I.R. No. 2020-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF GLASSBORO,

Charging Party,

-and- Docket No. CE-2020-009

UFCW LOCAL 1360,

Respondent.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge filed by a public employer. The charge alleges that UFCW Local 1360 rejected a "previously agreed-to settlement agreement" of a contractual grievance contesting a five-day suspension of a unit employee. The charge alleges that the parties eventually agreed to all "essential" and "non-essential terms" and that Local 1360 repudiated the agreement. Its conduct allegedly violates section 5.4b(3) and (4) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The Designee determined that in the absence of a signed agreement, the parties did not achieve a "meeting of the minds," thereby preventing the public employer from demonstrating a substantial likelihood of success on the merits.

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Appearances:

For the Charging Party,
Brown & Connery, LLP, attorneys
(William F. Cook, of counsel)

For the Respondent,
Spear Wilderman, P.C., attorneys
(Wendy Chierci, of counsel)

INTERLOCUTORY DECISION

On January 8, 2020, the Borough of Glassboro (Borough) filed an unfair practice charge against UFCW Local 1360 (Local 1360), together with an application for interim relief seeking a temporary restraint, a certification, exhibits and a brief. The charge alleges that on or about November 18, 2019, Local 1360 unilaterally rejected the parties' previously agreed-upon settlement agreement of a disciplinary action concerning unit employee David Chapes, thereby refusing to negotiate in good faith and refusing to reduce a negotiated agreement to writing

and to sign such agreement, violating section 5.4b(3) and (4)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On January 10, 2020, an Order to Show Cause issued without a temporary restraint, setting a return date of February 3, 2020. On January 24, 2020, Local 1360 filed a brief, exhibits and a certification opposing the application. On January 28, 2020, the Borough filed a reply. On the return date, the parties began arguing their respective cases in a telephone conference call and agreed to pursue an effort to informally dispose of the matter. On February 7, 2020, I was advised that the matter would require a decision. On February 11, 2020, the parties completed arguing their respective cases in another telephone conference call. The following facts appear.

Local 1360 is the exclusive representative of "all full-time and regular part-time employees in the Highway Department" of the Borough. The parties signed a series of collective negotiations agreements, the most recent of which extends from January 1, 2017 through December 31, 2021. The agreement includes provisions authorizing the Borough to discipline employees for just cause,

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1/ Employee organizations, their representatives or agents are prohibited from:(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

subject to the grievance procedure (Articles V, III, respectively). Article III enables Local 1360 to process unresolved grievances to arbitration.

On or about December 17, 2018, the Borough issued a Notice of Disciplinary Action to unit employee David Chapes imposing a five-day unpaid suspension for specified violations of the Borough's personnel policy. On or about the next day, Local 1360 filed a grievance contesting Chapes's suspension.

On January 30, 2019, Chapes filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) contesting his suspension. The complaint was filed without Local 1360's knowledge.

On or about February 14, 2019, Local 1360 filed a letter with our Commission, seeking a list of arbitrators for Chapes's grievance.

On or about March 14, 2019, the EEOC issued a Notice of Dismissal, with a copy sent to the Borough Human Resources Manager, Valerie Vanveen (Local 1360, Exhibit D).

On April 24, 2019, the Director of Conciliation and Arbitration issued a letter to both parties' counsel, advising of the named arbitrator (Dkt. No. AR-2019-428). The arbitrator scheduled hearing dates of September 26, 2019 and October 7, 2019, if needed.

In August, 2019, the parties agreed to postpone the September 26th hearing date to allow settlement discussions. On August 26, 2019, Borough Counsel sent a proposed settlement agreement to Local 1360 Counsel. On August 30, 2019, Local 1360 Counsel returned the proposal with changes. Specifically, Local 1360 Counsel removed (i.e., drew a line through) portions of the proposal:

> 1. TERMS OF SETTLEMENT
>
> . . .
>
> (b) Dismissal of Appeal. Following execution of this Agreement, Chapes will agree to withdraw with prejudice the pending appeal before the Public Employment Relations Commission, ~~and shall not file or pursue any other charges or claims relative to the October 3, 2018 incident~~: PERC Case No. AR-2019-428.

Local 1360 Counsel also deleted (i.e., crossed out) other proposed terms pertaining to an incident of "June 11, 2019" but left intact the following:

> Chapes received a five (5) day suspension without pay (emphasis supplied) for conduct related to an October 3, 2018 incident (emphasis supplied). It is understood by the Parties that this suspension has already been served. Chapes shall not seek or be entitled to any back pay or retroactive pay. [Local 1360, Exhibit I]

Later on August 30, 2019, Borough Counsel sent an email reply to Local 1360 Counsel, agreeing to some deletions and rejecting other proposed changes. The email provides:

> - Fine with removal of reference to June 11 at top of page 1

> - Removal of language in 1(a) regarding policy provisions and reference only to 'October 3, 2018' incident generally is not acceptable. I [will] narrow down or eliminate certain provisions if you want, but not all of them.
>
> - Paragraph 1(b) - I need full disclosure from Union or Chapes as to whether anything else will be pursued. Is he pursuing an EEOC claim or other claims or not? If not [sic], we cannot settle this.
>
> - Fine on Paragraph 2 expungement
>
> - Paragraph 4 - no admission of wrongdoing - no way. This is the whole point of the agreement - he agrees he did wrong and took a suspension
>
> - Fine on removal of Paragraph 12.
> [Local 1360, Exhibit J]

Later on the same day, August 30, 2019, Local 1360 Counsel emailed a reply to Borough Counsel. Local 1360 Counsel wrote in a pertinent part:

> . . . To recap with respect to 1(b), I removed the language from 1(b) because the charge [EEOC complaint] that was filed was separate from the grievance procedure. The Union had no part in filing the charge and should not be part of an agreement not to pursue it. Even though 1(b) only references Chapes's (and not the Union's) agreement, in such cases we generally request the Employer to use a separate document - for the grievant alone to sign, to satisfy that particular concern.
>
> The only other issue left is which violations will be removed from 1(a), which should be easily dealt with. Per my previous email, all other matters have been resolved.
>
> . . . The Union has no objection to cancelling the 10/7 hearing as long as the arbitrator retains jurisdiction (my observation is that this arbitrator can provide a quick hearing date

> in the extremely unlikely event that settlement fails) . . .
> [Local 1360, Exhibit K]

On September 9, 2019, Borough Counsel emailed the designated arbitrator, requesting a postponement of the October 7, 2019 hearing, with the arbitrator retaining jurisdiction. In his email, Borough Counsel wrote in a pertinent part:

> Just before I left for vacation [Local 1360 Counsel] and I were working through a draft written settlement agreement. I believe we will be able to reach a settlement.'[Local 1360, Exhibit L]

On October 8, 2019, Borough Counsel and Local 1360 Counsel conferred, soon after which Borough Counsel sent Local 1360 Counsel a revised draft of a settlement agreement. The revised draft deleted a reference to conduct on "June 11, 2019;" retained reference to conduct violative of specified (but fewer) sections of the personnel policy on October 3, 2018 in section 1(a); deleted reference to "pursuit of any other charges" as Local 1360 counsel had deleted (i.e., drew a line through, as previously set forth in the facts) from an earlier Borough Counsel draft agreement. The third page of this revised draft agreement sets forth signature lines for principal representatives of the parties and for David Chapes. The last page of the document, entitled "Appendix A," sets forth a signature line for David Chapes, preceded by a paragraph in which he would agree,

> . . . not to pursue any claims, charges, suits or grievances of any kind relative to the October 3, 2018 incident in any court, agency or forum. I further agree and acknowledge that to the extent that any such claims, charges, suits or grievances are pending as of this statement, same will be withdrawn and not pursued . . .
> [Local 1360, Exhibit M]

On October 18, 2019, Borough Counsel emailed Local 1360 Counsel, asking, ". . . if there are any developments on your end. The Borough is fine with this draft [i.e., draft of October 8, 2019]."

On October 29, 2019, Local 1360 Counsel replied, writing, "There are minor edits to paragraphs 4, 11 and Appendix A. Please review and confirm whether they are acceptable. The Union and Grievant haven't reviewed this yet, but once finalized, I don't anticipate any objections." Attached was a three-page draft agreement, with a fourth page designated as "Appendix A." Paragraph numbers 4 and 11 show proposed changes by additions and deletions. "Appendix A" includes this new proposed sentence: "I understand that this agreement does not apply to claims which are not waivable under law." Local 1360 Counsel also proposed to delete this sentence: "I agree that any formal claim of improper discrimination in violation of law with regards to the October 3, 2018 incident would be without merit."

On October 30, 2019, Borough Counsel emailed Local 1360 Counsel, advising that he has ". . . no issues with these edits" (Borough Exhibit M).

The agreement was sent to Local 1360 and the grievant for review. Local 1360 advised Local 1360 Counsel that the grievant would not sign the agreement (Local 1360 Counsel certif. #24). On November 18, 2019, Borough Counsel texted Local 1360 Counsel, inquiring if ". . . we have a signed agreement from the Union?" Local 1360 Counsel promptly replied: "No, we don't. The Grievant has raised concerns which I am currently looking into. I will let you know by Friday whether we need to reschedule the hearing" (Local 1360, Exhibit Q).

On an unspecified subsequent date before December 2, 2019, Local 1360 Counsel told Borough Counsel that the settlement agreement was unacceptable to the Grievant and he was unwilling to sign it. Both Counsel agreed to schedule a conference call with the arbitrator (Local 1360 Counsel Cert., #26).

On December 2, 2019, in a conference call among both Counsel and the designated arbitrator, Counsel for Local 1360, ". . . reiterated that there was no settlement because of the Grievant's objections and refusal to sign the agreement." All agreed to reschedule the grievance arbitration hearing for February 6, 2020 (Local 1360 Counsel Cert., #27).

On December 23, 2019, Local 1360 Counsel asked Borough Counsel if the Borough is willing to settle the grievance by removing the separate release page (Appendix A) from the settlement agreement. Borough Counsel was unable to answer at

that time; both Counsel agreed that Local 1360 Counsel would first seek the Grievant's consent to sign the last draft of the agreement without Appendix A before Borough Counsel would seek the Borough's consent to that revision (Local 1360 Counsel Cert., #29).

On January 8, 2020, Borough Counsel advised the designated arbitrator of his imminent filing of an unfair practice charge seeking "enforc[ement] of a settlement in this matter" and that the scheduled grievance hearing should be postponed (Local 1360, Exhibit T).

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. DeGioia, 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).

N.J.S.A. 34:13A-5.4b(4) makes it an unfair practice for an employee organization to refuse ". . .to reduce a negotiated agreement to writing and to sign such agreement." Section 5.4b (3) makes it an unfair practice for a majority representative to refuse "to negotiate in good faith with a public employer. . . concerning terms and conditions of employment of employees in that unit." If a majority representative is found to have violated section 5.4b(4), it will likely be found to have violated section 5.4b(3), too. Cf. Township of Irvington, P.E.R.C. No. 2010-44, 35 NJPER 458 (¶151 2009).

N.J.S.A. 13A-5.3 provides, in part:

> When an agreement is reached on the terms and condition of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and majority representative.

Accordingly, the Commission may determine whether an agreement was formed and if so whether Local 1360 refused to sign a written agreement embodying the terms of agreement. See City of Newark, P.E.R.C. No. 2016-56, 42 NJPER 441 (¶119 2016).

In order to determine if an agreement was achieved, moving party Borough must demonstrate (by the requisite standard) that intention among the parties. Interpretive devices include, primarily, expressions in writing. See Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221-222 (1979). In the absence

of a (signed) writing, I must determine if the parties reached a "meeting of the minds." North Caldwell Bd. of Ed., P.E.R.C. No. 90-92, 16 NJPER 261 (¶21110 1990); Borough of Fairlawn, H.E. No. 91-93, 17 NJPER 201 (¶22085 1991), adopted P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991); Washington Tp., H.E. No. 97-25, 23 NJPER 266 (¶28126 1997), adopted P.E.R.C. No. 98-63, 24 NJPER 4 (¶29002 1997). In a "meeting of the minds" case, the parties may have agreed on a specific provision, but not on its meaning or application; or the parties may have agreed on some but not all language; or may have negotiated over a topic but do not mutually agree that a final agreement was reached on the topic. Washington Tp., H.E. No. 97-25, 23 NJPER at 268-269.

The Borough contends that the parties, ". . . agreed to the essential, material terms of the settlement agreement," namely, "the agreed-to penalty of a 5-day suspension" (brief at 9). And it argues that on October 30, 2019, when, ". . . [it] communicated, through Counsel, to the union that it had no issues with the proposed edits of "non-essential terms" in the October 29, 2019 settlement agreement [i.e., Local 1360 Counsel's ". . . minor edits to paragraphs 4, 11 and Appendix A"] . . . it accepted the union's offer and the parties reached an agreement as to all terms set forth in the settlement agreement" (brief at 9-10). Finally, the Borough asserts, ". . . the agreement became enforceable and the Union cannot be permitted to repudiate the

agreed-to terms and conditions after that point in time" (brief at 10).

I disagree. Beginning with Local 1360 Counsel's August 30th deletion of Borough Counsel's proposed waiver and withdrawal of "any other charges or claims" by Chapes, both Counsel implicitly identified an impediment to an agreement. Later that day in an email to Local 1360 Counsel, Borough Counsel explicitly rejected the notion that the contractual grievance could be settled without a waiver of other claims:

> I need full disclosure from Union or Chapes as to whether anything else will be pursued. Is he pursuing an EEOC claim or other claims or not? If [so], we cannot settle this.

It appears that Borough Counsel, by his terminology, demanded the inclusion of a "non-essential term" in any agreement as a condition for resolving the "essential term" - the grievance.

Borough Counsel never yielded or surrendered that demand, even after Local 1360 Counsel persuaded him to literally separate a written grievance settlement from a proposed written waiver of "other claims," more specifically identified as "Appendix A."

Upon Local 1360 Counsel's review of "Agreement Between Borough of Glassboro, David Chapes and United Food and Commercial Workers Local 1360" and "Appendix A," she wrote in a pertinent part to Borough Counsel on October 29, 2019, after making "minor edits" to both documents:

> The Union and Grievant haven't reviewed this yet, but once finalized, I don't anticipate any objections.

Borough Counsel characterizes Local 1360 Counsel's entire October 29th communication as an "offer" that he "accepted" on behalf of the Borough the next day (brief at 9-10).

In "Offer and Acceptance, and Some of the Resulting Legal Relations," Corbin wrote:

> An offer is . . . an act whereby one person confers upon another the power to create contractual relations between them. . . . The act of the offeror operates to create in the offeree a power . . . thereafter the voluntary act of the offeree alone will operate to create the new relations called a contract. . . . What kind of act creates a power of acceptance and is therefore an offer? It must be an expression of will or intention. It must be an act that leads the offeree reasonably to belive that a power to create a contract is conferred upon him. . . . It is on this ground that we must exclude invitations to deal or acts of mere preliminary negotiation and acts evidently done in jest or without jest or without intent to create legal relations. All these are acts that do not lead others reasonably to believe that they are empowered to 'close the contract.'
> [Corbin, 26 Yale L.J. 169, 181-182 (1917)]
>
> See also Restatement 2nd Offer Defined §24.

It appears that Local 1360 Counsel's October 29th email to Borough Counsel was an act of conditional intention that did not lead Borough Counsel to reasonably believe that a power was bestowed upon him or the Borough to "close the contract." Presuming that her edits were both satisfactory to Borough Counsel and then inscribed in or omitted from the two documents

(as she so described), Local 1360 Counsel set forth two conditions for either a contract or a genuine "offer," (if it needed an "acceptance" by the Borough) - 1) review by Local 1360 and Chapes and 2) no unanticipated objections. As written, Local 1360 Counsel's email did not intend to create "legal relations."

The Borough has also characterized Local 1360 as ". . . repudiat[ing] the agreed-to terms and conditions." The Commission has described a claim of repudiation as supported, ". . . by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it." State of New Jersey (Dept. Of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Even if one concluded that Local 1360 Counsel's October 29th email created a contract among the parties, it appears to me that it is not clear enough to permit an inference of bad faith.

For these reasons, the Borough has not demonstrated a substantial likelihood of success on the merits of the charge. Accordingly, I deny the application for interim relief.

The charge shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: February 12, 2020
Trenton, New Jersey