

H.E. NO. 2017-9

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

In the Matter of

CITY OF MILLVILLE,

Respondent,

-and-

Docket No. CO-2016-251

NEW JERSEY CIVIL SERVICE ASSOCIATION
CUMBERLAND COUNCIL 18,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Charging Party's motion for summary judgment and denies Respondent's cross-motion. The Hearing Examiner determined that the City of Millville violated 5.4a(1) and (5) of the Act when it unilaterally reduced the salary range of certain represented titles thus repudiating specific language in the parties collective negotiations agreement. The Hearing Examiner rejected the City's assertion of a waiver.

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
Blaney Karavan, attorneys
(William G. Blaney, of counsel)

For the Charging Party
O'Brien, Belland & Bushinsky, LLC, attorneys
(Kevin D. Jarvis, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

The New Jersey Civil Service Association Cumberland Council 18 (hereinafter Council 18) filed an unfair practice charge and amended unfair practice charge against the City of Millville (hereinafter City) on May 16, 2016 and November 15, 2016, respectively. The charges allege that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),^{1/} when it adopted ordinances

^{1/} These provisions prohibit public employers, their
(continued...)

on November 16, 2015, February 16, 2016 and April 6, 2016,^{2/} which repudiated the parties collective negotiations agreement by unilaterally reducing the salary ranges for certain titles included in the bargaining unit.

On August 4, 2016, a Complaint was issued. The City filed an Answer by letter dated August 18, 2016, admitting that it adopted ordinances unilaterally changing the salary ranges of unit titles, but denying that doing so constituted a repudiation or a refusal to negotiate in good faith. A pre-hearing conference was held on September 16, 2016.

On November 15, 2016, Council 18 filed a motion for summary judgment and brief. The City filed a brief in opposition and a cross motion for summary judgment on November 28, 2016.^{3/}

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- 1/ (...continued)
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."
- 2/ The amended charge included an additional ordinance adopted by the City on April 6, 2016 which unilaterally reduced the maximum salary for the title Assistant Engineer.
- 3/ Respondent asserts that because Charging Party's motion for summary judgment was filed simultaneously with its amended unfair practice charge that the original charge is moot and the case should be returned, ". . . for the parties to engage in an exploratory conference in the interest of
(continued...)

Council 18 filed a reply to the City's opposition brief on December 9, 2016.

On December 13, 2016, the motion was referred to me for disposition. N.J.S.A. 34:13A-4.8. I have conducted an independent review of the parties' briefs and supporting documents submitted in this matter. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. The FOP and City are, respectively, public employer and public employee representative within the meaning of the Act. Council 18 is the exclusive bargaining representative of all full time employees of Respondent, City of Millville, but excluding policemen, firemen, confidential employees, managerial executives, and supervisors within the meaning of the Act. Council 18 also represents part-time employees who are permanently employed working a full calendar year with a minimum of 21 hours per week as their scheduled work period, not including seasonal employees, summer employees and temporary

3/ (...continued)
amicably resolving the matter." On March 20 and April 10, 2017, additional telephone conferences were held to discuss voluntary resolution. After a Complaint issues, amendments to an unfair practice charge may be filed with the Hearing Examiner. N.J.A.C. 19:14-1.5. Similarly, respondent may seek to amend its answer. N.J.A.C. 19:14-3.3.

emergency employees. (Certification of Sharon Smith, President of Council 18, attached to Charging Party's brief, Exhibit A).

2. Council 18 and the City are parties to a collective negotiations agreement (hereinafter "CNA") covering the period January 1, 2015 through December 31, 2016. (Copy of CNA, attached to Charging Party's brief, Exhibit A).

3. Article 6 of the CNA entitled, "Salary Job Guide," specifically provides, in relevant part, that

The City shall supply to the Council a list of job titles and salary ranges covered by this Contract with the understanding that the list of job titles and salary ranges does not prevent the governing body of the City from adopting a Salary Ordinance that may **increase** the salary range of a particular job title without the necessity of negotiating that change with the Union. (Copy of CNA attached to Charging Party's brief, Exhibit A).
(Emphasis supplied)

4. By Ordinance No. 32-2015, dated November 16, 2015, the City unilaterally changed the salary range for Payroll Clerk from a range of \$20,000.00-\$51,234.26 to a range of \$30,000.00-\$40,500.00. (Copy of Ordinance attached to Charging Party's brief, Exhibit B).

5. By Ordinance No. 3-2016, dated February 16, 2016, the City unilaterally changed the salary range for Code Enforcement Officer from a range of \$20,000.00-\$50,054.13 to a range of

\$20,000.00-\$40,000.00.^{4/} (Copy of Ordinance attached to Charging Party's brief Exhibit C).

6. By Ordinance No. 15-2016, dated April 6, 2016, the City unilaterally changed the salary range for Assistant Engineer from a range of \$20,000.00-\$80,075.95 to a range of \$50,000.00-\$72,900.00. (Copy of Memo from City Clerk/Administrator attached to Charging Party's brief, Exhibit D).

7. The City did not negotiate the salary changes.^{5/}

4/ I note that Charging Party's statement of facts and Respondent's brief, state that City Ordinance (Ordinance No. 3-2016) changed the minimum salary for Code Enforcement Officer from \$20,000 to \$30,000. However, my review of Ordinance No. 15-2016 demonstrates no change in the minimum salary. Regardless, the minimum salary whether the same or increased has no substantive bearing on this decision.

5/ Respondent submitted no certifications in opposition to Charging Party's motion or in support of its cross motion. Rather, the City submitted a brief with two emails attached as exhibits. The information in the brief and emails is that City Clerk Susan Robostello sent an email to representatives of Council 18 among unknown others, on October 29, 2015, stating ". . . attached is an ordinance that will be considered on first reading by the Board of Commissioners on Monday, November 2, 2015. The ordinance changes the salary range of Payroll Clerk, which is covered by the contract. . . ." and on February 2, 2016 stating, "Attached is an ordinance on tonight's Commission meeting agenda on first reading for the Commissioner's consideration to lower the max for the title of Code Enforcement Officer. . . ." These facts and emails without certification as to their veracity, are not appropriate for consideration. However, even assuming their veracity, for reasons discussed herein, they have no substantive impact on this decision.

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). In determining whether summary judgment is appropriate, we must view the evidence submitted in connection with the motion in the light most favorable to the party opposing the motion. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

Based upon the foregoing, the City's unilateral change in the salary ranges was a repudiation of the parties' collective negotiations agreement and violated 5.4a(1) and (5), and movant is entitled to the relief requested as a matter of law. Consequently, I grant Council 18's motion for summary judgment and deny the City's cross motion for summary judgment.

N.J.S.A. 34:13A-5.3 authorizes the majority representative to negotiate term and conditions of employment on behalf of all unit employees. Our Supreme Court has recognized that compensation is a negotiable term and condition of employment. Woodstown-Pilesgrove Reg. Ed. Assn., 88 N.J. 582 (1980); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 49, 4 NJPER 334 (¶4163 1978). Salary is a mandatorily negotiable term and condition of employment that was most evidently in the legislative mind. Bd. of Ed. of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 (1973). Nothing is more fundamental in collective negotiations than salary. UMDNJ II, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009).

When negotiations over a subject culminate in an agreement, the terms of the agreement must be reduced to writing and included in the collective negotiations agreement. N.J.S.A. 34:13A-5.3. These written agreements establish the terms and conditions of employment for the duration of the contract unless both of the parties voluntarily agree to change them. Passaic Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21191 1990); State of N.J., Dept. of Veterans Affairs (Menlo Park Soldiers Home), P.E.R.C. No. 89-76, 15 NJPER 90 (¶20040 1989); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 336 (¶16129 1985). Thereafter, the parties are not required to reopen negotiations on any express term contained in an extant

agreement mid-term. Middlesex Board of Education, P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993). An employer can not unilaterally change an express provision of the agreement during the contractual period. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978).

A majority representative may, however, waive its right to negotiate over a mandatorily negotiable subject. Such a waiver is proven when an employer can demonstrate "clear and unmistakable" contract language, conduct, or past practice that the union has knowingly and willfully waived its right to negotiate on the subject. Township of Pennsauken, 19 NJPER 114 (¶24054 1993); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

Here, the parties' contract language is clear. There is an express contractual right to prevent a change. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). A controlling contract provision can establish that the parties have already negotiated on a subject and no further negotiations are required. Passaic City Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990). There is no argument that the City was permitted to increase the minimum (or maximum, if it so chose) salaries of unit employees, and it is similarly

indisputable that the City could not unilaterally lower the salaries of unit employees.

The reduction of the maximum salary in the salary ranges under the City's ordinances repudiates the express terms of the Article 6 of the parties' CNA. The Association never agreed to reopen its contract, and there were no negotiations on the issue.

The City argues that Council 18 waived its right to negotiate when it did not object or respond to emails stating the City's intention to unilaterally decrease salaries. Council 18 had no obligation to do so, and its decision to not respond does not amount to an acquiescence let alone a clear and unmistakable waiver.

Finally, the City argues that no unit members were negatively impacted by the unilateral change and some benefitted. Assuming arguendo that is correct, it is of no consequence. The ends cannot justify the means; the City cannot disregard its duties under the Act.

Consequently, the City's unilateral reduction in salaries via the ordinances it adopted was in contravention of the CNA, repudiated the terms of the CNA and, thus, violated 5.4a(1) and (5) of the Act. See, State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

CONCLUSIONS OF LAW

The City of Millville violated N.J.S.A. 34:13A-5.4a(1) and (5), when it repudiated the parties' collective negotiations agreement by unilaterally reducing the maximum salary range of unit employees mid-contract.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the City cease and desist from:

A. Interfering with, restraining or coercing employees included in Council 18 in their exercise of the rights guaranteed to them by the Act, particularly by repudiating the express terms of Article 6 of the 2015-2016 collective negotiations agreement, by reducing the maximum salary of certain titles in the negotiations unit.

B. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by repudiating the express terms of Article 6 of the 2015-2016 collective negotiations agreement, by reducing the maximum salary of certain titles in the negotiations unit.

C. The City of Millville should take the following affirmative action:

1. Rescind City Ordinances No. 32-2015, 3-2016 and 15-2016 to the extent they reduce the maximum salary of any title represented by Council 18.

2. Reinstate any reduction in the salary ranges to an amount equal to (or greater than) the amount set forth in the 2015-2016 salary ranges referenced in Article 6 of the 2015-2016 collective negotiations unit.

3. Post in all places where notices to employees are customarily posted copies of the attached notice marked as "Appendix A." Copies of such notice on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative, will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

/s/Deirdre K. Hartman
Deirdre K. Hartman
Hearing Examiner

DATED: April 26, 2017
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 May 5, 2017.



RECOMMENDED



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees included in Council 18 in their exercise of the rights guaranteed to them by the Act, particularly by repudiating the express terms of Article 6 of the 2015-2016 collective negotiations agreement, by reducing the maximum salary of certain titles in the negotiations unit.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by repudiating the express terms of Article 6 of the 2015-2016 collective negotiations agreement, by reducing the maximum salary of certain titles in the negotiations unit.

WE WILL rescind City Ordinances No. 32-2015, 3-2016 and 15-2016 to the extent they reduce the maximum salary of any title represented by Council 18.

WE WILL reinstate any reduction in the salary ranges to an amount equal to (or greater than) the amount set forth in the 2015-2016 salary ranges referenced in Article 6 of the 2015-2016 collective negotiations unit.

Docket No. _____

(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372