

H.E. NO. 2018-9

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

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2015-141

TEAMSTERS LOCAL 97,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the City of Paterson violated 5.4a(1) and (5) of the Act, when it reduced the compensation of an assistant corporation counsel during the parties negotiations for a first collective agreement without notice to or negotiations with Teamsters Local 97, the majority representative. She determined that the Transitional Aid Act did not preempt negotiations over compensation despite the City's assertion that it had to comply with the State Monitor's directive on the compensation. The Hearing Examiner determined that the Aid Act provides guidance and oversight for fiscal management and receipt of transitional aid but does not usurp the parties' negotiations obligations.

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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TEAMSTERS LOCAL 97,

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Appearances:

For the Respondent
Steven S. Glickman, LLC
(Steven S. Glickman, Esq.)

For the Charging Party
Mets, Schiro & McGovern, LLP
(Matthew T. Clark, Esq.)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 17, 2014, Teamsters Local 97 (Charging Party or Local 97) filed an unfair practice charge against the City of Paterson (Respondent or City). The charge alleges the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1) and (5) by unilaterally reducing unit member Dawn Blakely-Harper's annual compensation without negotiations with Local 97 during negotiations for its first collective negotiations agreement.

Local 97 seeks as remedies a return to the status quo and making Ms. Blakely-Harper whole for any lost wages.

On June 9, 2017, Director of Unfair Practices Gayl R. Mazuco issued a Complaint and Notice of Pre-Hearing (C-1).^{1/}

On June 19, 2017, Respondent City filed its Answer (C-2). Respondent admits changing Blakely-Harper's salary but denies that its actions constituted a violation of the Act, namely a unilateral change in terms and conditions of employment during collective negotiations.

On November 30, 2017, a hearing was conducted. The parties submitted stipulated facts together with exhibits which were marked as J-1. The parties agreed that the facts as stipulated together with the exhibits constitute the complete record. Specifically, to the extent that the stipulated facts and exhibits are insufficient to sustain Charging Party's burden of proof by a preponderance of the evidence, the Complaint may be dismissed. Further, the Respondent relies on the sufficiency of the stipulated record to sustain any affirmative defenses or to rebut or disprove the existence of a prima facie case established by Charging Party.

Briefs were submitted on January 8, 2018. Based on the record, I make the following:

^{1/} "C" refers to Commission exhibits received into evidence. "J" refers to joint exhibits. "T" refers to transcript.

FINDINGS OF STIPULATED FACTS (J-1)^{2/}

1. The State of New Jersey ("State") has determined the City of Paterson ("City") to be a "transitional aid" municipality, eligible to receive State Aid in Fiscal Year 2014 to balance its budget.

2. In order for the City to receive transitional aid, the State required the City to sign a Memorandum of Understanding ("MOU") and City Council to pass a resolution approving the MOU.

3. The City signed a MOU for Fiscal Year 2014 (Exhibit 1).

4. City Council's [sic] passed Resolution No. 14:263 dated March 31, 2014, approved at the April 22, 2014 Council meeting, approving the MOU for Fiscal Year 2014 (Exhibit 2).

5. This MOU required:

6. Promotions, Transfers, and Title Changes: The Municipality shall not approve any promotions, transfers, and title changes resulting in a salary increase unless required to do so by contractual obligations.

7. Exceptions for Good Cause: The Director may authorize salary increases or promotions for good cause upon the Municipality's written request. Good cause may include salary increases or promotions that are part of a plan to restructure personnel or service delivery in a manner that is intended to achieve cost reductions.

6. Prior to September 16, 2013, Erin Malton Knoedler ("Knoedler") the State Fiscal Monitor assigned to monitor the

^{2/} Findings of Fact Nos. 1 through 20 are taken from the parties' stipulations as submitted.

City's compliance with the MOU, executed a waiver allowing the City to increase the hours of Ms. Dawn Blakely-Harper ("Blakely"), an attorney with the City's Law Department, from part-time to full-time. In conjunction with this increase in hours, Knoedler agreed to increase Blakely's salary to \$80,000.00. See Request for Employment Approval for Blakely for a salary of \$80,000 (Exhibit 3).

7. On or about September 16, 2013, the City's then Administration increased Blakely's salary to \$90,000.00, contrary to Knoedler's waiver and in violation of the MOU. See Personnel Action Form for Blakely with an effective date of September 16, 2013, with a base salary increase of \$55,186 to \$90,000 (Exhibit 4).

8. On February 18, 2014, Knoedler informed the City's then Administration of its violation of the waiver and the MOU, and failure to remedy the violation would jeopardize the City's transitional aid. See correspondence from [sic] to Charles Thomas, Esq. dated February 18, 2014, directing Respondent to reduce Blakely's base salary to \$80,000 (Exhibit 5).

9. On July 1, 2014, Jose Torres was sworn in as Mayor of the City, bringing in a new Administration.

10. Upon learning of the past Administration's violation of the waiver and the MOU, Nellie Pou ("Pou"), the City's new Business Administrator contacted Knoedler and received her

approval to rectify the above referenced violation concerning Blakely by reducing her salary to \$85,000.00. See e-mail from Knoedler to Pou dated July 16, 2014 directing Blakely's salary be reduced to \$85,000 (Exhibit 6).

11. On July 16, 2014, Pou approved a change in Blakely's salary from \$90,000.00 to \$85,000.00 in order to bring the City into compliance with the State's waiver and MOU in order to avoid a reduction in the City's transitional aid. See Personnel Action Form for Blakely with an effective date of July 1, 2014 with a base salary decrease of \$8,636 to \$85,000 (Exhibit 7).

12. On March 22, 2012, International Brotherhood of Teamsters, Local Union No. 97 ("Local 97") filed a representation petition with the New Jersey Public Employment Relations Commission ("PERC").

13. On June 14, 2012, PERC issued a Certification of Representation based on Union Authorization Cards, recognizing Local 97 as the exclusive collective negotiations representative for a unit comprised of:

All regularly employed, non-supervisory attorneys and paralegals employed by the City of Paterson, attorneys employed as public defenders, and legal secretaries employed in the City of Paterson Law Department.

(Exhibit 8).

14. Thereafter, Local 97 and the City entered into negotiations towards a collective negotiations agreement

concerning terms and conditions of employment between the City and members of the Local 97 unit.

15. Negotiations continued through May 5, 2017, when the parties reached agreement on a collective negotiations agreement for the period of July 1, 2014 through June 30, 2019 (Exhibit 9).

16. Beginning on September 16, 2013, Dawn Blakely-Harper, Esq. began working as a full-time Assistant Corporation Counsel in the City's Law Department.

17. Ms. Blakely-Harper continued to receive an \$85,000.00 annual salary until she left her position as Assistant Corporation Counsel in May 2017.

18. At all times relevant, Ms. Blakely-Harper was a member in good standing of the Local 97 negotiations unit.

19. During the period beginning on June 14, 2012 and ending on July 21, 2014, the City never attempted to negotiate with Local 97 regarding any changes in Ms. Blakely-Harper's salary.

20. Beginning on June 14, 2012 and continuing through July 17, 2014, the City never provided Local 97 with any information regarding Ms. Blakely-Harper's salary.

21. The parties stipulate that the City, Local 97 and Dawn Blakely-Harper are, respectively, public employer, public employee representative and public employee within the meaning of the Act (T5-T6).

The following facts are gleaned from exhibits 1 through 9 attached to J-1:

22. The parties' MOU states in pertinent part:

The Transition Plan shall discuss initiatives to bring structural balance to the Municipality's finances and shall include . . . A plan to constrain or reduce staffing costs through aggressive **collective negotiations agreements**. . . [Exhibit 1 at p.1, J-1]. [emphasis added]

23. Under subheading "Restrictions on Hiring," the MOU requires waiver forms to be filled out and submitted for review and approval to the Director of the Division of Local Government Services. Where candidates for hire require the governing bodies' approval, the advice and consent of the Director may be considered. All such candidates require the Division's written final approval before being hired.

Similarly, where a candidate for a senior level or confidential employee position does not require governing body advice and consent, such candidate is also subject to the Division's written final approval before being hired (Exhibit 1, J-1).

24. Under the subheading of "Individual and Collective Negotiation Agreements" at paragraphs 4 and 5, the MOU provides as follows:

4. The Municipality acknowledges that the State will not provide Transition Aid in cases where the Municipality allows or approves compensation increases that are not

sustainable. The Municipality understands that if it approves any individual employment contract or any **collective negotiation agreement** that increases annual compensation for the employee or group of employees by more than 2% annually, on average during the term of the agreement, the Municipality may be come ineligible for future aid.

5. The Municipality shall provide a copy of any proposed employment contract, **collective bargaining agreement**, or settlement agreement to the Division for review at least ten days prior to ratification. [Exhibit 1 at p.9, J-1] [emphasis added]

25. Under the heading of "Good Faith Exceptions," the MOU states that "[t]he Municipality may apply in writing to the Director for a good cause exception of any condition or requirement contained in this Memorandum." [Exhibit 1 at p.10, J-1].

26. Under the heading "Disbursement of Award," the MOU states in pertinent part:

The Division may, at its sole discretion, withhold funds from the final payment, where the Municipality is in substantial compliance, but has otherwise violated certain terms of the Memorandum. For example, in addition to any other sanctions, the division may withhold aid in an amount equal to no less than the amount of funds expended in support of hires or activities not approved in strict compliance with the terms and time frames set forth in this Memorandum. [Exhibit 1 at p. 10, J-1]

27. Finally, the MOU provides for withholding 25% of compensation to the Mayor and Council in the event they knowingly

or with reckless indifference incur or pay expenses after July 1, 2014 in violation of the MOU (Exhibit 1 at p. 10, J-1).

28. The collective negotiations agreement reached by the parties on May 5, 2017 and covering the period from July 1, 2014 through June 30, 2019 provides, at Article VII entitled "Salary," for across-the-board 2% salary increases retroactive for the years covered by the collective agreement. For 2014-2015, 2015-2016 and 2016-2017, the retroactive 2% increases also applied to overtime, longevity and shift differentials (Exhibit 9 at p.14 and 15, J-1).

ANALYSIS

Charging Party asserts that the City violated 5.4a(1) and (5) when it unilaterally reduced the salary of unit member Dawn Blakely-Harper from \$90,000.00 to \$85,000.00 in July 2014 during negotiations for the parties' first collective negotiations agreement. Respondent counters that the City was prohibited from negotiating a salary for Blakely-Harper that was in excess of the amount approved by the State's Division of Local Government Services and the MOU that the City entered into with the Division for the purposes of securing transitional aid. To the extent Blakely-Harper's salary was not in compliance with the MOU, the City maintains that it had no choice but to reduce her salary in order to continue to receive the aid. Therefore, the City

contends, there was no negotiations obligation triggered by its actions.

Public employers are prohibited from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act." N.J.S.A. 34:13A-5.4a(1).^{3/} The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

N.J.S.A. 34:13A-5.4a(5) sets out a right guaranteed to employees under the Act, namely, the right to have their majority representative negotiate with their employer over terms and conditions of employment on their behalf. Specifically, this section makes it an unfair practice for a public employer to refuse to negotiate in good faith with the majority representative concerning employees' terms and conditions of employment. Compensation is a negotiable term and condition of employment. Woodstone-Pilesgrove Reg. Bd. of Ed. Ass'n, 88 N.J. 582 (1980). Moreover, a public employer may violate this subsection if it modifies terms and conditions of employment without first negotiating to impasses or having a managerial prerogative or contractual right to make the change. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER

3/ N.J.S.A. 34:13A-5.4a(1) will be found derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

580 (¶16202 1985). Unless the public employer raises legitimate defenses to its unilateral action, it is a per se violation of the Act to make such modifications during negotiations for a collective agreement, because it causes a chilling effect on negotiations. Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25 (1978) (Supreme Court recognized importance of prohibiting unilateral changes during negotiations because changes interfere with objective of establishing working conditions through negotiations.)

Here, the parties were in negotiations for a first collective agreement when Blakely-Harper's salary as an assistant corporation counsel was reduced by the City unilaterally at the behest of the State Fiscal Monitor. The Monitor determined that Blake-Harper's \$90,000.00 salary violated the Monitor's initial waiver agreement with the City to increase Blakely-Harper's part-time position to full time at a salary of \$80,000.00, and also violated the MOU establishing prerequisites for the City to receive transitional aid from the State, presumably requiring pre-approval by the Monitor before hiring as well as the terms relating to compensation upon hire.

The City relies on the terms of its MOU with the State to defend its actions regarding the unilateral changes to Blakely-Harper's compensation. Essentially, the City asserts that it was constrained by the State's approval process in order

to keep its transitional aid from negotiating with Local 97, the majority representative. I disagree.

Charging Party correctly relies on City of Bridgeton, P.E.R.C. No. 2011-24, 36 NJPER 353 (¶137 2010), for the proposition that receipt of transitional aid, through the Special Municipal Aid Act (Aid Act), N.J.S.A. 52:27D-118.24 et seq., or through the express term of the parties' MOU regarding oversight conditions for receipt of such aid, does not preempt collective negotiations. The Commission determined in Bridgeton that nothing in the Aid Act or the MOU preempted negotiations of additional compensation for a promotion. In particular, citing Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982), the Commission found that the Aid Act did not "speak in the imperative and expressly, specifically and comprehensively set an employment condition."

Although not directly on point, the Commission recently considered whether a grievance contesting terminations of two employees without just cause was arbitrable. Pleasantville Bd. of Ed., P.E.R.C. No. 2018-8, 44 NJPER 89 (¶28 2017). In rejecting the Pleasantville Board's preemption argument that it was the State Monitor under the District Fiscal Accountability Act, N.J.S.A. 18A:7A-54 et seq., who had actually terminated the employees not the Board, the Commission recognized that the Accountability Act makes a State Monitor's authority subject to

education, labor and employment laws as well as the parties' collective negotiations agreement.

Here, like the Accountability Act, the Aid Act recognizes that the State Monitor's oversight is subject to contractual obligations. The MOU also provides a guideline for the City to adhere to in collective negotiations. See generally, fact nos. 22 through 24. Indeed, pursuant to the MOU, the City is free to collectively negotiate with the majority representative but it must do so aggressively to reduce costs and adhere to the MOU's approval requirements. See fact no. 22. Those requirements, however, do not expressly relieve the City of its negotiations obligations to the majority representative.

Respondent argues that Bridgeton is distinguishable. First, the Respondent contends that in Bridgeton at the time the City's Business Administrator promised the employee a particular salary increase upon promotion, the State had not yet determined the appropriate salary. Therefore, the City and union were free to negotiate the salary. Here, Respondent suggests there is no evidence that Blakely-Harper was promised a \$90,000.00 salary upon her promotion to full time status as an assistant corporation counsel before the State Monitor executed a waiver allowing the City to increase her hours at a salary of \$80,000.00. Respondent concludes, that the monitor's having set

the approved salary, the City was constrained from further negotiations.

This distinction, however, is inapposite. Whether the State Monitor first set the approved compensation at \$80,000.00 and the City then, in contravention of the Monitor's waiver, set an increase substantially higher is of no consequence. The City's action of defying the Monitor's directive by approving non-sustainable salary increases is contemplated by the terms of the MOU, namely potential loss of transitional aid. That consequence does not alleviate the City's obligation to negotiate with Local 97 over the compensation of a unit member. As Charging Party points out, the City did in fact enter into negotiations with the State Monitor to raise Blakely-Harper's salary from \$80,000.00 to \$85,000.00. Local 97 should have been included in that negotiation.^{4/}

For the foregoing reasons, I recommend that the Respondent City of Paterson violated 5.4a(5) and independently and derivatively a(1) of the Act, by unilaterally reducing, during

^{4/} Charging Party also asserts that the MOU's stricture that the State will not provide transition aid in cases where the municipality allows or approves compensation increases that are not sustainable is inapplicable to Blakely-Harpers' situation because this matter relates solely to Blakely-Harper's initial salary as a full time assistant corporation counsel not an increase in salary. Based on my analysis, I do not find it material to determine whether the salary at issue was an increase or base salary. In either event, a negotiations obligation was triggered with the change and not preempted by the Aid Act or MOU.

negotiations for the parties' first collective negotiations agreement, Dawn Blakely-Harper's compensation as a full time assistant corporation counsel from \$90,000.00 to \$85,000.00 effective July 1, 2014 without notice to or negotiations with Charging Party Teamsters Local 97 as the majority representative.

CONCLUSIONS OF LAW

Respondent City of Paterson violated 5.4a(5) and independently and derivatively a(1) of the Act, by unilaterally reducing, during negotiations for the parties' first collective negotiations agreement, Dawn Blakely-Harper's compensation as a full time assistant corporation counsel from \$90,000.00 to \$85,000.00 effective July 1, 2014 without notice to or negotiations with Charging Party Teamsters Local 97 as the majority representative.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the City of Paterson cease and desist from:

1. Interfering with restraining or coercing employees in the exercise of the rights guaranteed to them by this Act by unilaterally reducing, during negotiations for the parties' first collective negotiations agreement, Dawn Blakely-Harper's compensation as a full time assistant corporation counsel from \$90,000.00 to \$85,000.00 effective July

1, 2014 without notice to or negotiations with Charging Party Teamsters Local 97 as the majority representative.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally reducing, during negotiations for the parties' first collective negotiations agreement, Dawn Blakely-Harper's compensation as a full time assistant corporation counsel from \$90,000.00 to \$85,000.00 effective July 1, 2014 without notice to or negotiations with Charging Party Teamsters Local 97 as the majority representative.

B. That the City take the following action:

1. Make Dawn Blakely-Harper whole for any lost compensation, including longevity payments, as a result of the City's refusal to negotiate from July 1, 2014 when her salary was unilaterally reduced from \$90,000.00 to \$85,000.00 until May 2017 when Blakely-Harper left her position as assistant corporation counsel.

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. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this Order.

/s/Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: April 24, 2018
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 May 4, 2018.



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 interfering with restraining or coercing employees in the exercise of the rights guaranteed to them by this Act by unilaterally reducing, during negotiations for the parties' first collective negotiations agreement, Dawn Blakely-Harper's compensation as a full time assistant corporation counsel from \$90,000.00 to \$85,000.00 effective July 1, 2014 without notice to or negotiations with Charging Party Teamsters Local 97 as the majority representative.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally reducing, during negotiations for the parties' first collective negotiations agreement, Dawn Blakely-Harper's compensation as a full time assistant corporation counsel from \$90,000.00 to \$85,000.00 effective July 1, 2014 without notice to or negotiations with Charging Party Teamsters Local 97 as the majority representative.

WE WILL make Dawn Blakely-Harper whole for any lost compensation, including longevity payments, as a result of the City's refusal to negotiate from July 1, 2014 when her salary was unilaterally reduced from \$90,000.00 to \$85,000.00 until May 2017 when Blakely-Harper left her position as assistant corporation counsel.

Docket No. CO-2015-141

City of Paterson
(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