

I.R. No. 2009-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF TEANECK,

Respondent,

-and-

Docket No. CO-2008-402

LOCAL 108, PED, RWDSU, UFCW,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an unfair practice charge alleging that a public employer refused to pay annual merit increases to employees who are the subject of a pending representation petition (dkt. no. RO-2007-060). The designee determined that the parties filings revealed disputed material facts pertaining to the legal issue of whether the pay raises were "automatic" or "discretionary." Camden Housing Auth., P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987).

The designee found that the charging party had not demonstrated a substantial likelihood of success on the factual and legal merits of its case.

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Appearances:

For the Respondent, DeCotiis, Fitzpatrick Cole &
Wisler, LLP, attorneys (Louis N. Rainone, of counsel)

For the Charging Party, Oxfeld Cohen, PC, attorneys
(Nancy I. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On June 27, 2008, Local 108, PED, RWDSU, UFCW filed an unfair practice charge against Teaneck Township. The charge alleges that as of June 1, the Township refused to pay wage increases to unrepresented supervisory employees who are the subject of a pending representation petition (dkt. no. RO-2007-060). The charge more specifically alleges that in January, February or March of each year, Helene Fall, the Township Manager, informs unrepresented employees ". . . of raises for that calendar year retroactive to January 1." The charge alleges that in June, a petitioning employee inquired of Fall why he had not been informed of his salary for 2008 and she replied that

". . . she was waiting for the representation matter to be concluded prior to implementing 2008 adjustments." The Township's conduct allegedly violates 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The charge was accompanied by an application for interim relief, together with a certification seeking an Order directing the Township to "provide raises for the 2008 calendar year retroactive to January 2008 to all individuals in positions sought to be represented by Local 108."

On July 1, 2008, I issued an Order to Show Cause, specifying a return date of July 30 for argument at the Commission's Trenton offices or in a conference call by the parties' mutual consent. I also directed the RWDSU to file a brief and the Township to file an answering brief together with opposing certifications. The parties' papers were filed, respectively, on July 14 and 25, 2008. On July 29, the parties mutually consented to a conference call in lieu of in-person argument. On July 30, the parties argued their cases. The following facts appear.

^{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 this act."

1. On or about each November, self-evaluation forms are distributed to unrepresented employees. Supervisors and other employees who may or may not have rights under the Act submit the completed forms to Fall. Fall has authority to set salaries of unrepresented employees, subject to municipal ordinance and annual budget.

2. The Township has submitted "merit [pay] increase" records from about 16 unrepresented employees (subject to the pending petition) for the previous seven years. These "change of status" forms report each employee's name, department, title, pay change in dollars, Fall's signature (connoting approval), the dates of approval, and the dates to which the increases were retroactive.

For example, construction code official Steven Gluck was approved to receive a \$4100 merit pay increase on March 13, 2007, retroactive to January 1, 2007. On or about like dates in 2006, he received a \$5100 merit increase. Comparable increases on similar dates were reported for 2005 and 2004. Gluck was awarded a \$5400 annual merit increase in March 2003, together with a notice of a "change in [his] anniversary date." On July 1, 2003, Gluck received a \$5000 increase as part of the "ongoing salary adjustment program."

Recreation Department Superintendent Glenna Crockett was awarded a \$4200 merit pay increase on March 14, 2007, retroactive

to January 1. On January 2006, she was awarded a \$4300 merit pay increase, retroactive to January 1 of that year. In February 2005, she received a \$4700 merit pay increase. In March 2004, she was awarded a merit pay increase of almost \$13,000. In January 2003, she received a merit increase of \$3160. In 2002, Crockett was awarded an annual merit increase of about \$3000 on July 16, retroactive to January 1 of that year.

Assistant Department of Public Works Superintendent Francis Wilson received a merit increase on July 10, 2007, retroactive to July 1.

Municipal Court Administrator Jill Graham received a merit pay increase in March 2007, retroactive to January 1. She received an "annual and anniversary date change" increase on May 1, 2006, retroactive to January 1.

Tax Assessor James Tighe received a merit increase of \$6700 on March 19, 2007, retroactive to January 1. In February 2006, he received a \$5000 merit increase to an annual salary of \$97,000. In June 2006, he received an \$2000 annual wage increase as "merit for extra work on tax reevaluation."

3. Fall has certified that the salary increments to each employee ". . . differ based upon their performance levels" and that raises can be implemented at "any point of the year."

4. On February 5, 2007, Local 108 filed a representation petition seeking a card check certification of a unit of all

Township supervisory employees in the welfare, finance, public works, recreation, motor vehicle, system administration, tax collection and health departments (RO-2007-060). The matter is pending a final administrative decision by the Director.

5. On June 3, 2008, Tax Assessor Tighe requested from Manager Fall "information regarding the status of his 2008 salary." Fall replied in part on the same date: ". . . Since some managerial/executive and professional employees are seeking union representation, I am also waiting for this matter to be resolved prior to implementing 2008 adjustments."

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 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).

Local 108 argues that during the pendency of a valid representation petition, a public employer may not change any terms and conditions of employment. Such changes tend to interfere with or coerce employees' choice of representative or choice of having any or no representative. Morris Cty., I.R. No. 85-12, 11 NJPER 272 (¶16096 1985); Fairview Free Pub. Lib., P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998) (employer violated 5.4a(1) by unlawfully eliminating paid holidays for part-time employees and modifying bereavement leave conditions after union filed representation petition and before representation election). Local 108 contends that the Township's refusal to pay annual wage increases to unrepresented employees who are the subject of the pending representation petition solely because it is awaiting "resolution" of that case has violated 5.4a(1) of the Act.

Employees are protected by the Act in filing a representation petition and voting in a free and fair election. Both rights are jeopardized by cutting compensation or eliminating economic benefits during the period between a representation petition and a representation election. Fairview at 25 NJPER 21. See NLRB v. Hudson Transit Lines, 429 F.2d 1223, 74 LRRM 2797, 2802 (3rd Cir. 1970). In a card check certification case, however, employees essentially "cast" their votes before the petition is filed. Employer conduct such as

cutting compensation or eliminating benefits after such representation petitions are filed could discourage employees from filing another petition later.

In Camden Housing Auth., P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987), the employer interfered with employee rights by eliminating an increment system after a majority of employees voted in favor of representation at a Commission election but before those results were certified. The case turned on whether the increments withheld were "automatic" or "discretionary", the former constituting an element of the status quo whose continuation could not be disrupted unilaterally. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). If payments were "discretionary", their grant or denial was a matter that would be resolved in negotiations. Id. at 78 N.J. 48.

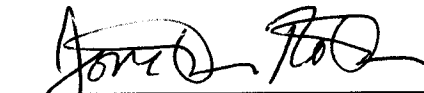
Local 108 has not demonstrated a substantial likelihood of proving that the wage increases were "automatic." Although the Township conceded that all of the petitioned-for employees received merit wage increases, it contests the notion that the amounts or timing of the payments were automatic. The Township's records support Fall's certification that the amounts and percentage increases paid in any year or series of years varied among the petitioned-for employees. The records also indicate that merit increases were sometimes approved in July and were not uniformly retroactive to January 1 of the same calendar year.

The records are consistent with Fall's certification that the merit pay increases were "discretionary." Accordingly, the parties' filings reveal disputed material facts.

I find that the Commission's interim relief standards have not been met and deny the application. The charge shall be forwarded to the Director of Unfair Practices for processing.

ORDER

The application for interim relief is denied.



Jonathan Roth
Commission Designee

DATED: July 31, 2008
Trenton, New Jersey