

D.U.P. NO. 2022-13

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

In the Matter of

PBA LOCAL 206,

Respondent,

-and-

Docket No. CE-2022-002

OLD TAPPAN BOROUGH,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint in a charge alleging that the PBA violated the Act when it refused to review and sign a draft successor agreement sent by the Borough on August 2, 2021, after the parties concluded interest arbitration. The Director determines that the draft agreement the Borough insists the PBA sign includes material unilateral changes that the Borough made to terms and conditions of employment that were not addressed in, or consistent with the interest arbitration award.

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Appearances:

For the Respondent,
Limsky Mitolo, attorneys
(Merick H. Limsky, of counsel)

For the Charging Party,
Trenk Isabel Siddiqi & Shahdanian, P.C., attorneys
(John L. Shahdanian, of counsel)

REFUSAL TO ISSUE COMPLAINT

On September 28, 2021, Old Tappan Borough (Borough) filed an unfair practice charge against PBA Local 206 (PBA). The charge alleges that on August 3, 2021, after the parties had received an interest arbitration award for a successor collective negotiations agreement (CNA), the PBA unlawfully refused to review and sign a draft agreement provided by the Borough on August 2, 2021. The PBA's conduct allegedly violates N.J.S.A.

34:13A-5.4b(3) and (4), of the New Jersey Employer-Employee Relations Act (Act).^{1/}

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent.

N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority 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.

The PBA is the exclusive representative of all police personnel (except the Chief) employed by the Borough. The parties' predecessor signed CNA extended from January 1, 2015 through December 31, 2018. After multiple negotiations sessions for a successor agreement proved unsuccessful, the Borough, on August 13, 2020, filed a petition to Initiate Compulsory Interest Arbitration pursuant to N.J.S.A. 34:13A-16(b)(2) to resolve the impasse over terms for a successor CNA (Dkt. No. I-2020-083). The parties participated in interest arbitration proceedings before Arbitrator Marc Winters (Winters). They mutually agreed

^{1/} These provisions prohibit employee representatives, 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."

to waive a hearing and allowed Winters to decide the matter based on their submitted documents.

On February 9, 2021, Winters issued an Interest Arbitration Award. N.J.S.A. 34:13A-16f(5). The Borough appealed the award, seeking clarification only on the sole issue of retiree medical contributions. N.J.S.A. 34:13A-16f(5) (a).

On April 29, 2021, the Commission issued Borough of Old Tappan, P.E.R.C No. 2021-43, 47 NJPER 468 (¶110-2021), remanding to the Arbitrator for clarification, “. . . to the Borough’s final proposal seeking that retirees’ health care coverage contribution be pursuant with levels set forth by P.L. 2011, c.78.” Id., 47 NJPER at 469.

On June 17, 2021, Winters issued a clarification. No further appeal was filed.

On August 2, 2021, Counsel for the Borough forwarded a draft CNA to PBA Counsel, together with this note:

Merick:

See attached draft of PBA contract for 2019-2022. I believe this encapsulates everything from the award and, subsequent clarification.

Regards,
John

The parties’ expired CNA provides in a pertinent part:

- 12:00 HOURLY RATE
- 12:01 The sum of the employees’ yearly base salary, his longevity pay, his college pay, his shift

differential, and his holiday pay shall be divided by 1952 hours to determine the hourly rate of pay.

The Borough's forwarded draft CNA provides, by comparison:

12:00	HOURLY RATE
12:01	The hourly rate of pay shall be determined by the sum of the Employee's yearly base salary, and, if applicable, his longevity pay, his college pay, his shift differential, and his holiday pay, divided by 2184 hours if the Employee is on the Modified Pitman Schedule as set forth in Section 11.00(B) of this Agreement.

In his award, Winters addressed only the duration of the new agreement, salary increases, retiree healthcare, detective stipends, outside detail procedures, out-of-title pay, and awarded that the 12-hour work week currently in effect shall be placed into the parties' CNA. A provision specifying the number of hours used to determine an officer's hourly rate of pay is not included in the award.

The PBA proposed to the arbitrator that officers who perform the work of a supervisor in a higher rank should be compensated at the rate of pay of that higher rank. This proposed term wasn't included in the expired agreement. Winters found this proposal to be justified and awarded it to the PBA as follows:

Any officers who performs the work of a supervisor, any rank above their own rank, will be compensated at the rate of pay of that higher rank for all hours actually worked in the higher rank.

The Borough's draft CNA regarding out-of-title pay provides:

58.00 OUT OF TITLE PAY

58.01 Any Officer who performs the work of a supervisor, any rank above their own rank, will be compensated at a rate of \$75.00 per shift that they work out-of-title, only if said Officer meets the appropriate criteria allowing them to be eligible for out-of-title pay. Out-of-Title pay requests must be submitted to the Chief by way of 'Out-of-Title Pay Request Form' and the Chief will determine whether said Officer's Out-of-Title Pay request is appropriate and thus approved or disapproved. The Out-of-Title Pay Request Form is attached hereto as Appendix "G." The Chief reserves the right to modify the Out-of-Title Pay Request Form as he/she deems appropriate.

On August 3, 2021, PBA Counsel replied to Borough Counsel:

John, I haven't even read the whole draft yet, but there is no way we are signing anything that has unilateral changes that were not awarded. Specifically, you changed the number of hours that determines the hourly rate. In addition, the members have not had their pay adjusted even though it was not contested, and no back pay has been paid. There is also the ridiculous position regarding out-of-title work. Unless you tell me that it was a mistake, the PBA will be filing an unfair practice charge.^{2/}

Merick H. Limsky

^{2/} On October 15, 2021, the PBA filed an unfair practice charge. A Complaint and Notice of Hearing issued on April 28, 2022.

Later that day, Borough Counsel emailed PBA Counsel this response:

Merick:

Read the entire draft. You will see why the changes were made. They were necessitated by the ruling. The number of hours is the standard Pittman schedule. You can't get a 12 hour schedule and have it based on 1954.

As we have discussed ad nauseam, once the contract is signed, all back pay due will be addressed.

If you have edits or suggestions, feel free to send them over.

Regards,
John

On August 4, 2021, PBA Counsel emailed Borough Counsel:

I am not debating this with you. This change in hours was knowingly done by you and the employer. It was not 'necessitated' by anything. In fact, it has been that way for many years under the 12 hour schedule. The arbitrator did not address this issue. I did read the whole draft. I am not making suggestions. Unless this is taken out, there will be no signed agreement and we will be filing an unfair practice. There also is no reason why their pay has not been changed for over six months when there was no dispute. Additionally, the 'form' for out-of-title pay is ridiculous.

On September 24, 2021, after the parties had met to discuss contractual issues, Counsel for the Borough wrote to PBA Counsel:

The Borough wants the PBA to sign the new agreement. If they don't have it by Monday they are going to consider their options with PERC. Just wanted to give you a heads up.

John

ANALYSIS

The Borough alleges that the PBA has failed to apprise it of any concerns, edits, or suggestions to the draft CNA and refuses to sign the agreement. The Borough claims that the PBA's actions violate the Act and it seeks an Order requiring the PBA to sign the presented draft CNA. The PBA asserts that it apprised the Borough of its concerns with the draft CNA, and advised that it would not sign an agreement with unilateral changes made by the Borough.

Majority representatives, like public employers, are obligated to negotiate in good faith over terms and conditions of employment. N.J.S.A. 34:13A-5.3. Sometimes, actions of a public employer will relieve a majority representative of the obligation to negotiate in good faith. Unilateral changes to existing terms and conditions of employment are "unlawful because they frustrate the statutory objective of establishing working conditions through bargaining." Galloway Tp. Educ. Ass'n v. Galloway Tp. Bd. of Ed., 78 N.J. 25, 48 (1978). To establish a 5.4b(3) violation, the employer must demonstrate that the majority representative, by its action(s), adversely impacted negotiations or created an impediment to reaching an agreement. Rutgers

University, P.E.R.C. No. 2017-4, 43 NJPER 71 (¶18 2016). The Borough cannot do so in this instance.

The Borough hasn't alleged that the PBA frustrated the interest arbitration process in any way. Both parties participated cooperatively, ultimately receiving an Interest Arbitration Award on June 17, 2021. Rather, the Borough alleges that the PBA violated the Act by refusing to review and sign a draft successor CNA that it sent to the PBA.

The facts show that the draft CNA forwarded by the Borough to the PBA includes material changes to terms and conditions of employment that are either not addressed by, or are inconsistent with terms set forth in the Interest Arbitration Award. More specifically, the award does not change how an officer's hourly rate of pay is to be calculated, nor does it provide that officers who work out-of-title should be paid at a rate of \$75 per shift, as the draft CNA that the Borough insists the PBA sign, reflects. PBA Counsel clearly communicated to the Borough that the PBA would not sign an agreement that includes such unilateral changes. The PBA's conduct is not an impediment to securing an executed successor CNA.

The Commission's complaint issuance standard has not been met, and I decline to issue a complaint on any of the allegations of this charge. N.J.A.C. 19:14-2.3(a).

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: May 13, 2022
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3(b) within 10 days.

Any appeal is due by May 23, 2022.