H.E. NO. 2017-2

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OLD BRIDGE,
Respondent,

-and- Docket No. CO-2015-170

FRATERNAL ORDER OF POLICE, LODGE 22
(SUPERIOR OFFICERS ASSOCIATION),
Charging Party.

SYNOPSIS

A Hearing Examiner grants a Motion for Summary Judgment filed by an employer seeking dismissal of a Complaint based on an unfair practice charge alleging that it falsely represented in collective negotiations that all unit employees would enjoy decreased health care premiums if the majority representative agreed to another health plan. The representation was made in advance of an Interest Arbitrator's "Recommendations for Settlement" which was accepted by both parties and resulted in a mutually signed successor collective negotiations agreement. The Hearing Examiner determined that the employer had timely disclosed all pertinent costs of competing health plans to both the Arbitrator and the majority representative. The signed collective negotiations agreement included an Article (XI) that provided for "transition" to the new plan and did not provide that all unit employees would enjoy decreased health insurance premiums. The Hearing Examiner finds that the employer did not violate section 5.4a(5) and (1) of the Act.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Cleary Giacobbe Alfieri Jacobs, LLC
(Adam S. Abramson-Schneider, of counsel)

For the Charging Party
Mets Schiro McGovern & Paris, LLP
(Leonard C. Schiro, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION FOR SUMMARY JUDGMENT

On January 20, 2015, Fraternal Order of Police, Lodge 22-SOA (FOP) filed an unfair practice charge against the Township of Old Bridge (Township). The charge alleges that in negotiations leading to a "recently reached" successor collective negotiations agreement, the Township assured the FOP that its proposed change in health plans [despite changes adverse to employees in "out-of-network" providers and co-pay amounts] would yield "substantial [financial] savings" to unit employees. The charge alleges that

on or about December 30, 2014, unit employee Sergeant Ronald Nitto's health plan premium increased by $149.40 per month over the premium cost in his previous plan. The charge alleges that the Township reneged on its promise during negotiations, violating section 5.4a(1), (3), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The FOP seeks an Order requiring the Township to reimburse Nitto for the increased cost and to provide him a lower insurance premium.

On April 25, 2016, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the section 5.4a(1) and (5) allegations in the charge and assigned the case to me to conduct a Hearing. On May 3, 2016, the Township filed an Answer and Affirmative Defenses to the charge, denying that it violated the Act and asserting that FOP failed to establish a prima facie case.

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. (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. (7) Violating any of the rules and regulations established by the commission."

On June 23, 2016, before the scheduled hearing date, the Township filed a Motion for Summary Judgment and supporting documents with the Commission, seeking dismissal of the Complaint. On July 21, 2016, the FOP filed its brief and supporting documents opposing the Motion with the Commission. Later that day, the Motion was referred to me for a decision. N.J.A.C. 19:14-4.8(a).

Summary judgment will be granted:

> if it appears from the pleadings, together with the briefs, affidavits and other documents filed, there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(e)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary hearing. Baer v. Sorbello,

177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Applying these standards and relying upon the parties' submissions, I make the following:

FINDINGS OF FACT

1. In 2014, the parties entered collective negotiations for a successor agreement to its predecessor that expired on December 31, 2013.

2. During negotiations in 2014, the Township proposed changing the health insurance plan from a PPO-point of service plan to an EPO-exclusive provider organization plan.

On behalf of the FOP, Nitto certifies: ". . . the Township represented that all FOP 22 members would enjoy a decrease in health care contribution rates." On behalf of the Township, Business Administrator Christopher Marion certifies: "The Township never promised the Union as part of its memorandum of agreement or collective negotiations agreement that all employees would see a reduction in health contributions." Marion also certifies that a switch to an EPO plan would result in a reduction in cost to the Township while maintaining a level of benefits comparable to the then-current plan.

3. The parties were unable to reach an agreement for a successor contract. The Township petitioned the Commission to initiate compulsory interest arbitration (IA-2014-047). During that process, the parties agreed that the Interest Arbitrator should issue a recommended settlement.

4. On July 15, 2014, FOP representative Bob Gries requested Marion to provide the FOP with information about the health plans. On July 24, 2014, he renewed that request in an email to Marion:

> On July 15, 2014 I sent you an email requesting the actual cost for the Township for the following health care plan versions
> PPO
> POS
> EPO (All proposed versions)
>
> I requested all cost for the following coverages (Single, Husband & Wife, Family)
>
> This is information that is needed for negotiations, especially for our upcoming mediation on 7/29/14, as of this date we have yet to receive the information.
>
> It is my expectation that the Township will provide the information in a reasonable amount of time in order for both sides to move forward in an amicable fashion.

5. On July 25, 2014, the Township emailed Gries this reply:

> Per your request for PPO, POS, and EPO the following is the breakdown for Township cost for 2014: Please note that this is based on current employee numbers:

PPO - $1,660,796.91
POS - $ 269,304.84
EPO - $ 566,213.76

Breakdown of Monthly Rates per Contract Type:

Horizon PPO
$1617.10-Family
$1617.10-Couple
$1288.91-Parent/Child
$522.48-Single

Horizon POS
$1665.79-Family
$1024.62-Couple
$1051.64-Parent/Child
$545.07-Single

Horizon EPO
$1271.04-Family
$1271.04-Couple
$1013.08-Parent/Child
$410.67-Single

On October 14, 2014, the Township attorney provided the Interest Arbitrator with information purportedly showing the overall cost savings for switching from the PPO plan to the EPO plan.

6. On October 19, 2015, the Interest Arbitrator issued "Recommendations for Settlement." Noting that his recommendations should be considered in their totality rather than selectively, he recommended, among other things, the Township's proposal to change from the PPO plan to the EPO plan. He wrote that the Township's exhibits demonstrated the savings achievable in switching from the PPO to the EPO. He found in a pertinent part:

> For active employees, the costs for the three (3) Lieutenants would be reduced from $60,794 to $53,491 a savings of $7,303 or 12% inclusive of the POS and prescription plans. The costs for the eighteen (18) Sergeants would be reduced from $488,920 to $389,932, a savings of $98,998 or 20.2% inclusive of the POS and prescription plans. Pursuant to Article 25(A), modifications to Article 11 - Health and Disability apply to retirees commencing July 1, 1995 and thereafter. The costs for the twenty-six (26) participants would be reduced from $699,198 to $557,664, a savings of $141,533 or 20.2% inclusive of the POS and prescription plans.

The Interest Arbitrator explained:

> The recommendation to permit the Township to transition to the EPO does not rest solely on the cost reductions that the Township has established. In addition to having positive impact on the recommendations concerning compensation, the reduction in premiums for the EPO will result in reduced contributions by FOP members. By way of example, for a family contract, an FOP member will save $2,029 annually in contributions with the EPO program compared to the existing program benefit costs.

Attached to the Interest Arbitrator's Recommendations are "Combined Cost Analysis" charts for both active and retired FOP-represented lieutenants and sergeants. The chart for active employees shows that the cost under the proposed EPO plan is exactly the same ($1271.04) for both husband and wife, and family coverages.

7. On October 20, 2014, the FOP attorney emailed the Township attorney, advising that the FOP had ratified the parties' MOA as memorialized in the Interest Arbitrator's

"Recommendations for Settlement." Nitto certifies that he voted in favor of the EPO plan based upon the Interest Arbitrator's recommendations.

8. The Township subsequently ratified the MOA and the parties signed their 2014-2016 agreement (Respondent Exhibit E) on August 3, 2015. The new agreement includes a provision (Article XI) expressing the transition from the PPO to the EPO. Nothing in the article or the agreement guarantees all employees lower premiums for switching to the EPO Plan.

9. Nitto certifies that after the change to the EPO was implemented, his health insurance premium for he and his wife increased by $149.40 per month. He acknowledges that the premiums of "all other members were decreased as promised by the Township." Apparently, Nitto and his wife paid the husband/wife or couple premium in the prior PPO plan which was a lesser amount than the family rate in that plan. Under the new EPO plan, the premium was the same for husband/wife or couple as it is for family, thereby increasing Nitto's premium rate.

10. Nitto certifies that in November, 2014 he spoke with the Township's Mayor about his premium increase. He certifies that the Mayor said that he (Nitto) would be reimbursed, and that a month later, the Mayor again assured him of reimbursement for the additional money he had paid. Nitto has never been

reimbursed. The Township does not dispute Nitto's conversation with the Mayor.

ANALYSIS

The Township contends that its Motion must be granted because it is entitled to relief as a matter of law. It argues that this case presents no genuine issue or dispute of material fact(s); that it provided the FOP with detailed information on the premium costs associated with the EPO plan; that the Interest Arbitrator found that switching to the EPO plan would result in significant savings; and that nothing in the Interest Arbitrator's Recommendations or in the new collective agreement provides that every employee's insurance premium will decrease by the change to the EPO plan.

The FOP's reply and defense of its unfair practice charge are essentially predicated on its purported acceptance and ratification of the Interest Arbitrator's Recommendations based on the Township's "promise" that all employees would realize a decrease in their health care premiums (brief at 1). In its brief, the FOP argues that the Township failed to adhere to the terms of the parties' settlement and that it adopted and ratified the Interest Arbitrator's Recommendations with the understanding that all members would enjoy decreased premiums. The Township denies that it ever promised that the cost of "contributions"

would be reduced for all employees after transition to the EPO plan (brief at 10).

Summary judgment cannot be granted if material facts are disputed. The FOP contends that whether or not the Township "represented" or "promised" that all unit employees would realize a premium savings (or decrease) is a disputed material fact, necessitating a decision denying the motion. I assume for purposes of this decision that in negotiations for the successor collective negotiations agreement, the Township "represented" that all employees would enjoy a premium decrease upon implementation of the EPO plan. I nevertheless recommend that the Motion be granted and that the Complaint be dismissed.

Neither the final product of the parties' negotiations -- their mutually signed collective negotiations agreement -- nor the document upon which that agreement was derived -- the Arbitrator's "Recommendations for Settlement" -- provide a guarantee of lower health care premiums for all unit employees. The FOP essentially seeks a determination that a verbal representation of an unspecified Township representative prevails over a subsequent and unambiguous writing. Such a determination would conflict with the parol evidence rule.

In Harker v. McKissock, 12 N.J. 310, 321 (1953), our Supreme Court considered the admissibility of parol evidence. It wrote:

> The 'parol evidence rule' is not a rule of evidence, but a rule of substantive law. It is not concerned with the probative trustworthiness of particular data, but rather with the source and components of jural acts. In determining the constitutive parts of jural acts, certain kinds of fact are legally ineffective in the substantive law. The embodiment of the terms of a jural act in a single memorial constitutes the integration of the act, i.e., its formation from negotiations and transactions in themselves without jural effect into 'an integral documentary unity', and it is a legal consequence of such integration that 'all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act'...The essence of a voluntary integration is the intentional reduction of the act to a single memorial, and where such is the case, the law deems the writing to be the sole and indisputable repository of the intention of the parties....
>
> Extrinsic evidence of a substantially different intention is not admissible to overcome and qualify the intrinsic force of the written words....

See also Mercer Cty. Vo-Tech Schools, P.E.R.C. No. 85-90, 11 NJPER 142, 143 (¶16063 1985), adopting in pert. part H.E. No. 85-5, 10 NJPER 476, 477 (¶15213 1984); Raritan Tp. MUA, P.E.R.C. No. 84-94, 10 NJPER 147 (¶15072 1984), adopting H.E. No. 84-33, 10 NJPER 64 (¶15037 1983); But Cf. Vernon Tp., P.E.R.C. No. 84-41, 9 NJPER 655 (¶14283 1983) (Union alleges that parties agreed to continue a longevity provision, but collective agreement set forth no such provision. Parol evidence admitted to show that union waived inclusion of provision in the agreement).

At an unspecified time after the Township represented that all unit employees would realize decreased insurance premiums under the EPO plan, FOP representative Gries sought and was provided an accounting of the Township's costs for the PPO, POS and EPO plans for single, husband and wife and family coverages. Those costs showed that under the proposed EPO plan, the premiums for family and "couple" coverages were identical - $1271.94. Under the PPO plan, the premiums for those same coverages were higher but also identical - $1617.10. Only the POS plan showed a difference in costs between the family and couple plans.

The Interest Arbitrator's "Recommendations for Settlement" accurately reiterated the proposed EPO plan costs for family and couple coverages. The Arbitrator included in his "Recommendations," "cost analysis" charts memorializing those comparisons. He concluded that, ". . . the EPO will result in reduced contributions by FOP members," a generalization that Nitto certifies as true for all 21 other unit employees.

The FOP ratified the EPO plan after all financial disclosures were provided for its deliberation. It signed a collective negotiations agreement expressing the transition to the EPO plan. The Township neither withheld pertinent facts from the FOP and the Interest Arbitrator nor otherwise negotiated in bad faith.

Under all of the circumstances, I grant the Township's Motion for Summary Judgment. N.J.A.C. 19:14-4.8(e).

RECOMMENDATION

I recommend that the Complaint be dismissed.

/s/Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: December 20, 2016
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by December 30, 2016.