

I.R. NO. 2013-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and-

Docket No. CO-2012-291

PBA LOCAL 109A,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Charging Party alleging that the Respondent violated a 2004-2009 Memorandum of Understanding ("MOU") when it promoted several unit members to the ranks of sergeant and lieutenant and did not increase their annual salaries as set forth in the MOU.

The Respondent filed certifications alleging that its officials had met with the Charging Party's representatives and a verbal agreement had been reached whereby the Respondent would make promotions with a waiver of the promotional salary increase for a year. Thereafter the Respondent presented the Charging Party with a written sidebar agreement which the Charging Party refused to execute. Promotions were later made based on New Jersey Civil Service requirements and those members did not receive the salary increase.

The Charging Party filed a certification from its President that denied that any such verbal agreement had ever been discussed or agreed to.

The Designee found that the material facts concerned whether or not there was a verbal agreement between the Respondent and the Charging Party's representatives regarding the waiver of the promotional salary increase for a year and determined that there was a clear dispute over material facts based on the certifications filed in support of and in opposition to the application for interim relief.

The Designee found that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.

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Appearances:

For the Respondent,
Scarinci Hollenbeck, attorneys
(Sean Dias, of counsel)

For the Charging Party,
Klatsky, Sciarrabone and DeFillippo, attorneys
(David DeFillippo, of counsel)

INTERLOCUTORY DECISION

On April 19, 2012, the Hudson County Corrections PBA Local 109A ("PBA") filed an unfair practice charge against the County of Hudson and the Hudson County Department of Corrections (both collectively referred to as "County"), which was accompanied by an application for interim relief, a certification, and a brief. The charge alleges that the County violated a 2004-2009 Memorandum of Understanding ("MOU") when it promoted several unit members to the ranks of sergeant and lieutenant and did not increase their annual salaries as set forth in the MOU. As set forth in the charge, the County's conduct allegedly violates

5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The application seeks an Order requiring the County to maintain the status quo and to compensate all officers holding the rank of sergeant and lieutenant at the contractually negotiated rate of \$94,648 and \$99,380, respectively, until the salaries for the years 2010, 2011, 2012 and beyond have been collectively negotiated. Additionally, the PBA requests an Order compelling the County to tender any and all appropriate back pay which may be due and owing to its members as well as any other relief that the Commission deems equitable and just.

The County asserts that it met with PBA officials and there was a verbal agreement whereby the County would make promotions

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

with a waiver of the promotional salary increase for a year. The PBA denies that there was any such verbal agreement.

On April 23, 2012, an Order to Show Cause was issued specifying May 24 as the return date for oral argument via telephone conference call.

The following pertinent facts appear:

The County has filed the certifications of Oscar Aviles, Director of the County of Hudson Department of Corrections, and Kirk Eady, Deputy Director of the County of Hudson Department of Corrections. Both Aviles and Eady assert that they attended a meeting on November 30, 2011, with PBA President, Lt. Omar Ortiz and Sgt. Thomas Caraccio, who is also a union official for the PBA. At the meeting, Aviles and Eady assert that Ortiz and Caraccio specifically discussed the issue of promotions with a waiver of the promotional salary increase for a year and that Ortiz stated that there were two previous union meetings with his membership and the consensus of the membership was that they wanted the promotions with the one year salary waiver.^{2/}

2/ In Aviles' certification, he stated that prior to the promotions of PBA members to a higher rank, the County consulted with and arrived at agreements with other County law enforcement unions concerning the waiver of a contractual salary increase for a specific period of time. Those law enforcement units were PBA Local 127 (Sheriff's Officers) and PBA Local 232A (Prosecutor's Superiors). Those two units agreed to the salary waiver, and the union representatives subsequently executed their respective sidebar agreement.

The PBA has filed the certification of Ortiz and he states in pertinent part: "Although the County and the PBA had been in active negotiations to resolve the terms of a successor agreement, the PBA's negotiating representatives, Lt. Omar Ortiz and Sgt. Thomas Caraccio, never discussed - let alone agreed to - any salary waiver with respect to promotions." Ortiz further states:

Upon learning of the County's attempt to require the promotional candidates waive their respective rights to receive the salaries of the rank of Sergeant or Lieutenant, respectively, counsel for the PBA e-mailed Patrick Sheil, Assistant County Counsel, on October 27, 2011 and reiterated the PBA's objection to any such purported "salary waiver."^{3/4/}

In undisputed that after November 30, a sidebar agreement was prepared by the County with respect to the promotions and salary waivers and the PBA representatives refused to execute the document.

Ortiz asserts that no promotions of PBA members were effected at that time as a result of the PBA's refusal to agree to any salary waiver for newly promoted officers.

3/ An email to that effect was provided by the PBA as an exhibit.

4/ Ortiz does not indicate in his certification if he ever attended the November 30, 2011 meeting referenced by Aviles and Eady.

Aviles asserts that, "[M]embers of the PBA sent an unsolicited signed document dated February 6, 2012 to me confirming what the PBA representatives advised me during the November 30, 2011 meeting." The document appears to contain nine signatures; during oral argument, Counsel for the PBA did not dispute the authenticity of the document but stated that neither Ortiz nor any other PBA representatives had signed the below document:

On November 16, 2011 PBA 109A had 2 separate meetings. The meetings were to discuss contract negotiations and promotions with a pay lag. In the first meeting it was suggested that we go around the room and see how the membership felt about the candidates taking the promotions with the pay lag. Since it was done in the first meeting we also did the same in the second meeting. About 80% of the members in the 2 meetings combined said they would have no problem with the candidates excepting the promotions with the pay lag, and that included our President and Vice President. The President went so far as to say he would contact the Director via e-mail, set up a meeting and not leave that meeting until they had a deal. The only problem amongst the members was they didn't want the agreement to set precedent, and pay lags become the norm when promotions take place. We also made some suggestions to the President that we thought could be negotiated in his meeting with the Director.

In March 2012, seven PBA members were promoted to the rank of sergeant and three were promoted to lieutenant. Aviles asserts that the promotions were necessary because the New Jersey

Civil Service Commission ordered that the Certification be returned.

It is undisputed that those members that were promoted did not receive the pay increases as set forth in the MOU.^{5/}

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. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975);

^{5/} At least one PBA member who was promoted was required to sign a New Jersey Department of Personnel form where County official(s) wrote in long hand, "Agreement to waive Promotional Salary increase for 1 year." As set forth in the copy of the form provided by the PBA, the one newly promoted lieutenant crossed out that language stating, "The u/s does not agree with the struck statement above."

Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The PBA argues, while denying that there was a verbal agreement regarding the waiver of the promotional salary increase, that pursuant to N.J.S.A. 34:13A-5.3, a verbal agreement must be reduced to writing and signed by the parties.^{6/}

The County, however, contending that there was a verbal agreement, replies that pursuant to N.J.S.A. 34:13A-5.4b(4), it is an unfair practice for the PBA to refuse to reduce a verbal agreement to writing and sign the agreement.^{7/}

^{6/} N.J.S.A. 34:13A-5.3 provides in pertinent part:

"When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative."

^{7/} N.J.S.A. 34:13A-5.4b(4) provides:

"b. Employee organizations, their representatives or agents
(continued...)"

The material facts in this matter concern whether or not there was a verbal agreement between the County and the PBA representatives regarding the waiver of the promotional salary increase for a year. As set forth above, there is without question a dispute over material facts based on the certifications filed in support of and in opposition to the application for interim relief; the material facts are diametrically opposed. See N. Hudson Reg. Fire and Rescue, P.E.R.C. No. 2008-61, 34 NJPER 113 (¶48 2008). This matter requires a plenary hearing because of the clear dispute over material facts.

As a result, I find that the PBA has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.^{8/} The application for interim relief must be denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

7/ (...continued)
are prohibited from: (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

8/ As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's Rules.



David N. Gambert
Commission Designee

DATED: July 13, 2012
Trenton, New Jersey