I.R. NO. 2021-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(OFFICE OF EMPLOYEE RELATIONS),
NEW JERSEY CITY UNIVERSITY,
THE COLLEGE OF NEW JERSEY,
WILLIAM PATERSON UNIVERSITY,
MONTCLAIR STATE UNIVERSITY,
RAMAPO COLLEGE OF NEW JERSEY, AND
KEAN UNIVERSITY,

Respondents,

-and- Docket No. CO-2021-025

IFPTE LOCAL 195,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge alleging that the State of NJ (OER) and several State colleges and universities unilaterally refused to pay a two per cent wage increase on July 1, 2020, repudiating the parties 2019-2023 collective negotiations agreement. The charge alleges that the State's and other Respondents' actions violate section 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act.

The Designee determined that the Charging Party/movant, IFPTE, Local 195, did not demonstrate by the requisite interim relief standard that the Respondents repudiated the parties' agreement. The Designee determined that a subsequent memorandum of agreement of the parties providing for wage deferrals, established legal uncertainty about whether the State unlawfully refused to pay the negotiated wage increase.

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Appearances:

For the Respondents,
Genova Burns, attorneys
(James J. McGovern III, of counsel)

For the Charging Party,
Oxfeld Cohen, P.C., attorneys
(Arnold Shep Cohen, of counsel)

INTERLOCUTORY DECISION

On August 5, 2020, IFPTE Local 195 (Local or IFPTE) filed an unfair practice charge against the State of New Jersey (Office of Employee Relations) (State) and State colleges and universities, individually, including New Jersey City University, The College of New Jersey, William Paterson University, Montclair State University, Ramapo College of New Jersey and Kean University, together with an application for interim relief, exhibits and a

certification. The charge alleges that on and after July 1, 2020, the Respondent(s) unilaterally deferred a negotiated 2% wage increase set forth in the parties' collective negotiations agreement (CNA) extending from July 1, 2019 through June 30, 2023. IFPTE contends that such deferral, ". . . is a repud1ation of the CNA by the State Colleges/Universities."

The charge alleges that following the issuance of the Governor's Executive Order No. 103 on May 20, 2020, the Civil Service Commission relaxed its rule regarding voluntary furloughs. Consequently, each State college or university signed a locally negotiated agreement with Local 195 about layoffs and furloughs. They separately agreed to voluntary furloughs of unit employees in lieu of layoffs; each college or university agreed to a number of furlough days as needed at that institution. The charge alleges that each "College" memorandum of agreement (College MOA) provides, among other conditions:

> Nothing in this MOA is intended to modify or waive IFPTE's right to negotiate over mandatory subjects or over the impact or terms and conditions of employment of non-negotiable managerial actions.

In July, 2020, after the signing of separate College MOAs, the State allegedly signed a memorandum of agreement with Local 195 (State MOA) addressing deferral of "across-the-board percentage wage increases," furloughs, a no-layoff agreement, leave time, union rights, enforcement of the State MOA and other

subjects. Employees subject to the State MOA served twelve furlough days (as distinguished from the varied number of days in the College MOAs). Section F of the State MOA allegedly provides:

> All provisions of the parties' 2019-2023 collective negotiations agreement not expressly modified by this MOA remain in full force and effect.

Section B (13) of the State MOA allegedly provides:

> The provisions of Paragraph B do not apply to specific employees at any of the nine State Colleges/Universities who are already subject to a locally negotiated furlough agreement with IFPTE/SEIU. Absent a locally negotiated agreement between IFPTE/SEIU and a State College or University, all the provisions of this MOA shall apply to IFPTE/SEIU negotiations unit employees employed at the State Colleges and Universities.

The charge alleges that the State, ". . . agreed to a two fold-agreement regarding the effect, if any, of the State MOA on the College MOAs." It alleges that first, Paragraph B, regarding furloughs, does not apply to the College MOAs and second, ". . . that only absent the existence of a locally negotiated MOA would the terms of the State MOA apply to the State Colleges/Universities." The charge next avers:

> The State MOA would fill-in the void. Significantly, a College MOA merely has to exist for it to stand alone. The plain language of the State MOA leads to this uncontroverted conclusion. They are stand-alone contracts that are totally binding, unless the State MOA supercedes any one of

them. There are no superceding provisions here, however.

The charge alleges that according to Paragraph B (13), ". . . the State MOA will only apply at a College that does not enter into a separate College MOA." It alleges that the 2019-2023 CNA, ". . . must be expressly modified by the State. Otherwise, non-modified provisions remain totally in effect. The July 1, 2020 raises were not expressly modified (Section F of the State MOA). Thus, they continue to stand." The charge alleges that since the College MOAs don't provide agreements to defer the two percent wage increase or any wage increase, the State Colleges lack the authority to defer, rendering the deferral a "repudiation of the CNA by the State Colleges/Universities." The charge alleges that Local 195 members are entitled to an across-the-board two percent wage increase under Article 15 (B)(1)(b) of the CNA between Local 195 and the State. The Respondents' conduct allegedly violates section 5.4a (1), (3) and (5)[1/] of the

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. (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. (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.

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The application seeks an order finding that the State has repudiated the CNA; that the decision to defer the two percent wage increase violates the Act and that employees should be awarded back pay, benefits and interest.

On August 10, 2020, an Order to Show Cause issued, setting forth dates for the submission of responses and for argument in a telephone conference call. On August 19, 2020, Counsel for the State requested an extension of time to file a response, without objection. The request was approved and an extension was given to Charging Party Counsel to file a reply. On September 1, 2020, the parties argued their respective cases.

The State contends that ". . . the matter is simply one of buyer's remorse;" that the Union negotiated a "global MOA that memorializes the parties' agreement to defer a series of wage increases over several years and initiate a variety of furlough programs. Contrary to the Union's attempt to claim otherwise, the MOA includes no exceptions as it relates to the mandatory wage deferrals for all Union members" (State brief at 1). The State also disputes that Local 195 has suffered irreparable harm because an adequate - specifically, monetary - remedy could be awarded at the conclusion of a plenary proceeding. It also avers that the relief sought will harm the public interest.

The following facts appear.

On or about September 27, 2019, the State and Local 195 signed a collective negotiations agreement extending from July 1, 2019 through June 30, 2023 and covering employees in the state-wide "operations, maintenance and services and crafts unit," and "the inspection and security unit," as more specifically identified in the "Recognition" provision (Article 1, Local 195 Exhibit A).

Article 15 ("Salary Special Payment and Fringe Benefit Program"), Section B.1.b of the CNA provides in a pertinent part:

> Effective the first full pay period after July 1, 2020 and July 1, 2021, the base salaries of all Union negotiations unit members shall be first increased by 2%. Full time exployees on the active payroll who earn less than $41, 400 in base salary as of the day before that date shall receive a cash bonus not included in base salary. . .

Section B.1.d.2. provides:

> For ten (10) month employees, the foregoing increases that are effective in the first full pay periods of October 2019, July 2020, July 2021 and April 2022 for 12 month employees, shall be applied to the base salary of ten (10) month employees effective the first full pay periods of October 2019, September 2021, September 2022 and June 2023.

Article 7 ("Grievance Procedure") provides a multi-step grievance procedure ending in binding arbitration for grievances, ". . . involv[ing] an alleged violation of the Contract as described in the definition of a grievance in A.1 above . . ."

On various dates in June, 2020, a number of State Colleges and Universities and IFPTE signed separate memoranda of agreement for voluntary unit employee furloughs, pursuant to the State Civil Service Commission's relaxation of rules pertaining to voluntary furloughs (enabled by the Governor's Executive Order No. 103). Among the institutional signators are New Jersey City University, Ramapo College, The College of New Jersey, William Paterson University, Montclair State University and Kean University. The separate agreements with Local 195 provide various furlough periods, leaving intact leave time and other contractual emoluments. (Local 195, Exhibit B; State Exhibits B-G). Several College MOA's include this sentence: "Nothing in this Memorandum of Agreement is intended to modify or waive IFPTE's right to negotiate over mandatory subjects or over the impact on terms and conditions of employment of non-negotiable managerial actions" (Local 195, Exhibit B; State Exhibits B, C, D, E).

Sometime in July, 2020, after the College MOA's were signed, the State and IFPTE/SEIU signed a memorandum of agreement [State MOA], initially noting, ". . . the impact of the pandemic on the State's economy [that] has caused an unforseen and unprecedented reduction in actual State revenues for FY 2020 and in projected revenues for FY 2021." (State MOA). The parties further recognized,

> [A]n agreement to reduce State salary costs during this economic crisis, while preserving the integrity of the collective negotiations agreement, is preferable to widespread layoffs and the disruption to pubic services caused by such layoffs.
>
> [State Exhibit I; Local 195 Exhibit B]

The parties negotiated eight capitalized lettered "sections," or "paragraphs" with the first, providing in a pertinent part:

> A. The Deferral of Across-the-Board Wage Increase
>
> 1. The 2% across-the-board increase to annual base salaries in Article 15(b) (1) (b) that 12-month employees are due to receive the first full pay period after July 1, 2020 and the 2% across-the-board increase in Article 15(b) (1) (d) (2) 10-month employees are due to receive the first full pay period after September 1, 2020 will be deferred and paid the first full period after December 1, 2021. The bonus payment described in Article 15(b) (1) (e) shall also be deferred to July 1, 2020.

Section A also provides:

> 4. Notwithstanding the parties' agreement to defer the payment of across-the-board increases, as permitted by law, IFPTE/SEIU unit members will not suffer any discrimination in their pension benefits as a result of the deferral of such payments.
>
> [State MOA, p. 2]

Section B, "Furlough Program," prescribes "an aggregate of 10 furlough days" between June 29 and July 25, 2020 for certain unit(s) employees, leaving health benefits, accrued paid leave, pension benefits and other emoluments unchanged. Paragraph B (13) provides:

> The provisions of Paragraph B do not apply to specific employees at any of the nine State Colleges/Universities who are already subject to a locally negotiated furlough agreement with IFPTE/SEIU. Absent a locally negotiated agreement between IFPTE/SEIU and a State College or University, all the provisions of this MOA shall apply to IFPTE/SEIU negotiations unit employees employed at State Colleges and Universities (emphasis added).
>
> [State MOA, p. 4-5]

Section C1, "No Layoff Agreement" provides:

> In consideration for the substantial personnel savings achieved through the raise deferral and furlough programs set forth in Sections A and B of the MOA, the State agrees that there shall be no layoffs of bargaining unit employees through December 31, 2021, unless a layoff plan was approved by any of the nine State Colleges/Universities prior to the execution of this Agreement.
>
> [State MOA, p. 5]

Section F, "Enforcement of the MOA," provides at no. 1:

> This MOA is incorporated into and modifies the parties' 2019-2023 collective negotiations agreement. The terms of this MOA and any dispute arising under this MOA, are subject to the grievance/arbitration provisions of [that] agreement.
>
> [State MOA, p.6]

Section F2 provides that if IFPTE/SEIU seeks to arbitrate a dispute arising from Sections A through C, (except B(4) - concerning furlough dates) the State waives, " . . . any right it may have to claim that the dispute is not legally arbitrable or negotiable under scope of negotiations law."

Section [G], "Existing Collective Negotiations Agreement," provides: "All provisions of the parties' 2019-2023 collective negotiations agreement not expressly modified by this MOA remain[s] in full force and effect."

On an unspecified date, IFPTE/SEIU membership ratified the State MOA. During argument, Counsel for Charging Party acknowledged that a grievance contesting the July 1, 2020 2% wage deferral has been filed.

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 isn't 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. DeGioia, 90 N.J. 126, 132-134 (1992); 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).

In State of New Jersey (Department of Human Services), PERC No. 84-148, 10 NJPER 41 (¶15191 1984), the Commission held that unfair practice charge allegations stating a mere beach of contract claim do not warrant the exercise of the Commission's unfair practice jurisdiction. The Commission, following National Labor Relations Board precedent, refused to issue a complaint when all that involved was a good faith dispute over the interpretation of an ambiguous contract clause. See In re United Telephone Co. of the West, 112 NLRB No. 103, 36 LRRM 1097 (1955).

But the Commission also held that a breach of contract may rise to a refusal to negotiate in good faith. A specific claim that an employer has repudiated an established term and condition of employment may violate section 5.4a (5) of the Act. Human Services. A repudiation claim may be supported by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past practice in administering the disputed provision. Human Services; Union Tp., I.R. No. 2011-18, 36 NJPER 439 (¶171 2010).

I find that IFPTE hasn't demonstrated by the requisite standard that the State and other Respondents have repudiated the CNA that now incorporates the State MOA. IFPTE's essential

argument, as written in its charge and reiterated in its brief, is that the second sentence of Section B (13) of the State MOA renders each College MOA as a "stand alone" agreement, i.e., not subject to any of the State MOA terms, including its wage deferral terms.

The record doesn't clearly establish IFPTE's parsing or interpretation of the second sentence from that two-sentence provision. Nor has IFPTE acknowledged the incorporation of the six-page State MOA into the parties' 2019-2023 CNA. The first sentence of Section B (13) appears to expressly limit its application to the "Furlough Program," creating, at a minimum, uncertainty about whether Section or Paragraph A of the State MOA, "Deferral of Across-the Board Wage Increase," applies to IFPTE unit employees at State colleges or universities. A similar uncertainty about the application of Paragraph A to those employees is posed through Paragraph F, which incorporates the State MOA terms into the parties' 2019-2023 CNA. Also, the second sentence of Paragraph B (13), upon which IFPTE relies, requires one to interpret or infer that Paragraph A (wage deferral provision) doesn't apply to the subject unit(s) employees. For all of these reasons, IFPTE has not shown that the second sentence of Paragraph B (13) is ". . . so clear that an inference of bad faith arises from a refusal to honor it."

ORDER

The application for interim relief is denied. The charge shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: September 3, 2020
Trenton, New Jersey