

D.U.P. NO. 2018-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TOWNSHIP OF EWING,

Charging Party,

-and-

Docket No. CE-2017-016

CWA LOCAL 32,

Respondent.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint in a charge alleging the Union engaged in bad faith by agreeing to a contract provision, and subsequently filing grievances challenging the application and meaning of the provision. The Director determines that the filing of a grievance is, itself, protected conduct, and the Union otherwise met its obligation to negotiate in good faith and execute a successor agreement.

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Appearances:

For the Charging Party
Hill Wallack LLP, attorneys
(Rocky L. Peterson, of counsel)

For the Respondent
Weissman & Mintz LLC, attorneys
(Annmarie Pinarski, of counsel)

REFUSAL TO ISSUE COMPLAINT

On June 29, 2017, July 14, 2017 and April 12, 2018, the Township of Ewing (Township) filed an unfair practice charge and amended charges against CWA Local 32 (CWA) alleging that after April 27, 2017, it violated section 5.4b(3), (4), and (5)^{1/} of

^{1/} These provisions prohibit employee organizations, their representatives or agents 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. (5) Violating any of the rules and regulations established by the Commission."

the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by filing and encouraging its members to file grievances contesting overtime compensation, despite a recently negotiated and clear contract provision that renders these grievances meritless. The Township claims this action constitutes a refusal to negotiate in good faith. It claims that by encouraging its members to file grievances, CWA is not abiding by the terms of the CNA and therefore, violating the Act. The Township seeks a cease and desist order prohibiting CWA from filing frivolous grievances.

CWA denies that it violated the Act. It claims that it has not repudiated, refused to honor, or rejected the parties' agreement. It asserts that the parties dispute the meaning and application of a specific contract provision, and that its right to file grievances is not an unfair practice.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. That authority has been delegated to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. I find the following facts:

CWA is the majority representative of a collective negotiations unit of clerical/administrative staff and

telecommunications operators employed by the Township. On April 25, 2017, the Township and CWA (collectively referred to as the parties) entered into a memorandum of understanding (MOU) for a successor collective negotiations agreement (CNA) containing twenty three (23) items. "Number 16" of the MOU provides:

If an employee takes time off for a holiday, vacation, personal day, or because he or she is sick (unless a medical note is provided), the time off, even though the employee is paid for the time, is not considered hours worked and will not be included in the total hours worked for overtime or compensatory time purposes. This section shall not apply if the employee is required by the Township to work overtime. If an employee after working overtime calls out sick, the employee must bring a medical notice in order to be considered for overtime or compensatory time. Requests for overtime will be based on seniority.

On April 27, 2017, the parties signed a successor CNA that omits the last two sentences of Number 16 in the MOU.^{2/} Article VI, "Hours of Work Excluding Public Safety Telecommunicators," Section II of the CNA memorializes in a pertinent part the first two sentences of the above-quoted Number 16.

^{2/} Neither party provided an explanation for the omission of the last two sentences from the CNA, nor contended that the omission was legally significant. See, e.g., Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983) (the Commission explained that the intent of the parties, as clearly expressed in writing, is the controlling factor for determining whether an agreement was reached, and thus concluded that the starting point in determining what the parties agreed to was an examination of their memorandum of agreement); Hillside Bd. of Ed., P.E.R.C. No. 89-57, 15 NJPER 13 (¶20004 1988).

Appendix A of the CNA governs overtime procedures for public safety telecommunicators. The CNA also includes a multi-step grievance procedure ending in binding arbitration (Article V).

On June 2, 2017, a public safety telecommunicator filed a grievance alleging a violation of the overtime provision in Appendix A. On June 7, two keyboarding clerks filed separate grievances alleging violations of Article VI, specifically, that they should have been paid time and one half because they were "required" to work overtime. All three grievances were denied by the Township and CWA appealed the grievances to arbitration.

ANALYSIS

The Township claims that CWA has failed to negotiate in good faith by filing grievances seeking relief to which it is not entitled under the last two sentences of Number 16 in the MOU. I disagree.

In State of New Jersey, 1 NJPER 39, 40 (1975) aff'd, 141 N.J. Super. 470 (App. Div. 1976), the Commission first articulated its standard for determining whether a party has refused to negotiate in good faith:

It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred. . . . A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent

brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a predetermined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [1 NJPER 40]

The facts do not indicate that CWA may have negotiated in bad faith in violation of section 5.4b(3). It sought, reached, and signed a CNA with the Township. Perhaps even more to the point, the Commission has held on many occasions that the filing of a grievance is protected activity. Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986). The Commission has not found that grievance filing is evidence of bad faith.

A contract repudiation occurs when a party refuses to honor a clear contract provision. See N.J. Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). No facts indicate that CWA repudiated any clear contract term by either filing grievances contesting overtime, or refusing to honor or abide by any of the terms in the parties' recently ratified agreement.

Even if I assume that the overtime provision in the MOU (but omitted from the CNA) survives as terms and conditions of employment, none of the contested grievances implicate the two

"new" sentences in the overtime provision. The first grievance was filed by a public safety telecommunicator, to whom Article VI, by its terms, does not apply. The remaining two grievances, both filed by keyboarding clerks, allege that the employees were required to work overtime, and should have been paid overtime at the rate of time and one half, regardless of time off taken during the same week. These grievances implicate language appearing in both the MOU and the CNA. Under these circumstances, I cannot find that CWA's actions constitute an unlawful refusal to negotiate in good faith.

The Township's claim that CWA's actions also violate 5.4b(4) and 5.4b(5) also lacks merit. CWA signed both the MOA and the CNA. Nor has the Township cited a Commission rule or regulation that CWA allegedly violated. For all of these reasons, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Acting Director of
Unfair Practices

DATED: May 8, 2018
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to
N.J.A.C. 19:14-2.3.

Any appeal is due by May 18, 2018.