

I.R. NO. 2009-20

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-2009-229

CWA LOCAL 1081,

Charging Party.

SYNOPSIS

Upon an application for interim relief brought by CWA Local 1081, a Commission Designee denies the requested interim relief based upon charges alleging that Essex County violated subsections 5.4(a) (1), (5) and (6) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when the County did not submit an alleged finalized memorandum of agreement (MOA) to the Board of Chosen Freeholders for a vote on whether or not to approve the agreement.

CWA contends that it reached an agreement with the County on a successor contract in late November 2008 when the parties met to finalize the terms of a memorandum of agreement. Subsequently, CWA alleges that County representatives sent a "final MOA" to CWA on November 25, 2008; thereafter, CWA asserts that the parties began taking the steps necessary to obtain ratification of the MOA. CWA argues that the fact that the MOA was unsigned is not dispositive of the issue of whether or not there was a "binding" or final MOA. CWA argues that other events - - such as the indication that the MOA would be placed on the Board of Freeholder's meeting agenda for a vote on approval - - demonstrated that the parties had reached a final agreement on the MOA which required the County to present it to the Board for an approval vote. CWA contends that when parties reach a tentative agreement on the terms of a successor contract, the parties are required to seek the approval of their principals concerning the agreement. Charging Party thus maintains that it has established the substantial likelihood of success on the merits of the case that is required for obtaining interim relief.

The County argues that the Charging Party has not met the substantial likelihood of success requirement for interim relief.

The Respondent contends that the November 25, 2008 MOA was not a finalized document, as it was unsigned. Respondent contends that the parties were still in the process of negotiations when, on November 26, 2008, the County received budgetary information which indicated that the County could not fund the compensation proposal in the most recent draft MOA - - the unsigned MOA dated November 25, 2008. Thereupon, the County so advised CWA and submitted a new compensation proposal to CWA.

The Commission Designee determined that absent some clear indicia that the November 25, 2008 draft MOA was intended as "the final MOA" - - such as the parties having signed the MOA - - he could not conclude that the County was required to submit the November 25 draft MOA to the Board of Freeholders for a vote on approval. Accordingly, the Commission Designee concluded that Charging Party did not meet the requisite substantial likelihood of success standard for interim relief; consequently, the interim relief application was denied.

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Appearances:

For the Respondent, Genova, Burns and Vernioia,
attorneys (Joseph M. Hannon, of counsel)

For the Charging Party, Weissman and Mintz, LLC (David
A. Tango, of counsel)

INTERLOCUTORY DECISION

On December 26, 2008, CWA Local 1081 (Charging Party or CWA) filed an unfair practice charge and on January 13, 2009, CWA filed an amended charge with the Public Employment Relations Commission, alleging that Essex County (Respondent or County) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). Charging Party alleges that the County violated subsections 5.4a(1), (5) and (6) of the Act^{1/} when 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. (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
(continued...)

County did not submit an alleged finalized memorandum of agreement (MOA) to the Board of Chosen Freeholders for a vote on whether or not to approve the agreement. On January 15, 2009, CWA filed an application for interim relief, asking that the County be required to show cause why an order should not be issued directing the County to place the memorandum of agreement on the Board of Freeholders' meeting agenda so that the Board may vote on whether or not to approve said memorandum of agreement.

On January 16, 2009, I executed an Order to Show Cause with an initial return date of February 6, 2009. Subsequently, the parties requested an adjournment of the return date; the hearing on the Order to Show Cause was rescheduled to February 20, 2009. On that date, I conducted a hearing, having been delegated the authority to act upon such requests for interim relief on behalf of the full Commission. Both parties argued orally at the hearing and submitted briefs and certifications in support of their positions.

* * * *

Charging Party contends that the County and CWA reached an agreement on a successor contract on approximately November 12, 2008, when CWA representatives met with County representatives to

1/ (...continued)
 refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

finalize the terms of a memorandum of agreement. Subsequent to that meeting, there were many discussions between the parties' representatives - - including, inter alia, CWA Local 1081 President Weiner and Assistant County Counsel Capetola - - concerning further changes to the terms of the MOA. The parties also exchanged several MOA drafts and the Charging Party asserts that on November 25, 2008, Capetola emailed Weiner "a final MOA." CWA contends that, based upon receipt of this "final MOA" and a statement by County representatives that they would arrange to have the memorandum of agreement placed on the Board of Freeholders' December 4, 2008 meeting agenda, CWA scheduled a membership meeting for December 2, 2008 to conduct a ratification vote. The Charging Party further asserts that on November 26, 2008, Capetola and Essex County Chief of Staff Alagia called Weiner to inform him that the County had just learned of budgetary issues which precluded the County's funding the 3.25% compensation increases in each of the last two years of the period covered by the MOA. CWA asserts that the County then removed the MOA from the Board's December 4, 2008 meeting agenda.

CWA argues that the County agreed to the MOA as demonstrated by its taking the steps necessary to obtain ratification of the agreement - - specifically, by indicating that the MOA would be placed on the December 4 meeting agenda.

CWA argues that the fact that the MOA was unsigned is not dispositive of the issue of whether or not there was a "binding" MOA. CWA argues that other events - - the indication that the MOA would be placed on the December 4 meeting agenda - - demonstrated that the parties had reached a final agreement on the MOA which required the County to present it to the Board for an approval vote.

CWA contends that when parties reach a tentative agreement on the terms of a successor contract, the parties are required to seek the approval of their principals concerning that agreement. [Citing Borough of Woodridge, P.E.R.C. No. 81-105, 7 NJPER 149 (¶12066 1981)]. Accordingly, Charging Party argues that by these events, it has established that the Respondent has refused to negotiate in good faith and has created a chilling effect on rights guaranteed by the Act in violation of subsections 5.4a(1) and (5).

Charging Party further contends that it has thus established a case for obtaining interim relief - - (a) a substantial likelihood of success on the merits of the case; (b) that irreparable harm will befall Charging Party if such relief is not granted -- in that the County's actions have created a chilling effect on negotiations; (c) that the relative hardship on CWA caused by a denial of interim relief outweighs any hardship to the County should interim relief be granted; and (d) that the

public interest would be served by the issuance of the requested order - - in that, allowing the Freeholders' vote would enhance the prompt settlement of labor disputes, which is in the public interest.

The County contends that no final agreement was reached by the parties in these negotiations. The County notes that no MOA was executed by the parties. The County states that up until the day it notified CWA that it had to change its financial offer due to changed financial circumstances, the parties were exchanging revisions to a memorandum of agreement which had not yet been finalized. The County argues that the decision not to present an unsigned, not finalized memorandum of agreement to the Board of Freeholders for a vote on approval/non-approval does not violate subsections 5.4a(1) and (5) of the Act. Accordingly, the County contends that Charging Party has not established a substantial likelihood of success on the merits of the case and therefore, no interim relief should issue.

The County states that the parties began negotiations in October 2007. The County asserts that beginning in approximately October 2008, the parties began exchanging draft memoranda of agreement as they drew closer to reaching an agreement and were attempting to finalize an agreement. The County notes that on November 18, 2008, Capetola emailed a revised MOA to Weiner for

his review. Thereafter, the parties had several telephone conversations regarding more revisions to the MOA.

The County asserts that on November 25, 2008, Capetola sent Weiner another revised MOA for review. On November 26, 2008, the County states that it was advised of budgetary issues that made finalizing the last two years of compensation increases (at 3.25% per year) not possible. Thereupon, the County asserts that Capetola and Alagia contacted Weiner and informed him that because of the budgetary issues, the County would not be able to finalize the proposed November 25, 2008 MOA; they then submitted a revised salary offer.

The County argues that because neither party signed the November 25, 2008 MOA, the County had no obligation to present it to the Board for a vote. The County asserts that the cases cited by CWA regarding the obligation to submit tentative agreements to principals for approval involved disputes over signed memoranda of agreement and are otherwise so dissimilar to these circumstances as to give no support to Charging Party's argument that the County was obligated here to submit the unsigned MOA to the Board of Freeholders for a vote on whether or not to approve the agreement.

The County also notes that the circumstances which led it to not being able to finalize the November 25, 2008 MOA were recent budgetary developments - - that on November 26, 2008, the County

received budgetary information which indicated that it would be unable to fund the last two years' increases as set forth in the November 25, 2008 draft MOA. Based upon this information, the County asserts that it had to - - and did - - revise its salary proposal. The County argues that its change of position in these circumstances is not indicative of bad faith negotiations.

Finally, the County contends that Charging Party has not demonstrated that absent interim relief, it would suffer irreparable harm. The County notes that the any harm that may result from these circumstances is of a monetary nature and could be adequately addressed through a monetary remedy in a final Commission decision.

The County argues there has been no demonstration of a chilling effect on negotiations - - it has not changed any existing terms and conditions of employment nor has it refused to negotiate in good faith with CWA.

The County notes that there has been no showing that not granting the requested relief would result in greater harm to CWA than granting the relief would harm the County. The County asserts that forcing it to put an unsigned, not finalized MOA before the Board of Freeholders for an approval/non-approval vote would put the County in the anomolous position of arguing with itself and against itself, and could possibly subject the County to other liabilities.

Finally, the County argues that issuing the requested relief would hurt the public interest because it creates a potential circumstance wherein County taxpayers could be required to fund an agreement that various of the County's designated representatives had advised against.

* * * *

Additionally, the following facts appear: CWA Local 1081 (CWA) is the statutory majority representative of a collective negotiations unit comprised of certain non-supervisory employees employed by the Essex County Division of Welfare. The County and CWA are parties to a collective negotiations agreement covering the above-referenced unit for the period from January 1, 2005 through December 31, 2007. The parties began negotiations for a successor contract in October 2007. David Weiner is the CWA Local 1081 President and was the spokesperson for the CWA's contract negotiations team. Assistant County Counsel Delores Capetola was a member of the County's negotiations team and was an active participant in the negotiations for a successor agreement.

During these negotiations, the parties engaged in numerous negotiations sessions, telephone discussions and exchanges of correspondence (including MOA drafts). In late October 2008, negotiations had reached a point where the parties began to

exchange draft memoranda of agreement as they attempted to finalize the terms of a successor contract.

On November 18, 2008, Capetola sent an e-mail to Weiner which included a revised draft MOA. CWA asserted that County representatives then indicated that arrangements would be made to place the MOA on the Board of Freeholders' December 4, 2008 meeting agenda. Further, CWA scheduled a membership meeting for December 2, 2008 in order to conduct a ratification vote on the MOA. Subsequently, the parties had several telephone conversations in which they agreed upon more revisions to the MOA. On November 25, 2008, Capetola e-mailed Weiner another draft MOA for his review - - which the CWA describes as "a final memorandum of agreement" and the County describes as "another revised memorandum of agreement."

On November 26, 2008, the County learned of budgetary issues which it contends made the funding of 3.25% raises in each of the last two years of the successor contract unfeasible. Thus, on November 26, Capetola and Alagia contacted Weiner and informed him that due to recently evolved budgetary issues, the County would not be able to finalize the proposed November 25 MOA. The County then submitted to CWA a revised compensation proposal. CWA asserts that the County thereafter removed the MOA from the Board of Freeholders' December 4, 2008 meeting agenda. Further, CWA notes that it did not conduct a membership vote on December

2, 2008, to ratify the November 25, 2008 draft MOA; however, a membership vote was conducted at a later time and CWA membership ratified the MOA.

The November 25, 2008 draft MOA consists of eight typewritten pages. It addresses many terms and conditions of employment, including salary increases for each of the three years covered by the agreement - - 3% in 2008; 3.25% in 2009 and 3.25% in 2010. The draft MOA states in two places that it is subject to ratification by the union membership, the Essex County Executive and the Essex County Board of Chosen Freeholders. The draft MOA provides that except as modified by its provisions, the terms of the parties' prior collective negotiations agreement shall remain in effect. Further, paragraph 11 of the draft MOA states: "This Agreement cannot be modified except by a writing signed by the parties." Finally, the November 25, 2008 draft MOA also contains a signature page, which is unsigned.

On December 26, 2008, CWA filed the instant unfair practice charge. A memorandum of agreement was never signed by the parties and was never placed before the Board of Freeholders for a vote concerning approval/non-approval.

ANALYSIS

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing such applications. The moving

party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations of the charge in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying the relief must be considered.^{2/}

In this interim relief matter, the key question for resolution is whether, under all of the circumstances set forth in the record, Respondent was obligated to submit the November 25, 2008 draft MOA to the Board of Freeholders for a vote on whether or not to approve the draft MOA.

To succeed on its interim relief application, Charging Party must establish, inter alia, a substantial likelihood of success that it would prevail on the merits of this case in a plenary proceeding before the Commission - - here, that it can establish that the November 25, 2008 draft MOA was the finalized package of terms and conditions of employment that the parties had negotiated and were required to submit to their principals for a vote to approve or not approve.

2/ Crowe v DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 79-9, 1 NJPER 59 (1975); 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); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

Charging Party contends that it has met the substantial likelihood of success requirement for interim relief. Charging Party asserts that the course of the parties' contract negotiations and the actions taken by the parties to arrange for ratification/approval votes on the MOA demonstrate that the November 25, 2008 MOA was "the final MOA" which was required to be submitted to the principals for their consideration and vote on ratification/approval.

Respondent argues that Charging Party has not met the substantial likelihood of success requirement for interim relief. Respondent notes that the record indicates that the parties had negotiated in good faith for fourteen months; in October 2008, their negotiations reached a point where they began drafting MOAs and were discussing and agreeing upon various changes to the draft MOAs. Respondent contends that the parties were in that process when, on November 26, 2008, the County received budgetary information which indicated that the County could not fund the compensation proposal contained in the most recent draft MOA - - the unsigned MOA dated November 25, 2008. The Respondent County notes that it immediately contacted the CWA, indicated that based on budgetary information which it had received on that day (November 25), it could not fund the compensation proposal in the November 25, 2008 draft MOA and was then submitting a new compensation proposal to CWA.

The County argues that the November 25 draft MOA was not a finalized document, as it was unsigned. Respondent maintains that on November 25 and 26, 2008, the parties' negotiations were still in process and that therefore, it was not obligated to submit the November 25 draft MOA to the Board of Freeholders for a vote to approve or not approve. Accordingly, Respondent contends that the requisite likelihood of success test has not been met and therefore, no interim relief should issue.

Based upon the legal and factual record in this case, I am not persuaded that the requisite heavy burden for the issuance of interim relief has been met.

The record here indicates that commencing in approximately October 2007, the parties negotiated for just over one year in an effort to reach a successor agreement to the one which expired on December 31, 2007. By October 2008, negotiations reached a point where the parties were able to craft a working MOA. As negotiations between the parties continued, more changes were proposed, discussed, and agreed upon - - it appears that the initial draft MOA evolved into a number of newer drafts. By November 18, 2008, negotiations had progressed far enough so that the parties each began making arrangements for submitting a draft MOA to their respective principals - - for a ratification vote by CWA membership on December 2, 2008 and for an approval vote by the Board of Freeholders on December 4, 2008. On November 25,

2008, the County forwarded another draft MOA to the CWA for review.

However, on November 26, 2008, the County received budgetary information which indicated that it could not fund the compensation increases in the November 25, 2008 draft MOA. County representatives then contacted CWA representatives to advise them that because the budgetary information which they had received indicated the County could not fund the salary increases in the November 25, 2008 draft MOA, the County was presenting a revised salary proposal to CWA.

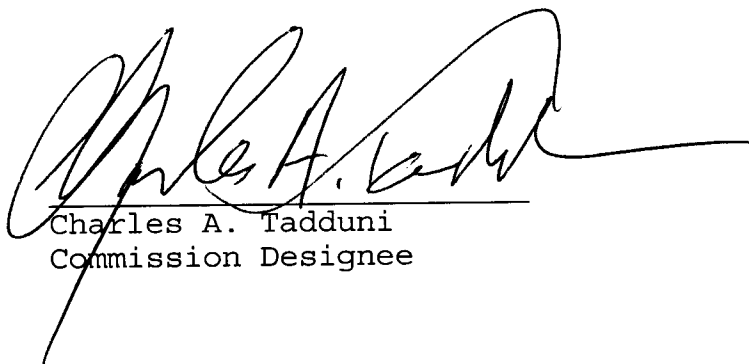
The record here indicates that the November 25, 2008 draft MOA was not a finalized document by any apparent agreement of the parties. The document was unsigned and the record does not otherwise sufficiently demonstrate that it was "the final MOA." Rather, the record indicates that in late November 2008, while it appears that the parties were moving toward a successor agreement, by November 26, 2008, the parties still had not finalized an MOA. Absent some clear indicia - - such as the parties having signed the MOA - - that the November 25 draft MOA was intended as "the final MOA," I cannot conclude that the County was required to submit the November 25 draft MOA to the Board of Freeholders for a vote on approval.

* * * *

Based upon the above record, I conclude that Charging Party has not established the requisite substantial likelihood of success on the merits of the case. Consequently, I decline to grant the application for interim relief. This matter will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's rules governing unfair practice charges.

ORDER

The application for interim relief is denied.



Charles A. Tadduni
Commission Designee

DATED: March 5, 2009
Trenton, New Jersey