

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WEST NEW YORK,

Respondent,

-and-

Docket No. CO-2012-066

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

A Commission designee denies an application for interim relief based upon a charge alleging that the Town of West New York repudiated the salary provisions of the parties' collective negotiations agreement as modified by an memorandum of agreement, specifically by refusing to pay a 6% salary increase on July 1, 2011; CWA alleged irreparable harm to the negotiations process. The Town argued it was facing severe financial difficulties that would have made it exceedingly difficult, if not impossible for it to adopt a legal budget in 2012 if the 6% salary increase had been paid. The Town had requested that CWA meet with it to discuss the 6% base salary increase and CWA refused. Although the Town could have potentially paid the 6% increase and then laid off or furloughed employees, the Town argued that this was not the preferred alternative in light of its already reduced workforce (employees decreased from 380 in 2006 to 280 in 2011); additionally, there were a significant number of employees eligible for retirement for whom the Town did not maintain a reserve for terminal benefits. The designee denied the application, finding that the relative hardships to the parties weighs in favor of the Town.

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Appearances:

For the Respondent, The Corrigan Law Firm (David F. Corrigan, of counsel and on the brief; Bradley D. Tishman, on the brief)

For the Charging Party, Weissman & Mintz, LLC, attorneys (Steven P. Weissman, of counsel; Annmarie Pinarski, on the brief)

INTERLOCUTORY DECISION

On September 8, 2011, the Communication Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the Town of West New York ("Town") which was accompanied by an application for interim relief. The charge alleges that the Town violated N.J.S.A. 34:13A- 5.4a(1) and (5)^{1/} of the New Jersey Employer-

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it repudiated the parties' collective negotiations agreement ("CNA") as modified by a memoranda of agreement ("MOA") when it failed to pay a 6% base salary increase on July 1, 2011. The application seeks an Order directing the Town to cease repudiating the terms of the MOA and to make the employees whole for any losses sustained as a result of not being paid the 6% increase and for the Town to post a notice of its violation of the Act.

On September 12, 2011, a Commission designee issued an Order to Show Cause specifying September 30 as the return date for argument via telephone conference call. CWA was directed to file its brief on September 20 and the Town was directed to file a response by September 26. On September 28, the return date was subsequently rescheduled to October 6 based on the Commission designee's request and with the consent of the parties. On October 4 this matter was reassigned to me. On the October 6 return date, the parties requested that they be allowed to argue their cases in person and that the proceeding be transcribed by a court reporter. I granted the request of the parties and the return date was rescheduled for October 18 at the Commission's office in Newark, New Jersey at which time the matter was argued.

CWA represents all white-collar (including civilian dispatchers) and blue-collar employees, excluding managerial executives, supervisors, confidential employees, temporary

employees, part-time employees, seasonal employees, tax assessors, professional employees, police fire, craft employees, and crossing guards.

The following material facts appear based on certifications and documentation provided by the parties.

The Town and CWA are parties to a CNA with a term of January 1, 2005 through June 30, 2010. The parties entered into an MOA during the summer of 2009 which extended the expiration of their CNA to June 30, 2011. In pertinent part, the MOA provides at paragraph 8:

"Article XVI shall be amended to reflect that the base salary rate for the employees shall not be increased; employees waive the salary increase scheduled to be effective July 1, 2009. Employees' base salary range will not be increased until June 30, 2011, when the base salary will be increased 6%, effective July 1, 2011."

CWA has filed the certification of Alan Kaufman, CWA Staff representative. Kaufman asserts the following, in pertinent part, with respect to the Town's failure to pay the 6% increase under the MOA:

7. In June 2011, West New York Business Administrator Joseph McConnell indicated to CWA Staff Representative Nick Lordo that the Town wanted the Union to forgo the 6% raise due on paid on [sic] July 1, 2011.
8. On June 21, 2011, I wrote to West New York Mayor Felix Roque, congratulated him on his election, and repeated that

employees were contractually due the 6% called for in the MOA.

9. At the most recent Town Council meeting, Town Attorney David F. Corrigan confirmed to me that the Town would not be paying the 6% increase due under the MOA.
10. The Town of West New York has repudiated the parties' MOA by refusing to pay the contractually required 6% increases to base salary. The obligation to pay the 6% increase is so clear on its face that, consistent with decades of PERC precedent, an inference of bad faith arises from the refusal to honor it.

On July 7, 2011, Kaufman filed a grievance with McConnell regarding the decision not to pay the 6% increase under the terms of the MOA. In the cover letter for the grievance, Kaufman stated that since the decision to not pay the raise apparently comes from the level of the Mayor, the Union considered the contractual steps moot and would be filing directly with PERC for it to issue a panel of arbitrators.

The Town responds that it is facing severe fiscal constraints and that requests had been made to meet with CWA to discuss the issue of the 6% increase. The Town has filed the certification of Frederick J. Tomkins, Chief Financial Officer for the Town. Tomkins asserts the following, in pertinent part, with respect to the Town's fiscal condition and its ability to pay the 6% increase:

[I]t is my opinion that it will be exceedingly difficult, if not impossible, for

the Town to enact a balanced budget in 2012 in the event the PERC orders the Town to pay a 6% increase to CWA members effective July 2011. My reasons for this opinion follows.

4. The Town is on a calendar year budget. (January 1, 2011 - December 31, 2011). Therefore the July 1, 2011 6% salary increase will result in a 3% salary increase for calendar 2011 because the increase occurs on July 1, 2011. The Town has the ability to fund this 3% increase.
5. However, this increase will have a serious deleterious impact on the 2012 budget. This is because the full weight of the 6% increase will be felt in 2012. This, coupled with other financial difficulties, will make it exceedingly difficult if not impossible to have a legal budget. This is because the Town is limited to increasing the budget to 2.0% without a referendum under the 2012 CAP restrictions under existing law (the CAP restricted salary increases to 2.0% in 2011). However, the Town will face the following mandated increase in 2012.
 - a. The City self-insures its health benefits. Based on projected premium increases of 12%, we anticipate similar increases; The Town utilized \$6,000,000.00 of surplus in the 2011 Budget. We do not anticipate replenishing all of that surplus from operations. That surplus, because of the need for prudent fiscal planning needs to be restored in 2012;
 - b. There are a significant number of employees eligible for retirement. The Town does not maintain a reserve for

terminal benefits for any of these.

Additionally, the Town filed the certification of the Town's Business Administrator, Joseph McConnell where he asserts the following regarding his discussions with Nick Lordo concerning the 6% increase:

2. I did have a conversation with Mr. Lordo regarding the pending salary increase. I told him that we could have a deal to eliminate the possibility of potential unpaid furloughs and layoffs for multiple years. I explained that the cost savings of foregoing the 6% increase would enable the Town to potentially avoid having furloughs and layoffs. In response, Lordo was noncommittal and appeared to take my suggestion under advisement.
3. Subsequently, I spoke with Mr. Lordo and said "Are we going to schedule negotiations for the upcoming agreement?" Lordo refused, saying that we could not meet while the issue related to the 6% was pending.
4. The Township had 380 employees in 2006. It now has 280 employees. While furloughs and layoffs are an available option to reduce costs, it is not the preferred alternative in light of the already significantly reduced workforce.

Finally the Town provided the certification of David F. Corrigan, Esq., Labor Counsel for the Town. Corrigan disputes Alan Kaufman's assertions:

3. Paragraph 9 is inaccurate. I did not tell Kaufman that the Town would not pay a 6% increase that the CWA claimed they were entitled to. Rather, I did say to

both Kaufman and Lordo that a new administration had just taken office and had many issues to address. Therefore, I suggested there be a meeting between Town and CWA representatives to discuss this and other matters of concern. Kaufman said he would consult with his lawyers. I later received a phone call from Ira Mintz, Esq., who I understands [sic] represents the CWA. I reiterated my offer to have a meeting with the parties. He declined and insisted the 6% be paid immediately or that an unfair practice charge would be filed immediately. Several weeks later, this charge was filed.

4. Paragraph 10 of Kaufman's certification is false. The Town has not repudiated any contract with the CWA. To the contrary, the CWA has filed a grievance regarding this issue and the Town believes it should be pursued pursuant to the parties' collective bargaining agreement. Moreover, the Town is adhering to all of the other provisions of the agreement. The Town has asked only that the CWA sits down with it to discuss the 6% salary increase issue in light of its difficult financial straits. The CWA has refused.

ANALYSIS

Interim relief is extraordinary relief, and the granting of such relief requires the "most sensitive exercise of discretion." Crowe v. De Gioia, 90 N.J. 126, 132 - 134 (1982). A determination as to whether interim relief should be granted is guided by four fundamental principles. Ibid. The first is that interim relief should not be granted except when necessary to prevent irreparable harm. The second principle is that interim

relief should not be granted if the legal right underlying the movant's claim is unsettled. A third rule is that interim relief should not be granted where material facts are in dispute and the movant has not made a preliminary showing of a reasonable probability of ultimate success on the merits. The final test is a weighing of the relative hardship to the parties in granting or denying relief. Ibid.

Although CWA argues that it will suffer irreparable harm to the negotiations process^{2/} (based on the Town's alleged repudiation of the MOA provision) if the Town is not required to pay the 6% immediately, the facts in the record set forth above show that the Town is facing a severe financial crisis and is unable to pay the 6% increase at this time as it will have a "serious deleterious impact" on the Town's ability to adopt a legal budget in 2012.^{3/}

Additionally, the Town approached CWA on at least two occasions to meet regarding the 6% salary increase due to the Town's financial crisis and CWA refused.

^{2/} CWA's Kaufman certification at paragraph 6 states that the parties are currently in negotiations for a successor agreement.

^{3/} CWA has not presented any evidence that disputes the Town's evidence of its financial crisis.

The test that is dispositive in this case is the fourth test which is a weighing of the relative hardship to the parties.^{4/} Even assuming arguendo, without finding, that there is impact on CWA's ability to negotiate a successor agreement with the Town absent the 6% increase being paid immediately,^{5/} nevertheless, I find that hardship to the negotiations process to be outweighed by the Town's hardship if it were ordered to immediately pay the 6% salary increase. Although the Town could potentially pay the 6% increase and then furlough or layoff CWA members (or employees in other units), the material facts show that the Town's workforce has decreased from 380 in 2006 to 280 currently. Furthermore, there are currently a significant number of employees eligible for retirement. The Town has a duty to provide for its citizens' public interest and welfare and a decreased workforce could potentially impact on the health and safety of the public.

Having given careful consideration to the Town's fiscal crisis and its reduced workforce, the hardship to the Town if it


^{4/} I acknowledge the case law which CWA asserts supports its position regarding its substantial likelihood of success and the existence of irreparable harm. However, because I find the relative hardship to the parties to be the dispositive factor, I have not addressed the other factors.

^{5/} CWA has not presented evidence or argued that the failure to pay the 6% increase immediately will present a financial hardship for its members. However, I note that the employees will continue to receive their current wages.

were required to immediately pay the 6% salary increase outweighs the hardship to CWA members in not immediately receiving the salary increase. Therefore, the CWA has not satisfied one of the requisite elements to allow for the granting of interim relief. CWA's application for interim relief is denied.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's rules.



David N. Gambert
Commission Designee

DATED: November 4, 2011

Trenton, New Jersey