I.R. NO. 2011-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EGG HARBOR,

Respondent,

-and- Docket No. CO-2011-006

CWA LOCAL 1032,

Charging Party.

Appearances:

For the Respondent, Peter J. Miller, Tp. Administrator

For the Charging Party, Weissman and Mintz, attorneys (Steven Weissman, of counsel)

INTERLOCUTORY DECISION

On July 6, 2010, Communications Workers of America, Local 1032, AFL-CIO (CWA) filed an unfair practice charge against the Township of Egg Harbor (Township), together with an application for interim relief, certification of CWA Treasurer/Staff Representative Paul A. Pologruto, supporting documents and a brief. The charge alleges that the Township repudiated the salary provisions of the parties' collective negotiation agreement as modified by two memoranda of agreement ("MOA I" and "MOA II"). Specifically, it is alleged that the Township has not paid negotiated salary increases for 2010 after CWA agreed twice to reopen negotiations and modify the parties' collective agreement to address financial difficulties experienced by the

Township. In "MOA I", CWA agreed to defer payment of the January 1, 2010 salary increases until April 1, 2010 when the increases would be paid retroactively. Subsequently, in "MOA II", CWA agreed to accept ten furlough days and other concessions in reliance on the Township's promise to implement the previously agreed-upon salary increases due April 1. To date, the salary increases have not been paid. CWA alleges that the Township's conduct violates 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The application seeks an Order restraining the Township from repudiating the collective negotiations agreement as modified by "MOA I" and "MOA II" and implementing the salary increases retroactive to January 1, 2010.

On July 9, 2010, I signed an Order to Show Cause, specifying July 27 as the return date for argument by telephone conference. I also directed the Township to file an answering brief, together with opposing certification(s) and proof of service upon CWA. At the request of Respondent and with the consent of Charging Party, the return date for argument was rescheduled to August 3.

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 refusing to process grievances presented by the majority representative."

On July 26, 2010, the Township filed a letter response in opposition to the application together with the affidavit of Township Manager Peter J. Miller and exhibits. On August 3, I conducted a telephone conference during which the parties argued their cases. It was agreed to conduct a follow-up telephone conference on August 24 to address the issue of irreparable harm and a recent Commission decision in County of Ocean, P.E.R.C. 2011-6, __ NJPER __ (¶_____ 2010). The date of the conference was scheduled at the request of the Township to accommodate Mr. Miller's vacation schedule. I invited the parties to submit any additional written argument on the issue of irreparable harm after reviewing County of Ocean and/or argue orally on August 24. On August 16, CWA submitted the certification of CWA Local 1032 President Patrick Kavanagh. The Township did not submit any additional writing, but objects to my consideration of the Kavanagh certification. I have accepted the certification over the Township's objection, having given the Township ample notice and opportunity to be heard on the issue of irreparable harm. The August 24 telephone conference was conducted as scheduled.

The following material facts appear.

CWA is the certified majority representative of all higher level supervisors employed by the Township. There are currently eight individuals in the unit. With the exception of the

Director of Recreation, all other unit positions are statutorily required under the Township's form of government.

The Township and CWA are parties to a collective negotiations agreement effective from January 1, 2007 through December 31, 2010. Article XIII, entitled "Salaries", at paragraph D provides in pertinent part that "[f]or the 2010 calender year, all bargaining unit employees shall receive a salary increase in accordance with Schedule A. Salary increases for 2010 are due on January 1 of that year." Schedule A is attached to the collective agreement and provides for specific salary increases by category and job title for each year of the collective agreement as well as a breakdown by individual unit member of the salary for each year of the agreement.

In November and/or December 2009, in response to budget problems experienced by the Township, the parties began discussions to modify the collective agreement, specifically regarding the implementation of the 2010 salary increase. On or about January 10, 2010, the parties executed "MOA I" modifying the terms of their collective agreement. "MOA I" states in pertinent part:

> The Communications Workers of America, AFL-CIO ("the Union") and the Township of Egg Harbor ("the Township") agree to delay the implementation of the salary increase due on January 1, 2010 as per Article XIII, Section D of the contract until April 1, 2010. This salary increase shall then be retroactive to January 1, 2010. Additionally, the employees

> shall be made whole for all benefits (e.g. pension credits) affected due to the delay of the salary increase.

Shortly after "MOA I" was executed, Township Administrator Peter Miller contacted CWA Staff Representative Paul Pologruto to discuss further concessions, including the salary increases for 2010, in light of the Township's continuing budgetary problems. On January 26, 2010, Miller and the entire CWA unit met and reached agreement on additional concessions including 10 furlough days and an agreement to refrain from selling back unused sick leave. Although reaching verbal accord, no written agreement was executed memorializing the terms of the second modification until the end of March.

Meanwhile, on March 17, 2010, the Township was notified by the State that it would not receive approximately $750,000 in funds that were previously earmarked for the Township. The Township began another round of negotiations with its unions seeking further concessions. All of the Township's unions with the exception of CWA had experienced significant layoffs in the previous months as a result of the budget crisis. Layoffs were not effected in the CWA unit because the positions, with the exception of the Director of Recreation, are statutorily-required positions.

The Township requested that CWA further postpone the 2010 salary increases from April 1 to June 1. CWA refused to defer

the salary increases. On or about March 29, 2010, CWA and the Township executed "MOA II" codifying the modifications to the collective agreement previously agreed to on January 26, 2010.

"MOA II" states in pertinent part that:

> A. The Union agrees to forego the benefits listed in Article XV, Sections K and L.
>
> B. The employees covered by the current agreement will be required to schedule and use ten (10) unpaid furlough days no later than December 31, 2010. Furlough hours may be scheduled in one-half (½) hour increments.
>
> C. If the Township elects to layoff or reduce the hours of any employee covered by this contract in the year 2010 then all employees covered by this contract will be repaid and made whole for all salary lost as a result of the implementation of Section C [sic] above.
>
> D. Employees shall not lose any seniority due to this agreement and all furlough time taken during the year 2010 shall be counted as time worked for the calculation of pension credits and earned leaves of absence such as, but not limited to vacation leave, sick leave, personal days, etc.

Article XV, sections K and L, pertain to payment for annual unused sick leave or from sick leave balance.

Discussions between Pologruto, CWA Local President Donald Stauffer, and Township Administrator Miller continued in April and May as to additional ways to effectuate savings. Miller proposed that CWA forego the 2010 salary increase altogether and agree to contract fire inspections to the State resulting in the

layoff of a unit member (Stauffer). He also proposed reduction in the workweek and/or additional furlough days.

CWA refused the Township's demands for further concessions and continued to insist that the Township implement the salary increases under the collective agreement as modified by "MOA I". However, CWA suggested that the Township transfer construction, electrical and plumbing inspections in-house to generate a significant savings. Miller agreed to look into this option.

Eventually, Pologruto certifies, on or about May 7, 2010, Miller assured him that no further concessions would be demanded of the CWA unit, that the salary increases would be paid, and that the Township would bring inspection positions in-house as proposed by CWA. Miller refutes these assertions and affirms that on June 9, he advised Pologruto that the Township was not introducing a salary ordinance at the Township meeting that night because no funds were available to pay the salary increase.

Pologruto certifies that on June 10 he spoke to Miller who told him that although the 2010 salary increases were fully funded in the current budget, the Township Council was refusing to pass the ordinance necessary to implement the salary increase and would not unless forced to do so. Miller allegedly told Pologruto that he shared this information with Stauffer. Stauffer did not provide a certification. Miller refutes Pologruto's description of this conversation.

While the issues of whether (1) the salary increases were fully funded and would be paid, (2) no further concessions were necessary and (3) the Township agreed to the in-house inspection proposal remain in dispute, I find there issues are not material facts to the repudiation allegation, since no agreements have been reached on any further concessions, the collective agreement as modified by "MOA I" requires payment of the 2010 salary increases by April 1,2010 and, to date, the 2010 salary increases have not been paid.

On or about June 21, CWA filed a grievance regarding the failure to implement the 2010 salary increase. The grievance was advanced to Step 2. At a meeting with the Township on July 1 to discuss the grievance, the Township suggested that the parties enter into another agreement that would extend the parties' collective agreement so that the 2010 salary increase could be partially recouped over the next two years. The Township, however, was not able to guarantee that the increase would be paid even with agreement on a contract extension. Pologruto states that the Township's failure to abide by its commitments under the collective negotiations agreement as modified by "MOA I" has chilled negotiations regarding any further concessions.

ANALYSIS

To obtain interim 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. DeGioia, 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).

CWA alleges that the Township repudiated the parties' collective agreement as modified by "MOA I" when it refused to implement the 2010 salary increases. The Township contends that the matter is more appropriately before an arbitrator as it implicates a violation of the parties collective agreement and that the Commission, therefore, has no jurisdiction.

The Commission usually does not assert unfair practice jurisdiction over contract disputes under the Human Services doctrine, leaving such disputes for arbitrators to decide. New Jersey State Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). However, an exception to that policy is where a claim of repudiation is asserted, namely that the

employer has acted in bad faith by repudiating a contract clause that is so clear on its face that an inference of bad faith arises from a refusal to honor it.

Article XIII, section D, of the parties' collective agreement requires payment of a salary increase on January 1, 2010. At the request of the Township because of budgetary constraints, the parties agreed to modify Article XIII to postpone payment of the 2010 salary increases to April 1 with payment retroactive to January 1, 2010 and executed "MOA I" on January 10, 2010 codifying this modification. The language entitling CWA unit members to the 2010 salary increase is clear. Although the parties continued to discuss and agreed to further concessions unrelated to the 2010 salary increase, the terms of "MOA I" regarding payment of the 2010 salary increases remained unchanged. The failure of the Township, therefore, to implement the 2010 salary increases after April 1, absent agreement to further modifications in this regard, appears to constitute a mid-contract repudiation of both the parties collective negotiations agreement and "MOA I" modifying that agreement. CWA has satisfied the first prong of the standard, because there is a substantially likelihood that it will prevail in a final Commission decision.

The second prong of the interim relief standard is establishing that Charging Party is irreparably harmed by

Respondent's actions. Irreparable harm is by definition harm that cannot be remedied at the conclusion of a final Commission determination. Ordinarily, where the final remedy is primarily money, the Commission is reluctant to grant interim relief. Township of Maplewood, I.R. No. 2009-26, 35 NJPER 184 (¶70 2009); Union Cty., I.R. No. 99-15, 25 NJPER 192 (¶30088 1999).

Here, there are two types of harm at play - e.g. harm to the individuals who have not received their 2010 salary increases and harm to the negotiations process. As to the individual harm, CWA has not demonstrated that the harm to its members cannot be rectified at the conclusion of a final Commission determination, because the Commission has the authority to issue a remedial order at the conclusion of the case which would make negotiations unit members whole for any monetary losses suffered by the failure of the Township to implement the 2010 salary increases. The cases cited by CWA to support irreparable harm in this regard are distinguishable because in each instance a particular hardship to the individual(s) was identified that could not be remedied in a final Commission decision.

For instance, in Union Cty., I.R. 92-4, 17 NJPER 448, 452 (¶22214 1991), a Commission Designee found irreparable harm where in order to close a budget gap, the County imposed consecutive five-day unpaid furloughs amounting to an entire week's pay. Although the employees could have been compensated in a final

Commission decision by reimbursing the five-days salary, the Designee determined that the loss of pay in that instance constituting a full weeks salary could constitute immediate economic harm. The PBA President submitted a certification supporting that employees were worried about meeting food, shelter, and health payments. No such demonstration of economic hardship is present in the matter before me where unit employees are among the highest paid Township employees, and while not receiving their increase in pay, continue to receive current wages.

Likewise, in Bridgeton Bd. of Ed., I.R. 2006-8, 31 NJPER 315 (¶123 2005), the Commission Designee considered whether a change in health carriers constituted irreparable harm. There, the employees were going to be paying increased up-front costs for health services, arguably costs that could have been recouped in a final Commission decision. Nevertheless, the Designee determined that because employees may be required to pay up-front costs of treatments, they might forego treatment and, therefore, the harm was not merely monetary. That is not the case in the matter before me.

Finally, Atlantic City Bd. of Ed., I.R. No. 2005-15, 31 NJPER 206 (¶81 2005), cited by CWA, is also distinguishable. There, irreparable harm was found where the City altered the bi-weekly payroll distribution to 10-month employees by delaying

the issuance of final paychecks until the last day of school. Unlike here, five employees submitted affidavits detailing financial hardships they would suffer individually if paychecks were withheld. No individual financial hardship is present in this matter.

These cases are consistent with Commission cases holding that money alone without additional factors demonstrating particular hardship does not support irreparable harm. See also, Sussex County Bd. of Freeholders & Sussex County Sheriff, I.R. No. 2003-13, 29 NJPER 274 (¶81 2003).

Nevertheless, although there is no harm to individual CWA unit members that cannot be remedied by a monetary award in a final Commission determination, the irreparable harm here is not to the individuals but to the negotiations process. In Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978), the Commission determined that unilateral changes in working conditions during successor contract negotiations, namely the failure to pay increments, is the antitheses of the Legislature's goal that terms and conditions of employment be established through bi-lateral negotiations. The failure to pay increments under those circumstances affects the balance required for good faith negotiations.

Although the repudiation in this instance occurred not in successor negotiations but mid-contract, CWA correctly argues

that under the particular circumstances of this case, where the union agreed to reopen negotiations mid-contract twice at the Township's request to help the Township close its budget gap and agreed twice to significant concessions including wage deferral and furloughs, the Township's actions in repudiating not only the collective agreement but the agreed-upon modification ("MOA I") has upset the balance required for good faith negotiations and has chilled the negotiations process at a time when cooperation between labor and management is imperative to address unique economic circumstances.

The Township has no contractual defense, but argues that its actions are justified because when it entered in the parties' collective agreement in 2007, it could not have anticipated the economic consequences of this deep recession. That is true. However, those same fiscal constraints, that have forced governments at all levels to approach unions for concessions by opening up negotiations of current agreements in order to avoid more draconian choices such as layoffs, require the type of labor-management cooperation that caused CWA twice to reopen and modify its collective agreement. Allowing the Township to renege on its contractual commitments under these circumstances will have a devastating impact on the negotiations process and cripple the parties' ability to negotiate further concessions. Money damages will not satisfy the damage to the process.

Recently, in County of Ocean, P.E.R.C. No. 2011-6, __ NJPER __, (¶ 2010), the Commission granted reconsideration of a Commission Designee's decision granting applications for interim relief requiring the County to pay eligible employees salary increments required by the parties' recently expired collective negotiations agreements. The County argued that in these recessionary times, the increments might be greater than negotiated increases in successor collective agreements and that, in any event, there is no irreparable harm because money damages could remedy the charges in final Commission decisions.

While recognizing the County's argument that the increments might exceed any negotiated increases, the Commission rejected unilateral employer action that strips collective negotiations agreements of their undisputed meaning and effect. The Commission suggested that the parties could arrange for recoupment, red-circling or any other method to ensure that employees receive only what is negotiated on their behalf. Or, the Commission opined, ". . . as has happened with other employers and unions all over our State, these employers may sit with their unions and seek changes in obligations under existing or recently expired collective negotiations agreements in order to adjust to changed economic circumstances."

In his certification, CWA President Kavanagh explains that CWA locals throughout the State have entered into MOAs modifying

collective negotiations agreements in response to these difficult financial times. Even the state-wide CWA unit entered into such a modification in 2009 with the State agreeing to ten unpaid furlough days and deferral of 3.5% salary increases due on July 1, 2009 to January 1, 2011 in exchange for an agreement not to layoff CWA members. Kavanagh points out that mid-contract modifications in this economic climate have become increasingly commonplace. Modifications of collective agreements, however, require ratification by the membership. Employees are often reluctant to reopen collective negotiations agreements which reduce compensation or defer raises, reasoning that reopening an agreement compromises what has already been negotiated. It is imperative, therefore, that unions be able to ensure employees that modifications are enforceable, in order to get their cooperation in supporting such endeavors.

Kavanagh summarizes that "[i]n these times it is difficult for me to imagine anything more inherently destructive to the collective negotiations relationship than the repudiation of a contract, particularly after a union has made two rounds of concessions - first deferring raises and then agreeing to furloughs . . . . The harm that flows from such a repudiation is absolutely irreparable." I agree. Allowing the Township to repudiate the collective agreement as modified by "MOA I" by not

paying the 2010 salary increases would irreparably harm the negotiations process.

I also find that the public interest would be furthered by requiring the Township to fulfill its contractual commitment under these circumstances. The ability of the Township to negotiate further concessions with CWA or any of its other unions is damaged by the repudiation of modifications it has already negotiated.

Finally, in considering the relative hardship to the parties, I find that enforcing the collective agreement as modified by "MOA I", thus, preserving the Township's ability to approach its unions for further concessions outweighs the cost to the Township. The Township argues that the 2010 increases would cost approximately $25,000, money that is not in the current budget. It might, therefore, have to layoff two employees. Although this result is not desirable, it does not justify the employer's unilateral action. County of Ocean. Once the Township has fulfilled its current contractual obligations to CWA, it can seek further concessions and/or seek to recapture savings in negotiations for a successor agreement.

ORDER

The application for interim relief is granted. The Township is ordered to immediately pay the 2010 salary increases due on April 1, 2010 retroactive to January 1, 2010 under the parties'

collective negotiations agreement as modified by "MOA I" with interest pursuant to R. 4:42-11 retroactive to April 1, 2010 when the 2010 salary increases were to be paid.

Wendy L. Young
Commission Designee

DATED: August 24, 2010
Trenton, NJ