I.R. NO. 2020-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Respondent,

-and- Docket No. CO-2020-217

HOBOKEN MUNICIPAL
EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief sought by the Hoboken Municipal Employees Association (HMEA) based on an unfair practice charge it filed against the City of Hoboken (City).

The charge alleges that the City engaged in unfair practices when it submitted a layoff plan to the Civil Service Commission calling for the layoffs of 62 employees represented by the HMEA. The charge alleges that the City sought to retaliate against the HMEA for not agreeing during collective negotiations to accept a change in health insurance coverage to plans that would reduce the level of health benefits from those that the employees presently received. The charge also alleges that the City was obligated to negotiate in good faith with the HMEA. The Designee concludes that the HMEA did not establish that it had a substantial likelihood of success in prevailing on the merits of its charges.

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Appearances:

For the Respondent, Alyssa L. Bongiovanni, Esq.,
Assistant Corporation Counsel

For the Charging Party, Limsky Mitolo, attorneys
(Marcia J. Mitolo, of counsel)

INTERLOCUTORY DECISION

On February 14, 2020, the Hoboken Municipal Employees Association (HMEA or Charging Party) filed an unfair practice charge and a request for interim relief with the Public Employment Relations Commission. The Association alleges that the City of Hoboken (City or Respondent) violated the New Jersey Employer-Employee Relations Act, as amended, when it threatened to layoff employees represented by the HMEA while the parties were in collective negotiations for a successor agreement.[1/] The

1/ A layoff plan filed by the City to the Civil Service Commission (CSC) on January 15, 2020 identified 79 positions, 62 of which were in the HMEA unit. The plan, served on the HMEA on January 31, was approved by the CSC by letter dated February 20, 2020.

charge asserts that the layoffs would be implemented because the HMEA did not agree to the City's proposed changes in health insurance coverages made during collective negotiations for a successor collective negotiations agreement (CNA). And, the charge maintains that the City posted notices of promotional vacancies for several positions in the layoff plans that are represented by the HMEA. These actions by the City are alleged to violate the following unfair practice sections of the Act; N.J.S.A. 34:13A-5.4a(1),(2),(3),(4) and (5).[2/]

An Order to Show Cause was signed on February 27, 2020, setting a briefing schedule and a hearing on the interim relief application. On March 18, the parties argued via telephone. These pertinent facts and factual assertions appear.[3/]

2/ These provisions prohibit public employers . . . 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 this 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 . . . ."

3/ The parties submitted certifications and exhibits. The City filed a certification from Brian Marks, its Business Administrator until February 20, 2020. The HMEA submitted the certification of its President Diane Carreras.

1. The HMEA represents the City's non-uniformed, non-supervisory employees.

2. The last collective negotiations agreement showing all negotiated terms between the City and the HMEA covered the period from July 1, 2002 through June 30, 2005. This CNA was succeeded by Memoranda of Agreement (MOA), the most recent of which covered the period from January 1, 2015 to December 31, 2017.

3. At all pertinent times, in addition to the HMEA, the City had collective negotiations relationships with five other unions representing City employees.[4/] All CNAs or MOAs covering the six units of City employees had expired.

Health Insurance

4. Prior to August 18, 2019, employees represented by the HMEA received health insurance coverage under a so-called "platinum plus" plan. The benefits were self-funded by the City and administered by CIGNA.

5. At a collective negotiations session on August 18, 2019, the City proposed a change in the health benefits. Employees could choose either a "Gold Plus" plan or a Health Savings Account (HSA) with a significant deductible.

4/ In addition to the HMEA the other units are the Hoboken Municipal Supervisors Association (HMSA), two unions representing police officers and two unions representing fire fighters.

6. The City estimated that the plans would save the employees 4.7% and 28.8%, respectively, in their contributions towards the cost of health care.

7. The HMEA rejected this proposal as did the City's other municipal unions.

8. In November, 2019, the City sent a written "Last Best Offer" to some, but not all, of the six unions. The HMEA was not among the recipients. Regarding health insurance coverage, the offer was for the Gold Plus or HSA plans.

9. However, on February 10, 2020, the City advised other Unions, but not the HMEA, that it was rescinding the "Last Best Offer" as no union had accepted the proposed change in health insurance coverage. Marks' memorandum to each union recited the date of the Last Best Offer and further provided:

> To date your bargaining unit has neither accepted the City's proposal nor made a counter offer. I understand that it has taken several months to effectuate the sharing of health insurance information which is now underway. However, with the hindsight and clarity of three additional months of economic forecasting and analysis, the City's financial position has changed significantly since November 2019. Therefore since your bargaining unit has not accepted the City's offer, I am hereby withdrawing and rescinding the administration's proposal. This does not mean that negotiations have come to an impasse. However, with my imminent departure and the beginning of the municipal budget process, the City's position may change from the proposal offered last November.

10. As related by counsel during oral argument, these other health insurance arrangements were discussed, but not necessarily during formal collective negotiations sessions:

- Switching to the NJ Direct10 Plan under the State Health Benefits Program, which would require a 90-day waiting period and could only be adopted if it applied to all employees. This option is favored by HMEA and apparently the other unions.
- Switching to another self-funded plan that would "mirror" the benefits of NJ Direct 10 but could be implemented without the waiting period. The City prefers this plan to actually enrolling in the SHBP.

The Layoff Plan

11. In December 2019, the City met with all six unions to advise them of the City's budget outlook.

12. Also in December 2019, the City received input from City departments regarding possible layoffs and restructuring.

13. HMEA President Carreras certifies that, at the December 11, 2019 City-HMEA meeting, the City said unless the HMEA accepted the proposed healthcare changes, layoffs would result.

14. On January 15, 2020, Marks sent a layoff plan to the CSC. It consisted of a seven page, single-spaced letter with Appendices A through Q.[5/]

15. Marks certifies the City was anticipating a budget deficit of $7,420,795 that was based, in part, on maintenance of

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5/ Carreras certifies that, as the HMEA President, she received a copy of the layoff plan on January 31, 2020.

the current health care plans. He states that had the municipal unions accepted the City's proposed changes in health care there would have been a health care savings to the City of $972,493.00. Instead, maintenance of the current plans would increase expenses by $1,513,450, a swing of $2,485,943.

16. Marks further certifies that even if the Unions had agreed to the City's healthcare proposals that would not have guaranteed there would be sufficient savings to avoid layoffs as the City faced increased expenses in several other areas.[6/]

17. By letter dated February 20, 2020, addressed to Marks and copied to the unions representing the City's organized employees including the HMEA, Kelly Glenn, the CSC's Director of Agency Services, approved the plan.

18. Appendix P to the layoff plan contains a sample layoff notice. It advises that the last day of work for a laid off employee would be May 7, 2020. During oral argument both counsel acknowledged that, based on statutory notice requirements, if

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6/ Marks certifies that aside from health insurance costs, the City faced these increases: pension costs ($578,345); higher personnel costs resulting from expected new CNAs ($5,691,795); revenue shortfalls from municipal court fines and interest on investments ($300,000); debt service increase ($600,000); supplemental departmental budget requests ($642,000); increases in solid waste disposal fees ($100,000) and increase in Joint Insurance Fund premiums ($87,000). These figures are reflected and broken down in more detail in the layoff plan.

notices were served on employees on February 28, any layoffs would occur after May 7.

The promotional announcements

19. Carreras certifies that on January 31, 2020 she was made aware of "a dozen or so" promotional vacancy postings for positions that are within the HMEA's collective negotiations unit and include titles that are listed in the layoff plan.[7/]

20. Marks certification asserts:

> The promotional announcements referenced . . . were requested from civil service in October 2019 at the recommendation of the Personnel Officer. The reason for this request was so that there would be the opportunity for promotion if the need were to ever arise. The results of the promotional exams are good for three years. The promotional announcements were not directly related to any plans for promotion currently or in the immediate future.

ANALYSIS[8/]

To obtain interim 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

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7/ The postings contain issue dates of February 1, 2020 and closing dates of February 21, 2020 for these positions: Clerk 2, Bilingual; Clerk 1, Bilingual; Keyboarding Clerk 2, Bilingual; Keyboarding Clerk 1, Bilingual. The languages are Spanish and English. Appendix B to Carreras' certification includes more than one notice for most jobs.

8/ The factual recitation also refers to dealings and events involving the City and the other five unions. This decision only adjudicates the interim relief application submitted by the HMEA.

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); Whitmyer 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 HMEA's arguments do not discuss how the City's actions violated N.J.S.A. 34:13A-5.4a(2) and (4).[9/] Thus, I deny interim relief as to claimed violations of those subsections. The Director of Unfair Practices may decide if those claims warrant further processing.

Thus, the HMEA's interim relief application focuses on its claims that the City violated N.J.S.A. 34:13A-5.4a(3) and (5).[10/]

As set forth in In re Bridgewater Tp., 95 N.J. 235, 242-243 (1984) the Commission is to apply the following standard in assessing alleged violations of subsection 5.4a(3).

9/ The HMEA refers its prior unfair practice charge against the City, Docket No. CO-2018-222. in which an interim relief order was vacated by the Commission. See P.E.R.C. No. 2019-22, 45 NJPER 213 (¶56 2018).

10/ An unfair practice under either subsection is also a breach of N.J.S.A. 34:13A-5.4a(1). See Galloway Board of Education and Galloway Township Ed. Assn, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976), aff'd 157 N.J. Super. 74 (App. Div. 1978).

First, the Charging party must prove that discrimination for protected activity was a substantial or motivating factor in the adverse personnel action. The required proofs are that: (1) the Charging Party engaged in protected activity; (2) the public employer, its agents or representatives, were aware of such conduct, and (3) that the public employer was hostile towards the protected conduct using direct or circumstantial evidence, to demonstrate a nexus between the protected activity and the adverse personnel action.

Second, the public employer may avoid a finding that it violated 5.4a(3) by proving that it took the same action without regard to the protected activity. The key word is "took" rather than "could have taken." However, the employer is relieved of establishing this affirmative defense unless the charging party has met its obligation under the first part of the analysis. See Jackson Tp. Bd. of Ed., P.E.R.C. No. 93-94, 19 NJPER 241 (¶24118 1993)(Dismissing complaint where Association did not prove hostility to employees' protected activity).

Personnel decisions that are normally the province of management – layoffs, promotions, demotions and transfers – if shown to be the product of hostility to protected conduct can be the basis for finding a violation of 5.4a(3). See Hackensack v. Winner, 82 N.J. 1, 20 (1980) ("[i]t would certainly constitute an unfair labor practice if public employees, having engaged in

lawful organizational activities, were to be penalized or denied promotions because of that protected participation.");[11/] Bergen Cty. Special Services School Dist. and Politzer, P.E.R.C. No. 88-83, 14 NJPER 241 (¶19088 1988), aff'd NJPER Supp.2d 206 (¶181 App. Div. 1989) (employer violated 5.4a(3) by laying off union spokesperson and not considering him for re-employment when vacancy in his job arose); Township of Mantua, P.E.R.C. No. 84-51, 10 NJPER 433 (¶15194 1984) (employer violated 5.4a(3) by laying off employee who had led organizing drive and not considering him for position in another department).

Here the HMEA was engaged in collective negotiations, a protected activity, with Township officials. Thus, protected activity and employer knowledge of it, are present.

However, I cannot conclude at this time and on the record before me that the submission of the layoff plan and the issuance of layoff notices demonstrates hostility to protected conduct.

The City's layoff plan does refer to the unwillingness of the HMEA and the other unions representing City employees to agree to modified health care plans. The City's layoff plan

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11/ In a similar vein, Justice Handler's dissenting opinion in In re Local 195, IFPTE, 88 N.J. 393, 423 (1982) proclaims "I would not hesitate to consider it an unfair practice under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5 et seq., for a public employer to transfer or assign union officials or shop stewards for impermissible reasons or for motives ulterior to the legitimate needs of government. . ."

states that its focus in collective negotiations is to secure agreements to changed medical plans to reduce costs.

Even if the admission that the HMEA's unwillingness to agree to health plan changes was a factor in pursing layoffs, and could be construed as hostility, the record shows that the there were other economic pressures on the City that accounted for the bulk of the projected budget deficit it anticipated.

The City's layoff plan asserts that it was facing a deficit of $7,420,795. That figure is based on the continuation of the status quo on health care coverage – the self insured "Platinum Plus" plan administered by CIGNA.

Marks certifies that if the unions had agreed to the City's proposal, it would have saved $972,493.00. Instead, he estimated, as reflected in the layoff plan submitted to the CSC, that maintenance of the current plan would increase the City's health care expenses by $1,513,450, a swing of $2,485,943.[12/]

If the City had achieved that savings there would still be a deficit of $4,934,892, or approximately two thirds of the original projected budget deficit.[13/]

12/ This figure is a product of adding the lost savings from the rejected plan switch to the cost increases stemming from maintaining the status quo.

13/ For a breakdown of the elements of the non-health care related parts of the projected deficit see note 6 supra.

I therefore conclude that the HMEA has not shown that it has a substantial likelihood of prevailing on the portion of its unfair practice charge that the City's submission of a layoff plan to the CSC violated N.J.S.A. 34:13A-5.4a(3).[14/]

A public employer violates its statutory duty to negotiate terms and conditions of employment if it makes unilateral changes in working conditions during the course of collective negotiations. See N.J.S.A. 34:13A-5.3, 5.4a(5); Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). Galloway requires that the public employer maintain the status quo of working conditions at least until it negotiates to impasse on the issues on the negotiating table. 78 N.J. at 48.[15/]

14/ I do not find a connection between the HMEA's protected conduct and the City's posting of promotional announcements. The HMEA's brief notes the close temporal connection between its receipt of the layoff plan (January 31, 2020) and the posting of the promotional opportunities (February 1), presumably implying that because the promotions were for some of the titles included in the layoffs, the motive behind the layoffs was suspect. However, Marks certifies that the City requested CSC approval for promotional announcements in October 2019. At the very least there is an issue of fact as to the timing and motive for the promotional announcements and what relation, if any, they have to the layoff plan.

15/ The HMEA cites Galloway in arguing that the Act prohibits laying off employees during the course of collective negotiations. However economic layoffs are not mandatorily negotiable. See Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, Inc., 145 N.J. Super. 435 (App. Div. 1976) (¶23 App. Div. 1976), certif. den. 74 N.J. 248 (1977).

In Fredon Tp. Bd. of Ed. and Fredon Ed. Ass'n, P.E.R.C. No. 96-5, 21 NJPER 275 (¶26177 1995), the Commission explained when an impasse is reached:

> In City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977), we addressed the sensitive issue of when a public employer can implement terms and conditions of employment without a mutual agreement. In that case and others since then, we have concluded that a public employer that has negotiated in good faith and has reached a genuine post-fact-finding impasse may unilaterally implement its last best offer. See also Bayonne City Bd. of Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990); Red Bank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd NJPER Supp.2d 99 (¶81 App. Div. 1981); Rutgers, the State Univ., P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980).

The August 18, 2019 meeting was the only formal City-HMEA collective negotiations session addressing the City's proposed change in health care plans. Based on the attachments to the layoff plan and Marks' certification, there were two meetings with representatives of the other City unions. And, there was no representation that either party had sought to invoke the impasse resolution procedures applicable to units of civilian employees. N.J.A.C. 19:12-3.1 through N.J.A.C. 19:12-4.3.

The events in this case do not meet the standard for reaching a negotiations impasse as described above.[16/]

16/ The unions representing police or fire employees may have collective negotiations impasses resolved through interest arbitration. N.J.S.A. 34:13A-14 et seq. Unless expressly allowed by language in a CNA, the City could not (continued...)

Marks concedes as much as his February 10, 2020 memos to the representatives of the unions that withdraw the City's November 2019 "Last Best Offer" of either the Gold Plus or HSA health care plans provide:

> Therefore since your bargaining unit has not accepted the City's offer, I am hereby withdrawing and rescinding the administration's proposal. This does not mean that negotiations have come to an impasse.
>
> [See Finding No. 9, emphasis supplied]

If the facts of this dispute showed that the City implemented a change in the health care coverage for employees represented by the HMEA than I could find there was a substantial likelihood of concluding that the City had violated N.J.S.A. 34:13A-5.4a(5).

However, there is no evidence that the City actually imposed a unilateral change in the status quo, the "Platinum Plus" health care plan.[17/]

16/ (...continued) unilaterally alter working conditions of employment for public safety employees.

17/ A public employer may select the carrier or the method of providing health care benefits, but the level of benefits is mandatorily negotiable. See Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975). It is undisputed that the City was seeking changes in benefit levels.

Therefore I conclude that the HMEA has not shown that it has a substantial likelihood of succeeding on its claim that the City violated N.J.S.A. 34:13A-5.4a(5).

As the first element of proof required to sustain an interim relief regarding both the claimed violations of N.J.S.A. 34:13A-5.4a(3) and (5) has not been satisfied, I need not review the parties' arguments regarding irreparable harm, the public interest and the balance of hardships to the parties.[18/] The case will be referred to the Director of Unfair Practices for further processing.

ORDER

It is HEREBY ORDERED that the application of the Hoboken Municipal Employees Association for interim relief is denied. This case is referred to the Director of Unfair Practices for further processing.

/s/ Don Horowitz
DON HOROWITZ
Commission Designee

Dated: April 2, 2020
Trenton, New Jersey

18/ I also need not address the City's contentions regarding the HMEA's ability to challenge the layoff plan before the CSC and whether that should bear on its interim relief application.