNA is consistent with the IA Award. (Attachment D to Unfair Practice Charge). On the issue of the increment language in Article III, Section 2 of the draft CNA (Exhibit B to Tortora Cert.) providing payment of increments in accordance with past practice, the PBA noted that at page 54 of the IA Award, the Arbitrator found that "all provisions of the existing Agreement [2017 CNA] shall be carried forward except for those which have been modified by the terms of this Award" and that the past practice language in the 2017 CNA was not modified by the IA

Award. In further support of its position, the PBA cited Article XVIII, Section 3 of the 2017 CNA, which was not modified by the IA award and would, therefore, also carry forward into the 2018-2020 CNA. That section provides:

Unless a contrary intent is expressed in this Agreement, all existing benefits, rights, duties, obligations and conditions of employment applicable to any Police Officer pursuant to any rules, regulations, instruction, directive, memorandum, statute or practice shall not be limited, restricted, impaired, removed or abolished. De minimis changes are not effected by this Article. [Exhibit C to the Tortora Cert., Page 30]

The Borough ultimately did not agree with the PBA's position and did not sign the PBA's Draft 2018-2020 CNA. (Gallo Cert., Paragraphs 16 and 24).

13. In or around the Spring of 2019, the Borough's Chief Financial Officer (CFO) and an outside auditor retained by the Borough reviewed "all figures contained in the [IA] Award", including but not limited to "calculations for step increases" in 2019 to ensure the figures awarded were accurate. (Gallo Cert., Paragraphs 17 and 18).^{3/} According to the Borough's analysis,

^{3/} The Borough and PBA disagree about whether increments for 2019 were paid to PBA unit employees in accordance with the IA Award. The Borough asserts they were, the PBA asserts they were not. (Gallo Cert., Paragraph 19; Tortora Cert., Paragraph 22). This is a contractual dispute that should be resolved in accordance with the parties' negotiated grievance procedures. State of New Jersey (Human Services); P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The issue in this case is whether the Borough committed an unfair
(continued...)

the cost of implementing the award pursuant to the PBA's draft CNA exceeds the costs delineated in the IA Award. (Gallo Cert., Paragraph 23, Exhibits B, C, D; Page 40 of IA Award). Based on the discrepancy between the costs of step increases in the IA Award and the calculations made by the CFO and independent auditor, the Borough declines to sign the PBA's CNA.

ANALYSIS

The issue in this case is whether the Borough violated the Act by refusing to sign the draft 2018-2020 CNA provided by the PBA (attached as Exhibit B to the Tortora Cert.). If the CNA memorializes the terms of the December 27 IA Award, then the Borough is obligated under the Act to sign the CNA. Since the CNA is consistent with the terms of the IA Award, I find the Borough violated section 5.4a(6) of the Act by not signing that agreement and grant the PBA's motion for summary judgment.

Section 5.4a(6) of the Act prohibits public employers from refusing to reduce collective negotiations agreements to writing and sign such agreements. N.J.S.A. 34:13A-5.4a(6); Borough of Leonia, P.E.R.C. No. 2008-3, 33 NJPER 204 (¶73 2007). In the context of interest arbitration, the Commission has interpreted Section 5.4a(6) as requiring employers to reduce interest

3/ (...continued)
practice by refusing to sign the draft CNA provided by the PBA. Borough of North Arlington, P.E.R.C. No. 2014-64, 40 NJPER 443 (¶154 2014).

arbitration awards to a written collective negotiations agreement that accurately reflects the terms of the award and sign that agreement. Leonia, 33 NJPER at 205; Borough of North Arlington, P.E.R.C. No. 2014-64, 40 NJPER 443 (¶154 2014); Pemberton Tp., D.U.P. No. 2002-12, 28 NJPER 226, 227 (¶33080 2002) (Employer did not violate Act by implementing and drafting CNA that “. . . comported with the plain meaning of the [interest] arbitrator’s decision”). As the Commission explained in Leonia:

Interest arbitration is a binding procedure for settling contracts involving police officers and firefighters. An arbitrator’s award is final and binding unless vacated or modified on appeal. An award that is not appealed must be implemented immediately. Consistent with the obligation to implement the award is the obligation to reduce the award to writing and sign it. There is no duty to negotiate further after an award issues.

[Leonia, 33 NJPER at 205 (internal citations omitted); see also N.J.S.A. 34:13A-16(f)(5)(b); N.J.A.C. 19:16-5.4.]

If there is a dispute between a majority representative and employer about the interpretation of an interest arbitrator’s award, “. . . a party must appeal to the Commission in the first instance to seek clarification [of the award] or the appellant is deemed to have waived the appeal right.” Bloomfield Tp., P.E.R.C. No. 2012-44, 38 NJPER 323, 324 (¶107 2012). Such an appeal must be filed within fourteen (14) calendar days of a party’s receipt of an IA award. N.J.S.A. 34:13A-16(f)(5)(a); N.J.A.C. 19:16-8.1. A party challenging an interest arbitrator’s

cost calculations in an award must file an appeal with the Commission within that 14 day time period. Hudson County Prosecutor, P.E.R.C. No. 2012-37, 38 NJPER 283 (¶97 2012) (Commission remands case to interest arbitrator to resolve conflicting interpretations of an interest arbitrator's calculations of a salary award); N.J.S.A. 34:13A-16(f)(5)(a). Outside the 14 day window of time to appeal an IA Award, the Commission will not consider claims seeking to overturn an interest arbitration award because to do so would ". . . undermine the interest arbitration process." Town of Harrison and PBA Local 22 (Raefski), D.U.P. No. 2006-11, 32 NJPER 185, 187 (¶82 2006).

Here, the Borough raises two defenses for refusing to sign the 2018-2020 CNA: (1) the language in Article III of the draft CNA providing for step increases is inconsistent with the Arbitrator's IA Award because salary increments ". . . were clearly denied in the Award" (Page 3 of Borough's 12/30/19 Letter Brief); and (2) the cost calculations made by the Borough's CFO and auditor of the salary increments under the CNA are inconsistent with the cost figures provided by the arbitrator in his IA Award on salary increases (Pages 4-5 of Borough's 12/30/19 Letter Brief). The Borough acknowledges that ". . . post-award, the parties resolved all of their issues with the exception of the language regarding step increases", that

there is “. . . no dispute as to the interpretation of the Award” and that the Award “is clear on its face.” (Pages 5 and 7 of Borough’s 12/30/19 Letter Brief). The PBA disagrees, arguing the draft CNA’s terms on salary increments is consistent with the IA Award and that any objections concerning the cost calculations of those salary increments should have been raised on appeal to the Commission within 14 days of the award’s issuance (which was not done). I agree with the PBA.

Article III, Section 2 of the draft CNA accurately reflects the salary terms of the December 27 IA Award. (Exhibit B to Tortora Cert., Page 6). The IA Award provides salary step increases for 2018, step increases for 2019 (effective October 1, 2019) and no step increases for 2020. (IA Award, Pages 41 and 54). Article III, Section 2 of the draft CNA provided by the PBA accurately reflects these terms and provides:

Increments shall be paid in accordance with past practice except that during the year 2019 only the Salary Step Increases, where applicable, shall be effective October 1, 2019. For the year 2020 there shall be no Step movement for salary increases.

[Exhibit B to Tortora Cert., Page 6]

This CNA language is consistent with the IA Award in that it provides for step increases effective October 1, 2019 and no step movement in 2020. Moreover, consistent with the IA Award, the CNA does not address salary step movement beyond 2020 and only

provides for increments effective October 1, 2019 for the 2019 contract year.

The Borough also objects to carrying over the language from the 2017 CNA into Article III, Section 2 of the 2018-2020 CNA that provides "increments shall be paid in accordance with past practice . . .". (Exhibit B to Tortora Cert., Page 6). But this language was not removed or modified by the IA Award and, pursuant to the IA Award, "all provisions of the existing agreement [2017 CNA] shall be carried forward except for those which have been modified by the terms of this Award." (IA Award, Page 54). Since this provision was not modified by the award, it continues in effect in the 2018-2020 CNA. Moreover, the language in Article III, Section 3 of the 2017 CNA providing for the preservation of all terms or benefits to unit employees consistent with past practice was not modified by the IA Award and therefore continues in effect for the 2018-2020 CNA. (Exhibit C to Tortora Cert., Page 30).^{4/} Included among the practices preserved by this provision is the past practice governing the payment of salary step increases.

^{4/} This section provides: "Unless a contrary intent is expressed in this Agreement, all existing benefits, rights, duties, obligations and conditions of employment applicable to any Police Officer pursuant to any rules, regulations, instruction, directive, memorandum, statute or practice shall not be limited, restricted, impaired, removed, or abolished. De minimis changes are not effected by this Article." (Exhibit C to Tortora Cert., Page 30).

The Borough does not object to the terms of the CNA, but to the costs of implementing those terms. According to the Borough, the costs of implementing the salary terms in the draft 2018-2020 CNA is greater than the costs delineated by the Arbitrator in his salary award. To the extent the Borough is challenging the accuracy of the arbitrator's calculations under the 2% base salary cap, the Borough was obligated to appeal the IA Award within 14 days of its issuance on December 27, 2018. It did not. Consequently, it waived the right to challenge the arbitrator's salary award and was obligated to implement that award immediately.^{5/} Bloomfield; Leonia.

Since the draft 2018-2020 CNA's terms are consistent with the IA Award, I find the Borough violated section 5.4a(6) of the Act by refusing to sign the CNA.

RECOMMENDED ORDER

The Borough of Bergenfield is ordered to:

A. Cease and desist from refusing to reduce a negotiated agreement to writing and to sign such agreement, particularly by refusing to sign the draft agreement submitted to it by the Bergenfield PBA Local No. 309.

^{5/} To the extent the Borough is choosing to interpret the 2018-2020 CNA as only requiring it to pay the salary amounts set forth in the IA Award, that contract interpretation may be challenged by the PBA in accordance with the CNA's grievance procedures. State of New Jersey (Human Services); P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). That interpretation, however, does not change the fact that the draft CNA's terms are consistent with the IA Award and must be signed by the employer pursuant to section 5.4a(6) of the Act.

B. Take this action:

1. Immediately sign the draft agreement submitted to it by the Bergenfield PBA Local No. 309 that implements the interest arbitration award issued on December 27, 2018.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Hearing Examiner

DATE: February 10, 2020
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 20, 2020.



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from refusing to reduce a negotiated agreement to writing and to sign such agreement, particularly by refusing to sign the draft agreement submitted to it by the Bergenfield PBA Local No. 309.

WE WILL immediately sign the draft agreement submitted to it by the Bergenfield PBA Local No. 309 that implements the interest arbitration award issued on December 27, 2018.

WE WILL post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

WE WILL within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

Docket No. CO-2019-288

Borough of Bergenfield
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830