I.R. No. 2019-24

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Respondent,

-and- Docket No. CO-2019-258

IAFF Local 2578,

Charging Party.

Appearances:

For the Respondent,
Brown & Connery, of counsel
(Michael J. DiPiero, attorney)

For the Charging Party,
Loccke, Correia & Bukosky, of counsel
(Michael A. Bukosky, attorney)

INTERLOCUTORY DECISION

On April 10, 2019, Camden Fire Officers, IAFF Local No. 2578 (IAFF) filed an unfair practice charge against the City of Camden (City), together with an application for interim relief, exhibits, a certification and a brief. The charge alleges that after January 8, 2019, following the parties' signing and ratifying a memorandum of agreement for a successor collective negotiations agreement, the City repudiated the agreement by, ". . . failing to comply with any of its financial terms and conditions." The charge more specifically alleges that the memorandum of agreement, signed under the auspices of an assigned interest arbitrator, and extending from January 1, 2017 through December 31, 2020, sets forth specified wage increases -

including two that are retroactive to January 1, 2017 and January 1, 2018 - and payable, ". . . as soon as practicable after ratification." IAFF alleges that the City's refusal to pay the retroactive wage increases has "damaged the negotiations process," violating section 5.4a(1), (2), (3), (4), (5), (6) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act).

The IAFF seeks an Order restraining the City from repudiating the signed and ratified memorandum of agreement and directing it to immediately implement the retroactive wage increases.

On April 18, 2019, I issued an Order to Show Cause, setting forth dates for the City's response, IAFF's reply and argument on

---

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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 the 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. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

the application in a conference call. On May 17, 2019 the parties argued their respective cases.

The City denies repudiating the memorandum of agreement. It contends that it awaits the State's approval of the agreement, pursuant to its signed "Memorandum of Understanding" with the State Department of Community Affairs, "setting forth minimum conditions on the receipt of 2018 fiscal year transitional aid to localities," enforceable by the Division of Local Government Services (DLGS). It specifically avers: "As of today [i.e., May 3, 2019] the DCA has not provided final approval and therefore, the City is legally prohibited from entering into and/or implementing the agreement." The City also claims that it has maintained "the dynamic status quo." It also disputes that the IAFF has suffered irreparable harm.

The following facts appear:

IAFF is the exclusive representative of battalion fire chiefs, fire captains, training officers, chief apparatus officers, chief constables and assistant chief constables employed by the City.

On May 21, 2018, the State Fiscal Monitor, on behalf of the Director of the Division of Local Government Services of the Department of Community Affairs issued a letter to the City, together with a "fully executed copy of the Fiscal Year 2018

Memorandum of Understanding."[2/] According to the memorandum, about $18,000,000 in transitional aid is to be issued to the City, no more than 75% of which is to be disbursed upon the City's "execution of the memorandum," with the remainder disbursable if (in the "sole discretion" of the DLGS) the City is in "substantial compliance" with its terms and "oversight measures."

Another provision enables the DLGS to withhold funds even when the municipality is in "substantial compliance," but has ". . . otherwise violated certain terms of the memorandum."

A section of the memorandum entitled, "Individual and Collective Negotiations Agreements" provides:

> 3. **DLGS Prior Approval of all Agreements**: 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. A "Contract Request Form" (Attachment D) shall be submitted to and approved by the Director prior the Municipality authorizing execution of the Collective Negotiations Agreement. [City exhibit "G"]

Other portions of the section require "the municipality" to provide the State with calculations of total annual salary costs, the costs of increments, longevity, total contract costs, lists of all negotiations unit members and a scattergram of each employee as he/she ". . . moves through the salary guide proposed

---

2/ This "Memorandum of Understanding" is signed by the City Mayor and other City representatives and the Director of the DLGS.

for the proposed term of the agreement." By its terms, the memorandum, ". . . remains in full face and effect until a successor memorandum of understanding is executed."

On or about July 5, 2018, IAFF filed a Notice of Impasse with the Commission regarding a successor to the collective negotiations agreement that expired on December 31, 2016 (IAFF exhibits "B" and "C"). On July 19, 2018, the City filed a Petition to Institute Compulsory Interest Arbitration with the Commission (IAFF exhibit "D"). On July 27, 2018, the then-Acting Director of Conciliation and Arbitration issued a letter apprising the parties of the designation of a named interest arbitrator (Dkt. No. IA-2019-001) (City exhibit "E").

On October 8, 2018, the assigned interest arbitrator issued a letter to Counsel for the parties, together with a copy of a "fully executed memorandum of agreement,"[3/] subject to the parties' ratification (IAFF exhibit "F"). The memorandum provides in pertinent parts:

> 3. The following across-the-board wage increases shall be implemented on the dates specified:
>
> Effective January 1, 2017 - Two Percent (2%)
> Effective January 1, 2018 - Two Percent (2%)
> Effective January 1, 2019 - Two Percent (2%)
> Effective January 1, 2020 - Two Percent (2%)
>
> Retroactive payments shall be made as soon as practicable after ratification.

3/ This "memorandum of agreement" is signed by representatives of the City and IAFF.

> 6. Both Negotiating Committees agree to urge the ratification of this Memorandum of Agreement.
> [IAFF exhibit "F"]

On an unspecified date, IAFF ratified the memorandum of agreement (IAFF President Samuel Munoz certification, para. 21). On October 18, 2018, the City filed a letter with the Director of Conciliation and Arbitration requesting to withdraw its petition, with the IAFF's consent, owing to a settlement ratified by the union and pending ratification by the City (City exhibit "F"). On December 11, 2018, the City ratified the memorandum of agreement (City brief at p. 2).

On or about January 8, 2019, IAFF requested a "status update" on a "form of contract" incorporating the "recent settlement terms," to which the City did not reply (Munoz certification, para. 25, 26).

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. De Gioia, 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).

The IAFF contends that the City is repudiating the ratified memorandum of agreement, relying on City of Irvington, I.R. No. 2019-7, 45 NJPER 129 (¶34 2018). In that case, the public employer refused to pay negotiated and scheduled wage increases (and other benefits) mid-contract, following the exclusive representative's refusal to reopen negotiations. The Designee determined that the employer, ". . . provided no justification for its action, nor cited any contractual defense." The Designee also determined that such a "mid-contract repudiation upsets the balance required for good faith negotiations and chilled the negotiations process at a time when cooperation between labor and management is imperative to address [existing] circumstances." Id., 41 NJPER at 135.

In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), a seminal decision that in part defined the contours of a "repudiation" claim, the Commission wrote:

> A claim of repudiation may also be supported, depending on the circumstances of a particular case, by a contract provision that is so clear that an inference of bad faith arises from a refusal to honor it (emphasis added) . . . [10 NJPER 423]

In an attached footnote (no. 12) approvingly citing the NLRB's rationale for finding a violation of the federal statue as opposed to a mere contract violation, the Commission quoted:

> . . . [A]n employer's decision in midterm of a contract to pay its employees for the remainder of the contract's terms at wage rates below those provided in the collective bargaining agreement affects what is perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the [NLRA]. Because so substantial a portion of the remaining aspects of a bargaining contract are dependent upon the wage rate provision, it seems obvious that a clear repudiation of the contract's wage provision is not just a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. [Id., 10 NJPER 425-426, quoting Oak-Cliff-Golman Baking Co., 207 NLRB No. 1063, 85 LRRM 1035, 1036 (1973)]

In this case, the City avers an intent to comply with the ratified new agreement and has not implemented any of its terms, instead maintaining a status quo of the predecessor agreement. It acknowledges its duty to pay retroactive wage increases, leaving in doubt only the "when" of payment, owing to the DLGS's "awaited [and belated] approval" of the agreement, pursuant to the terms of its Memorandum of Understanding with the State. It appears to me that the City's intent, a marker of a repudiation claim, differs from the overtness revealed in the midterm settings described in Human Services and City of Irvington and is further attenuated, perhaps slightly, by the parties' agreement that retroactive payments, ". . . shall be made as soon as practicable after ratification." In this vein of unique circumstances, I find that the IAFF has not demonstrated

repudiation of the agreement by a substantial likelihood of success.

It also appears to me, conversely, that the facts alleged in the charge meet the Complaint issuance standard (particularly if "practicability" denotes a purely ministerial action that would have been accomplished months ago). N.J.A.C. 19:14-2.1. A formal Complaint shall issue on this unfair practice charge and the matter shall be assigned to a hearing examiner for processing.

Finally, and most importantly for the resolution of this case, I believe that it would serve the public interest for the parties to agree to present the matter for an expedited grievance arbitration on the merits. The Director of Conciliation and Arbitration is ready and willing to assist the parties in establishing an expedited procedure.

ORDER

The application for interim relief is denied. A Complaint shall issue under separate cover. The parties are encouraged to seek an expedited grievance arbitration hearing with the assistance of the Director of Conciliation and Arbitration.

Jonathan Roth
Commission Designee

DATED: May 22, 2019
Trenton, New Jersey