

L.D. NO. 97-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Respondent,

-and-

Docket No. CO-L-96-83

EDISON FIRE FIGHTERS' ASSOCIATION
LOCAL 1197, I.A.F.F.,

Charging Party.

Appearances:

For the Respondent
Karcher & Rainone, attorneys
(Louis N. Rainone, of counsel)

For the Charging Party
Kroll & Heineman, attorneys
(Raymond G. Heineman, of counsel)

DECISION

On September 26, 1995, the Edison Firefighters Association, Local 1197, I.A.F.F. filed an Unfair Practice Charge against the Township of Edison. Processing of this matter was thereafter held in abeyance while the parties attempted to resolve it. When those efforts were unsuccessful, the parties jointly requested that the dispute be resolved through the Commission's Litigation Alternative Program. The parties requested that the LAP decision be based upon stipulated facts, information presented at a November 25, 1996 conference and an affidavit submitted by the Township in December, 1996. They also agreed that this decision is binding and resolves

the above-captioned charge, which will be withdrawn upon this decision's issuance.

Local 1197 alleges that the Township implemented and then rescinded a monetary grievance arbitration award to Firefighter Scott Boland in retaliation for Boland's union membership and Local 1197's decision to appeal another arbitration award concerning extension of a promotional list. Local 1197 contends that the Township's actions violated subsection 5.4 (a) (1) of the New Jersey Employer-Employee Relations Act.^{1/} The parties have stipulated to the following facts.

On August 2, 1995, Arbitrator Mattye Gandel issued an award in favor of the Township concerning extension of the firefighters' promotional list. Local 1197 appealed the Gandel award on October 3, 1995. The Chancery Division vacated the Gandel award and the Township appealed to the Appellate Division. The Appellate Division reversed the Chancery Division. Local 1197 filed for certification with the Supreme Court, which was denied. Arbitrator Gandel's award therefore remained in favor of the Township.

On July 26, 1995, Arbitrator Herbert Haber issued an award in favor of Local 1197 concerning the payment of major illness pay

^{1/} Local 1197's charge also alleged that the Township's reduction of Boland's major illness pay violated subsection 5.4 (a) (3) of the Act. However, that allegation is no longer before me. When the conference for this matter was conducted in November 1996, the appeal process for the Boland matter had been concluded and the Township stipulated that it will abide by the order of the Appellate Division.

to firefighter Scott Boland. The Township appealed the Haber award to the Law Division on October 19, 1995. The Law Division affirmed the award. The Township appealed and the Appellate Division affirmed the Law Division. The Township did not appeal further. Arbitrator Haber's award was therefore affirmed in favor of Local 1197.

On August 3, 1995, the Township's Business Administrator issued an interoffice memorandum to Fire Chief Albert Lamkie stating that the Township would comply with Haber's award and that Boland would be compensated accordingly. Local 1197 President Robert Yackel received a copy of the memorandum. Boland's pay rate was adjusted pursuant to Haber's award on August 16, 1995. However, on August 30, 1995 Boland's paycheck did not reflect the additional pay he was entitled to pursuant to the Haber award.

During the summer of 1995, there were many outstanding grievances between the Township and Local 1197. Township attorney Louis Rainone and Local 1197 attorney Raymond Heineman were in frequent contact by telephone during that time period.

* * * * *

The parties disagree on the timing and substance of two telephone conversations.

Local 1197 attorney Heineman stated that he called Township attorney Rainone on August 18, 1995 to discuss several outstanding matters between the parties. Heineman recalled discussing the following matters: (1) filing briefs on an unfair practice hearing

concerning a wage reopener, (2) an arbitration award concerning a change in the method of overtime calculation including payment issues arising from that award and (3) funding a contract provision for buy out of employees' accumulated sick leave.

Heineman then told Rainone that Local 1197 would shortly be filing a motion to vacate the Gandel award. According to Heineman, Rainone said he was surprised, that he did not think grounds existed to appeal the Gandel award and that it was not a good idea because it would encourage the Township to challenge future arbitration awards in favor of Local 1197. Neither Haber's award nor Boland was discussed in that conversation and Heineman was not aware that Boland had been paid in accordance with Haber's award. Heineman's records reflected that the conversation was billed at 1/10 of an hour.

Rainone did not recollect a specific conversation with Heineman on August 18, 1995 and did not even recollect being in his office on that day. He agreed that he and Heineman discuss multiple matters on a regular basis, and characterizes their conversations as longer than the six minutes Heineman's billing records reflect for August 18, 1995. Rainone stated that most conversations with Heineman last an average of 25 minutes, because of the large number of outstanding matters between the parties that are discussed.

Rainone believed that he had a conversation with Heineman to review all pending matters between the parties in September 1995, that included the following general discussion. He stated that

Heineman told him that Local 1197 was "pretty sure" that it would appeal the Gandel award, but that it had not filed an appeal at that time. Rainone recalled telling Heineman that it was not a good idea to appeal the Gandel award because the ongoing circle of grievances between the parties had to be resolved, an all-inclusive resolution of outstanding matters was desirable, and appealing the Gandel award would impede this objective and would be at odds with Heineman's stated goal to resolve issues amicably. Rainone did not believe that he and Heineman discussed either the Haber award or Boland. Rainone stated that in the course of their conversations, he and Heineman acknowledge the adversarial relationship between their clients.

On August 30, 1995, Firefighter Boland called Local 1197 President Robert Yackel and informed him that his most recent paycheck did not contain the pay he was entitled to pursuant to the Haber award. Yackel called Heineman and informed him that Boland did not receive the additional payment in his August 30th check. Heineman did not know why Boland did not receive the additional payment, but told Yackel that Rainone was informed on August 18, 1995 that Local 1197 would appeal the Gandel award. Heineman was concerned that the Local's intention to appeal the Gandel award was related to Boland not receiving his payment because of the timing between his conversation with Rainone and Boland's next paycheck. Yackel told Heineman that he would call Fire Chief Albert Lamkie to discuss Boland's paycheck.

Yackel called Lamkie, informed him that Boland's pay did not reflect the additional payment pursuant to the Haber award and asked him if there had been a mistake made in the payroll department. Yackel states that Lamkie told him that the Mayor had rescinded Boland's additional pay because Local 1197 planned to appeal the Gandel award concerning extension of the promotional list. Yackel informed Heineman and instructed him to file this unfair practice charge.

Lamkie's version of this conversation differs from Yackel's. Lamkie told Yackel that Boland's pay changed because the Township's attorney advised him that an appeal of the Haber award would be filed. Lamkie contends that he did not tell Yackel that the Township's decision to appeal the Haber award was related to any other pending arbitration between the Township and Local 1197 or in retaliation for Local 1197's appeal of the Gandel award concerning the promotional list. Lamkie states that he has never spoken to the mayor regarding the Boland matter and that he has no personal knowledge of the Mayor's views on the matter that he could have conveyed to Yackel.

Local 1197 states that the Township's action was taken to punish the Local for deciding to appeal the Gandel award, as confirmed by Yackel's conversation with Lamkie. The Haber award issued in late July, the Township complied and paid Boland in mid-August and rescinded payment at the end of August. Local 1197 argues that the only intervening event in the time period between

the Township's compliance with the Haber award and its subsequent decision to rescind payment was its decision to appeal the Gandel award, which was communicated from Heineman to Rainone on August 18, 1995. After the Township became aware that Local 1197 intended to appeal the Gandel award, it took almost immediate action to reduce Boland's pay. Local 1197 characterizes the Haber award as a clear decision that was affirmed throughout all stages of the appellate process.

The Township states that its appeal of the Haber award was based solely on the merits of that decision and was not linked in any way to Local 1197's expressed intent to appeal the Gandel award. The Township contends that I cannot credit Yackel's version of his conversation with Chief Lamkie because Lamkie was not a part of the process to decide if the Haber award would be appealed. The Township also notes that this charge was filed by Local 1197 before it filed its appeal of the Haber award. The Township characterizes this charge as an attempt by the Local to prevent its appeal of the Haber award and contends that finding a violation under these circumstances would constitute a decision that the Township could not exercise its statutory right to appeal an arbitration award.

Boland was paid pursuant to the Haber award on August 16, 1995 and his pay was reduced on August 30, 1995. Local 1197 contends that Boland's pay was reduced as a result of an August 18, 1995 telephone conversation between Heineman and Rainone in which Heineman informed Rainone that the Local would appeal the Gandel

award. The Township contends that it reduced Boland's pay because it changed its mind and decided to appeal the Haber award. The parties disagree on the substance and timing of two conversations - one between attorneys Heineman and Rainone and the other between Local President Yackel and Chief Lamkie. They have requested that I make a credibility determination which will govern whether the Township violated the Act. However, the testimony of all four individuals presents two sets of conflicting events without any sufficient additional evidence to allow me to credit one version over the other.

Although Heineman and Rainone disagree over the timing of their discussion regarding Local 1197's intent to appeal the Gandel award and the possible impact of that decision, they both agree that neither Boland nor the Haber award was discussed specifically in relation to the potential appeal of the Gandel award. I find that the parties' agreement on this significant point is persuasive. Without an allegation that Boland or the Haber award were discussed in conjunction with the Local's intent to appeal the Gandel award, Local 1197 has not sustained its burden of proof that the events were linked or that the Local's intent to appeal motivated the Township's actions. Local 1197 relies upon Yackel's version of his conversation with Lamkie as evidence that Boland's pay was reduced because it intended to appeal the Gandel award. However, this version is contradicted by Lamkie's affidavit and unsupported by any additional evidence. I find Heineman and Rainone's agreement that

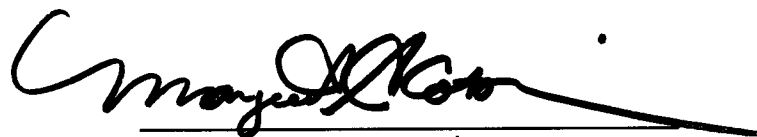
neither Boland nor the Haber award were discussed in conjunction with the appeal of the Gandel award to be compelling.

Local 1197 contends that Haber's award was clear, straight forward and that the Township therefore had no grounds to appeal it. I reject this contention. The Local's subjective evaluation of the award cannot prevent the Township from exercising its right to seek an appeal. More importantly, finding a violation of the Act under these circumstances may have a tendency to chill the right of any party to appeal an arbitrator's award, a right that is conferred by statute. N.J.S.A. 2A:24-7. I note that the Local also availed itself of the right to appeal the Gandel award.

I do find the sudden timing of Boland's pay reduction troubling, especially in light of the fact that the Township did not appeal the Haber award until October 19, 1995. Although N.J.S.A. 2A:24-7 provides that an appeal may be filed within three months after an award has been delivered to the parties, the Township could have taken several actions to avert the situation that led to the filing of this charge. The Township could have informed the Local in writing that it reduced Boland's pay because it intended to appeal Haber's award. More importantly, the Township could have timed the reduction of pay to the filing of the appeal, or adjusted Boland's pay after an appeal was actually filed. The gap in timing between the reduction in Boland's pay and the filing of the appeal is suspicious enough to make deciding this case close and difficult. However, the Township's inartful handling of the matter

is not sufficient to find a violation of the Act given the evidence before me.

Both parties exercised their right to the appeal process, the matters have concluded and Boland has been made whole. I also note that despite the adversarial relationship between their clients, the relationship between Heineman and Rainone has remained cordial and professional, enabling them to represent these clients effectively. Under the totality of these unique circumstances, I decline to find that an unfair practice has been committed by the Township.



Margaret A. Cotoia
LAP Umpire

DATED: April 1, 1997
Trenton, NJ