H.E. NO. 86-64

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

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and- Docket No. CO-86-114-103

JERSEY CITY FIRE OFFICERS
ASSOCIATION, LOCAL 1064,

Charging Party.

## SYNOPSIS

A Hearing Examiner grants the Respondent's Motion for Summary Judgment and dismisses an allegation that the Respondent violated §5.4(a)(6) of the Act when it failed to ratify and implement a collective agreement reached with the Charging Party. Noting the absence of dispute as to material facts, the Hearing Examiner finds that the Respondent is entitled to the dismissal as a matter of law. The Hearing Examiner finds that a tentative agreement between the parties contained clear conditions precedent (i.e. as to the need for ratification by both parties) to implementation, and that, in the absence of ratification by the Respondent, no agreement was reached and no (a)(6) violation could be found.

The Hearing Examiner denies the Respondent's Motion for Summary Judgment on the alleged violation of 5.4(a)(5) and, derivatively, (a)(1). He finds that the allegations are not ripe for summary judgment because material issues of fact exist as to the conduct of Respondent's agents, and that undisputed facts present a legal question of first impression.

H.E. NO. 86-64

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

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and- Docket No. CO-86-114-103

JERSEY CITY FIRE OFFICERS
ASSOCIATION, LOCAL 1064,

Charging Party.

Appearances:

For the Respondent, Pachman & Glickman, P.A.
(Martin R. Pachman of counsel)

For the Charging Party, Sterns, Herbert & Weinroth, P.A.
(Michael J. Herbert of counsel)

RULING ON MOTION FOR SUMMARY JUDGMENT

On November 12, 1985, the Jersey City Fire Officers Association, Local 1064 ("Charging Party" or "Local 1064") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the City of Jersey City ("Respondent" or "City") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party alleged that the Respondent "had refused to enact the enabling resolution to adopt..." a collective agreement reached between Respondent and the

Charging Party, in violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6).[1/]

On January 30, 1985, the Commission Director of Unfair Practices issued a Complaint and Notice of Hearing.

On February 27, 1986, the Respondent filed an Answer. It denied that it committed any unfair practice, and requested dismissal of the Complaint in its entirety. In addition, the Respondent also filed a Motion for Summary Judgment pursuant to the N.J.A.C. 19:14-4.8 and a brief and affidavits in support of that motion. Pursuant to N.J.A.C. 19:14-4.8, the motion was referred to the Chairman of the Commission. On April 7, 1986 the Chairman referred the motion to me for determination.

After grant of an extension time to file its response to the motion and the supporting affidavits, the Charging Party filed a brief and an affidavit. I received the last of these documents on

---

1/ These subsections 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; (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; and (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

May 20. On May 27, the Respondent filed a memorandum and affidavit in response to the submissions of the Charging Party. The Charging Party filed a letter response received on May 30, 1986.

Upon the record papers filed by the parties, I make the following:

UNDISPUTED FINDINGS OF FACT

1. The City of Jersey City is a public employer within the meaning of the Act and is subject to its provisions.

2. The Jersey City Fire Officers Association, Local 1064 is an employee representative within the meaning of the Act and is subject to its provisions.

3. Local 1064 and the City of Jersey City are parties to a collective agreement for the period of July 1, 1982 through June 30, 1987. Article XXX of the agreement provides that any of its provisions could be "changed, supplemented, or altered, provided both parties mutually agree in writing." Article LX of the agreement provides for a reopener of Article IX (salaries) "for modification effective July 1, 1985. Parties agree that all provisions of this Agreement shall remain in effect until a successor agreement has been executed. Negotiations for the reopener shall commence no earlier than June 15, 1985."

4. In May and June, 1985, representatives of Local 1064 and one or more representatives of the City had a series of meetings which culminated in a "Tenative [sic] Agreement" on June 18,

1985.[2/] The Tentative Agreement was signed solely by Frederick Tomkins, Business Administrator of the City of Jersey City and George Geyer, President of Local 1064. The Tentative Agreement is a four page document which covers a variety of terms and conditions of employment within the meaning of the Act, including salaries, vacations and a prescription drug plan.

5. The introductory paragraphs of the Tentative Agreement reached on June 18, 1985 state:

> WHEREAS, the City of Jersey City and the Jersey City Fire Officers Association have agreed to reopen negotiations for a new agreement commencing July 1, 1985 and ending December 31, 1987; and
>
> WHEREAS, the parties have negotiated in good faith; and
>
> WHEREAS, both parties have agreed to recommend for ratification the terms of a new agreement as set forth below without reservation to the membership of the organization and the governing body of the city, the following agreements have been reached.

6. The final numbered paragraph of the Tentative Agreement states: "The City agrees to present this agreement to the City Council at its meeting of June 27, 1985 for approval. The Union agrees to present the agreement to its members for ratification as soon as practical."

---

2/ The Charging Party alleges that "all of the essential economic elements of the reopener agreement were agreed to..." at a June 5 negotiations session (Charging Party brief at p. 3); the City denies this (City Reply Memorandum at p. 5). This dispute is reviewed infra.

7. In late June, 1985, the membership of Local 1064 ratified the tentative agreement reached on June 18, 1985.[3/]

8. On June 27, 1985, the Tentative Agreement was on the agenda of the Jersey City Municipal Council. After some discussion, and including remarks by Louis Ippolito,[4/] Council resolved to delete the Tentative Agreement from its agenda by a vote of four (4) to two (2) with one abstention.

9. The June 27, 1985 Council meeting was the last session of the Council as then constituted. Pursuant to an election held on June 11, 1985, a new Mayor and Council were installed in office effective July 1, 1985.

10. Although counsels for the City and Local 1064 have exchanged subsequent letters concerning the Tentative Agreement, the Tentative Agreement has been neither ratified nor implemented by the City.

## ANALYSIS

### Summary Judgment Standards

Pursuant to N.J.A.C. 19:14-4.8(d), summary judgment may be granted "[i]f it appears from the pleadings, together with the

---

3/ This fact is asserted by the Charging Party at paragraph 6 of its unfair practice charge. While the City, in its Answer, states that it has "insufficient information to form a belief..." as to this assertion, this fact has not been placed in dispute, and any doubt on this issue is resolved in favor of Local 1064 for the purposes of this decision.

4/ The parties dispute whether Ippolito acted in an official capacity at the meeting or as a private citizen.

briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...."

A motion for summary judgment should be granted with extreme caution. The moving papers are to be considered in the light most favorable to the party opposing the motion and all doubts are to be resolved against the movant. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182, 185 (App. Div. 1981). In view of these principles, the Commission has been reluctant to grant summary judgment (see, e.g. Bergen County College, P.E.R.C. No. 83-47, 8 NJPER 608 (¶13288 1982)), especially in matters of first impression. Essex County Educational Services Commission, P.E.R.C. No. 83-65, 9 NJPER 19, 20 (¶14009 1982). Within these bounds, I proceed to rule on the motion for summary judgment, with a separate analysis for each alleged violation of the Act.[5/]

Alleged Violation of N.J.S.A. 34:13A-5.4(a)(6).

This subsection of the Act requires public employers to reduce to writing and sign agreements which are negotiated in good

---

5/ While the Charging Party alleges violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6), it has not argued an independent violation of subsection (1). Accordingly, that allegation will be treated solely as a derivative violation of both the subsection (a)(5) and (6) charges.

faith.[6/] The Commission has found violations of this subsection in two situations:

1. Apparent/Actual Authority: Consistent with agency/principal doctrines of contract law, the Commission has found violations of section 5.4(a)(6) where employers have failed to execute collective agreements reached by employer agents with actual or apparent authority to conclude agreements. Thus, when employer representatives were fully authorized, worked within general guidelines set forth by their principal, and reached an agreement containing no conditions precedent (e.g. as to the need for ratification by the principal), employers who refused to execute agreements have violated section 5.4(a)(6). Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975); East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976), mot. for recon. den., P.E.R.C. No. 77-26, 3 NJPER 16 (1977), appeal dismissed as moot, App. Div. Docket No. A-250-76, (December 2, 1977); Long Branch Bd. of Ed., P.E.R.C. No. 77-70, 3 NJPER 302 (1977), mot. for recon. den. P.E.R.C. No. 78-6, 3 NJPER 314 (1977), Camden Fire Dept., P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982), and South Amboy Bd. of Ed., P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981). See also Boro of Wood-Ridge, P.E.R.C. No. 81-105, 7 NJPER 149 (¶12066 1981) where the charging party failed to prove a similar allegation. The doctrine

---

6/ Employee organizations are similarly obligated pursuant to N.J.S.A. 34:13A-5.4(b)(4).

also applies to employee organizations; see Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 78-83, 4 NJPER 249, 250 (¶4126 1978), where the Commission found that the employee organization justifiably relied upon an express "qualifying statement" regarding the need to ratify the proposed agreement. Also, see Glen Rock Bd. of Ed., P.E.R.C. No. 82-11, 7 NJPER 454 (¶12201 1981).

2. Post-ratification: In cases where agents did not have authority to bind principals, the Commission has found violations of 5.4(b)(4)[7/] where both parties have ratified a memorandum of agreement reflecting a meeting of the minds on all substantive issues, followed by a refusal to execute the agreement by the employee organization. See Bergen County Prosecutor's Office, P.E.R.C. No. 83-90, 9 NJPER 75 (¶14040 1982) and Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985). By contrast, the Commission has dismissed 5.4(a)(6) allegations where notwithstanding ratifications by both parties, the charging party failed to demonstrate a meeting of the minds on all substantive

---

7/ While the Commission has yet to find a violation of 5.4(a)(6) in a post-ratification setting, it is currently considering a recommendation to that effect by Hearing Examiner Alan R. Howe. Matawan-Aberdeen Bd. of Ed., H.E. No. 86-46, 12 NJPER ____ (¶ 1986).

issues. See, e.g., Long Branch Bd. of Ed., P.E.R.C. No. 86-97, 12 NJPER 204 (¶17080 1986).[8/]

In the instant matter, the alleged violation is not in Category 2 above, since it is undisputed that the City Council has never ratified the Tentative Agreement of June 18, 1985 (Findings of Fact #8 and 10). Accordingly, to prove a violation of subsection (a)(6) occurred, the Charging Party would have to demonstrate that Business Administrator Tomkins had actual or apparent authority to bind the City to the Tentative Agreement of June 18, 1985. I now proceed to examine whether or not any facts material to the issue of Tomkin's authority in genuine dispute.

The Tentative Agreement signed by Tomkins and Local 1064 President Geyer is attached to the Charge as part of Exhibit A. There is no allegation that the Tentative Agreement has been altered in any way, or that it embodies any mistake or fraud. The document is labeled "Tentative Agreement," and contains two other clear indications of conditions precedent to implementation of the Tentative Agreement: "both parties have agreed to recommend

---

8/ Of course, numerous (a)(6) and (b)(4) allegations have been dismissed where neither apparent authority nor ratification occurred. In these cases, the Commission concluded that no agreement was ever reached, thus no (a)(6) or (b)(4) violation. See, e.g. Lower Twp. Bd. of Ed., P.E.R.C. No. 78-32, 4 NJPER 25 (¶4013, 1977); City of Camden, P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983); City of New Brunswick, P.E.R.C. No. 85-61, 11 NJPER 24 (¶16012 1984) Borough of Matawan, P.E.R.C. No. 86-87, 12 NJPER 135 (¶17052 1986); and Passaic Valley Water Comm., P.E.R.C. No, 85-4, 10 NJPER 47 (¶15219 1984).

for ratification the terms of a new agreement as set forth below without reservation..." and "[t]he City agrees to present this agreement to the City Council at its meeting of June 27, 1985 for approval. The Union agrees to present the agreement to its members for ratification as soon as practical." (Findings of Fact #5 and 6). On its face, the Tentative Agreement does not appear to be binding on either party. Indeed, the record indicates that Local 1064 submitted the Tentative Agreement to its membership for ratification and their membership ratified the Tentative Agreement (Finding of Fact #7).

However, Local 1064 asserts in its brief that "councilmanic approval of the collective negotiations contracts has always been a pro forma matter and the parties signing binding agreements over the past several years have always been the Business Administrators, pursuant to their administrative authority under State statutes." This assertion is disputed by the City (letter memorandum of May 23, 1986 at p. 7). If this factual dispute is material to the alleged violation of subsection (a)(6), then the Motion for Summary Judgment must fail.

Based on Commission case law, I find that the above factual dispute is not material; that is, assuming the truth of Local 1064's assertion as to previous contractual negotiations history with the City, I could not rely on similar evidence to find a violation of subsection (a)(6). In Black Horse Pike Regional Bd.

of Ed., supra, the Commission rejected a Hearing Examiner's reliance on prior negotiations history to discern the intentions and authorities of the parties in a current negotiations dispute. Instead, the Commission limited apparent authority/actual authority inquiries:

> In order for collective negotiations to be effective and productive, it is essential that each participant know with certainty the extent of the opposing negotiating team's authority. A party must be able to rely on the statements and general conduct of the other side's representatives during the negotiations process. Accordingly, the Commission, in applying the criteria established in the Bergenfield and East Brunswick decisions, will consider only whether, during the course of the particular negotiations in dispute, there was an absence of oral or written qualifying statements or general conduct by negotiating representatives from which binding authority on the part of the negotiating teams to conclude an agreement could reasonably be inferred. To consider the additional factor of past history of ratification would only cause confusion and disruption to the negotiating process. A party would be uncertain whether to rely on the practice of ratification in previous negotiations or the current representations of binding authority by the negotiating representatives. 4 NJPER at p. 250 (citations omitted; see citations at p. 7, supra).

While Black Horse Pike concerned a public employer seeking to rely on the conduct of an employee organization in previous contract negotiations, its principles surely apply to an employee organization seeking to rely on conduct by an employer in previous contract negotiations. In both settings, each party must be able to rely on current representations of the other party, and neither party can rely on past practices in previous contract negotiations.

Since the disputed fact concerning prior negotiations history[9/] is not material to a subsection (a)(6) allegation involving apparent authority, I proceed to consider whether any other facts in dispute are material. The parties dispute whether or not a negotiations session conducted on June 5, 1985 resulted in "a full agreement as to economic terms..." (Brief of Charging Party at p. 8). Assuming (without deciding) that an oral agreement was reached on that date, the parties voluntarily and fully memorialized that agreement into the Tentative Agreement put into writing on June 18th (Brief of Charging Party at p. 3). Thus, the disputed facts concerning what agreement, if any, was reached on June 5 are not material to the (a)(6) allegation and cannot preclude a ruling on the summary judgment motion. Rather, the written Tentative Agreement of June 18, as the voluntary bilateral integration of all of the parties' negotiations, must be the agreement which the Charging Party seeks to enforce in this proceeding.

---

9/ The Charging Party does not allege that Tomkins cloaked himself with authority to bind the City in the current negotiations, nor is any affidavit by Tomkins offered to that effect. Local 1064 President Geyer, by affidavit, asserted that negotiations were conducted "[w]ith the full authority of the City Administration...," but proffered no specific facts in support of that assertion. Moreover, since neither mistake nor fraud is alleged as to the Tentative Agreement, and in view of the clear, unambiguous and repeated conditions precedent included in the Tenative Agreement, such evidence, if offered, would be excluded by the parol evidence rule. See Mercer County Vocational Technical School Bd. of Ed., P.E.R.C. No. 85-90, 11 NJPER 142 (¶16063 1985) and Cherry Hill Bd. of Ed., P.E.R.C. No. 83-13, 8 NJPER 444 (¶13209 1982), aff'd App. Div. Docket No. A-26-82T2 (December 23, 1983).

There are no other disputed facts which bear on the alleged violation of subsection (a)(6).[10/] Having concluded that the facts which are in dispute are not material to the (a)(6) allegation, I now consider whether, as a matter of law, the City's motion should be granted along with the relief it requests (i.e. the dismissal of the (a)(6) allegation).

The Charging Party asserts that N.J.S.A. 40:69A-44 vested Business Administrator Tomkins with the authority to bind the City to a collective agreement with the Charging Party. The Respondent does not contest that it operates under N.J.S.A. 40:69A-1 et seq. (the Faulkner Act), but does not ascribe such authority under that Act to the Business Administrator (Affidavit of Martin Pachman, ¶11).[11/] The Charging Party does not cite any case law in support of its position, and the language of the statute does not speak specifically and in the imperative regarding the power of a Business

---

10/ Disputed facts concerning the City's failure to ratify the Tentative Agreement are reviewed infra in the context of the alleged violation of subsection (a)(5). These disputed facts are not relevant to the (a)(6) allegation; that is, if Tomkin's had authority to bind the City as the Charging Party alleges, then an (a)(6) violation would have occurred when the City failed to ratify the Tentative Agreement, irrespective of the other actions of its agents.

11/ This is a dispute of law, not of fact. The Charging Party does not allege that Tomkins represented that he had special authority under the Faulkner Act, nor does it offer any enactments by the City Council which confirm such authority pursuant to the Faulkner Act.

Administrator in municipal negotiations.[12/] In the absence of clear and unambiguous language in the statute cited, and reading the statute in para materia with our Act, I conclude as a matter of law that N.J.S.A. 40:69A-44 does not exclusively empower the Business Administrator of the City to negotiate binding agreements.

Thus, if Tomkins had actual or apparent authority to bind the City, he must have been cloaked with such authority by the City or by his own representations. The Charging Party has submitted no enactment of City Council or affidavit to support either proposition. Thus, in the absence of any indication of actual or apparent authority vested in Tomkins, and in the face of clear and unambiguous conditions precedent in the Tentative Agreement (requiring ratification by the City), I conclude that the City is entitled, as a matter of law, to the dismissal of the allegation that it failed to "reduce a negotiated agreement to writing and to sign such agreement." Accordingly, the City's Motion for Summary Judgment as to the alleged violation of subsection (a)(6) is granted, and that portion of the charge is dismissed.

---

12/ See State Supervisory Employees Assn., 78 N.J. 54, 81 (1978). Compare N.J.S.A. 40:69A-44 to N.J.S.A. 40A:14-118, which speaks specifically and in the imperative as to the powers of police chiefs in New Jersey. The Commission has found that that statute creates an irrebuttable presumption that police chiefs are managerial executives within the meaning of our Act. Egg Harbor Twp., P.E.R.C. No. 85-46, 10 NJPER 632 (¶15304 1984).

Alleged Violation of N.J.S.A. 34:13A-5.4(a)(5)

The Charging Party alleges that the City has refused to negotiate in good faith. While much of this charge is subsumed in the (a)(6) allegation reviewed above, a separate violation can attend the conduct of principals and/or their agents subsequent to a tentative agreement. For example, in Lower Township Bd. of Ed., supra, and Boro of Wood-Ridge, supra, the Commission found that employers violated subsection (a)(5) (but not subsection (a)(6)) when their agents failed to present to their governing bodies the actual tentative agreements reached with employee representatives. Recommendation of such agreements is also required of agents where, as here, the agents have agreed to recommend the tentative agreement to their principals. South Amboy Bd. of Ed., supra. Implicit in these decisions is the responsibility of a principal to consider and vote upon such tentative agreements in good faith; absent this obligation, negotiations through agents would serve no purpose, and would not "tend to promote permanent public...employer-employee peace and the health, welfare, comfort and safety of the people of the State." N.J.S.A. 34:13A-2.

I now consider whether any material facts are in dispute which bear on the negotiations responsibility reviewed above. The parties dispute whether or not an agreement was reached on June 5, 1985 with the participation and acquiescence of City representatives Tomkins, his Assistant Business Administrator, and Martin Pachman, labor counsel to the City. If the parties reached oral agreement on that date, and the agreement, as alleged, was

fully memorialized in the Tentative Agreement of June 18, 1985, then Pachman and the Assistant Business Administrator may have had affirmative obligations to recommend the agreement. On that issue, the comments of Louis Ippolito at the Council meeting of June 27 could also be material to Council's beliefs about Pachman's view of the proposed agreement. Thus, I conclude that material issues of fact exist regarding the conduct of City agents, and that the resolution of such issues could result in a subsection (a)(5) violation.

Because of the material factual disputes, I conclude that the subsection (a)(5) and derivative (a)(1) allegations are not ripe for summary judgment and should proceed to hearing. Even in the absence of these disputes, I would find that summary judgment is not appropriate on a legal issue of first impression: Did the City satisfy its negotiations obligation to consider and vote upon the Tentative Agreement when it removed from its agenda the proposed resolution adopting that agreement? That is, under the facts presented, is such action equivalent to the permissible conduct of voting "No," or does the City's negotiations obligation require an express vote, up or down, on the proposed agreement? Together with the material factual issues presented, this legal issue of first impression calls for the development of a full record and it not ripe for summary judgment. Essex County Educational Services, supra.

ORDER

The City of Jersey City's Motion for Summary Judgment and requested relief of dismissal is granted as to the alleged violation of N.J.S.A. 34:13A-5.4(a)(6). The City's Motion for Summary Judgment as to the alleged violation of N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1) is denied, and these remaining matters shall proceed to hearing.

Mark A. Rosenbaum
Hearing Examiner

Dated: June 10, 1986
Trenton, New Jersey