I.R. NO. 2021-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Respondent,

-and- Docket No. CO-2020-283

HOBOKEN MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief sought by the Hoboken Municipal Employees Association (HMEA) based on an unfair practice charge it filed against the City of Hoboken (City). The charge alleges that the City engaged in unfair practices when, just before economic layoffs were about to take effect, it advised the HMEA that for those employees who decided to exercise their Civil Service Commission "bumping" rights, the City would determine the employees' placement on the salary guide and each employee's amount of longevity credit.

Despite the City's assertion that, so long as an employee were placed on a salary that fell within the negotiated range for each job, it had the right to unilaterally set post-layoff compensation, the Designee held that the HMEA had shown that the City's action was subject to the statutory obligation to negotiate. However, the Designee, observing that the City's action occurred following an economic layoff, ruled that the existence of an impasse in collective negotiations was not sufficient to demonstrate that irreparable harm existed. Accordingly, the application for interim relief was denied.

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Appearances:

For the Respondent, Alyssa L. Witsch, Esq., Assistant Corporation Counsel

For the Charging Party, Limsky Mitolo, attorneys (Marcia J. Mitolo, of counsel)

INTERLOCUTORY DECISION

On May 8, 2020, the Hoboken Municipal Employees Association (HMEA or Charging Party) filed an unfair practice charge and a request for interim relief with temporary restraints with the Public Employment Relations Commission. The HMEA alleges that the City of Hoboken (City or Respondent) violated the New Jersey Employer-Employee Relations Act, as amended, when it threatened to and actually reduced the compensation of those employees affected by a layoff who choose to exercise "bumping" rights into another position. The charge alleges the City's unilateral action occurred while the parties were engaged in collective

negotiations for a new contract and violated N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5) and (7).[1/] The HMEA filed a brief and exhibits in support of its application as well as the certification of its President, Diane Carreras.

I was appointed as Commission Designee to hear and rule on the HMEA's application. I invited the City to respond to the application for temporary restraints. After it did so on May 13, 2020, in a letter to the parties dated May 18, I declined to issue temporary restraints and signed an order to Show Cause setting a date for the City to file a brief and a return date for the parties to argue before me via a telephone conference call. On May 26, the City filed a brief, exhibits, and the certifications of Steven D. Marks, its Business Administrator until February 20, 2020, and of Linda Landolfi its Director of Finance.

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[1] These provisions prohibit public employers . . . 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 . . . . (7) violating any of the rules or regulations established by the Commission "

On May 29, the parties presented oral argument. These pertinent facts and factual assertions appear:

The events in this case follow those occurring between August 18, 2019 and February 20, 2020 which were the subject of an unfair practice charge filed by the HMEA against the City on February 14, Docket No. CO-2020-217. The HMEA also filed an application for interim relief with that charge. I was assigned as Commission designee and on March 18, orally denied the request following oral argument. I explained my reasoning in a written decision issued on April 2, 2020, I.R. NO. 2020-16, 46 NJPER 461 (¶105 2020)

1. The HMEA represents the City's non-uniformed, non-supervisory employees.

2. On January 15, 2020, the City sent a layoff plan to the Civil Service Commission (CSC) which the HMEA received on January 31. It provided for a proposed layoff of 79 employees, 62 of whom were represented by the HMEA.

3. By letter dated February 20, 2020, addressed to the City and copied to the unions representing the City’s organized employees, including the HMEA, Kelly Glenn, the CSC’s Director of Agency Services, approved the plan.

4. Based on the statutorily required 45-day notice period, the layoffs would take effect on May 7 or 8, 2020.

5. Collective negotiations between the HMEA and the City were suspended by the Coronavirus pandemic.

6. The City refused the HMEA's request that the City ask the CSC to delay the implementation of the layoff plan.

7. However, on April 17, 2020 the City wrote to the CSC and requested that 47 of the 77 proposed layoffs be rescinded.

8. On May 1, 2020, layoff rights notices were issued to the employees still facing layoffs. Employees were to advise the CSC and the City if they were refusing their lateral displacement rights by May 5, 2020.

9. On or about May 4, 2020, the City advised the HMEA that any employees exercising their layoff rights would be receiving a reduction in salary.

10. The union asserts that, more specifically, the City unilaterally decided that any employees starting new positions by way of "bumping rights" will be able to maintain their longevity since 2012. However, they would be placed at a $35,000 base pay and shall be

provided an additional $1,000 for every year of service since 2012.

11. Ultimately 11 employees choose to use their bumping rights and suffered a reduction in compensation. Carreras asserts that in at least one case the employee's compensation was reduced even though pre and post layoff duties remained the same.

12. Finance Director Landolfi certified that the City's financial picture has worsened since the layoffs were originally proposed. She identifies these and other factors affecting City revenues and outlays:

- Parking revenues have dropped approximately $800,000 since non-essential businesses have been closed.
- Costs have risen in the form of overtime for essential employees needed to address the crisis.
- Expenses have increased relating to: testing for the virus; personal protection equipment; sanitizing costs; and technology costs needed to implement the working from home mandate.

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); 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).

The HMEA argues that a showing that severe irreparable harm will result or continue absent an order halting the unfair practice, can be the primary consideration in determining whether the application should be granted. It cites In Re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 80-138, 6 NJPER 258 (¶11123 1980). The HMEA asserts the City's directives to employees who sought to exercise their bumping rights is such a circumstance. The HMEA argues that implementing layoffs are prohibited while the parties are engaged in collective negotiations and that the unilateral establishment of salaries that do not conform to an employee's proper place within the negotiated ranges, violates the City's statutory duty to negotiate and to maintain the status quo while the parties are at impasse.

The City initially responds that it has a statutorily recognized and non-negotiable right to lay-off employees for reasons of economy. Responding to the HMEA's assertions concerning the post-layoff compensation paid to employees who exercised their bumping rights, the City continues:

> The setting of salaries for employees who exercised their lateral or demotional rights is a natural extension of the Layoff Plan and is not akin to setting wage or salary structure. There have been no changes to the salary ranges that have been negotiated and agreed upon by the City and HMEA and all newly established salary amounts for employees who exercised layoff rights are within the agreed upon ranges for each title. The starting salaries for specific employees are never negotiated because the parties have already negotiated the salary ranges. For those employees exercising their lateral or demotional rights, they are accepting a move into a new position. They are not retaining their prior position, even if the title is the same, and they are not entitled to the same salary. The City's Layoff Plan was predicated on the need for economy and efficiency, and the economy of the City has significantly worsened given the COVID-19 pandemic crisis . . . Therefore, it would not be in accordance with the Layoff Plan to allow those employees exercising their layoff rights to retain the same salary - this would not accomplish the goal of the layoff plan. That being said, the City went above and beyond in good faith in setting the salaries for employees in new positions in a manner that was above the minimums for most titles, took into account their years of service, and allowed them to retain their longevity.
>
> Due to the fact that the issue of setting salaries for employees who exercised their layoffs rights within the previously negotiated and agreed upon ranges, is not mandatorily negotiable, the City has not violated the provisions of N.J.S.A. 34:13A-5.3 and therefore the HMEA will not be successful on the merits of its Unfair Practice Charge.

ANALYSIS

The HMEA's arguments do not discuss how the City's actions violated N.J.S.A. 34:13A-5.4a(2), (3), (4), and (7). Thus, I deny interim relief as to claimed violations of those subsections. The Director of Unfair Practices may decide if those claims warrant further processing. Thus, the interim relief application focuses on the HMEA's claim that the City violated N.J.S.A. 34:13A-5.4a (5).[2/]

Likelihood of success on the merits

A public employer violates its statutory duty to negotiate terms and conditions of employment if it makes unilateral changes in working conditions during the course of collective negotiations. See N.J.S.A. 34:13A-5.3, 5.4a(5); Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). Galloway requires that the public employer maintain the status quo of working conditions at least until it negotiates to impasse on the issues on the negotiating table. 78 N.J. at 48.

Because a public employer has no obligation to negotiate with the representative of its employees over economic layoffs, I do not accept the HMEA's argument that layoffs cannot be implemented while the parties are at impasse. See Union County Regional High School Board of Education v. Union County Regional

[2] An unfair practice under any 5.4a subsection is also a breach of N.J.S.A. 34:13A-5.4a(1). See Galloway Board of Education and Galloway Township Ed. Assn, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976), aff'd 157 N.J. Super. 74 (App. Div. 1978).

High School Teachers Asso., 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248, reversing P.E.R.C. No. 76-47 (1976) granting interim relief.

I do concur with the HMEA's arguments that disputes over the compensation paid to employees who, post-layoff, have exercised bumping rights are mandatorily negotiable in cases where:

> 1. It is asserted that, both before and after the layoff, the employee's duties are identical, but compensation has been reduced,
>
> and
>
> 2. The employee has bumped into a different title but asserts that the compensation does not comport with the appropriate position on the salary guide given the employee's years of experience and/or service.

See respectively, County of Essex, and IBT Local 723, P.E.R.C. No. 94-29; 19 NJPER 540 (¶24255 1993) (grievance asserting post-layoff compensation violated contract because duties were unchanged was arbitrable); Twp. of Middletown v. Middletown PBA Local 124, 334 N.J. Super. 512 (App. Div. 1999) aff'd 166 N.J. 112 (2000) (initial salary guide placement of experienced officers mandatorily negotiable).

The HMEA has not provided specifics concerning the amounts that the employees exercising bumping rights were paid post-layoff and the amounts that the HMEA asserts they should have

been paid.[3/] The City acknowledges that it set the post-layoff salaries of the employees who exercised bumping rights and claims a non-negotiable right to have done so because its actions are not inconsistent with the negotiated ranges. While the HMEA's allegations are general and not specific as to each affected employee, coupled with the City's concession, it has arguably shown that the City has not lived up to its duty to negotiate as set by the "Proposed new rules" language of N.J.S.A. 34:13A-5.3 and enforced by N.J.S.A. 34:13A-5.4a(1) and (5).

Irreparable harm

Even assuming that the HMEA's claims and the City's concessions are sufficient to establish that the employer violated N.J.S.A. 34:13A-5.4a(5), I find this case is conceptually different from Galloway, 78 N.J. 25, supra., and others like it and that irreparable harm is not present.

As the triggering event in this dispute, layoffs, cannot be challenged in an unfair practice/duty to negotiate case, (See Union County, supra.,) the existence of a negotiations impasse is essentially temporal only and there is no dynamic connection or impact between the post-layoff salaries of the employees who bumped into new positions and the ability of the HMEA to engage in collective negotiations with the City. In short, the facts

[3] The HMEA has submitted a list of titles showing the minimum and maximum salaries for all jobs in its collective negotiations unit.

and events before me do not show that the post-layoff salaries were set by the City to "chill" the exercise of the HMEA's statutory rights.

As the relief sought by the charge is essentially monetary, the HMEA can obtain relief at the end of an unfair practice case that will be adequate to remedy the City's alleged commission of unfair practices.

As irreparable harm has not been demonstrated, I need not review the parties' arguments regarding the public interest and the balance of hardships to the parties. The case will be referred to the Director of Unfair Practices for further processing.

ORDER

It is HEREBY ORDERED that the application of the Hoboken Municipal Employees Association for interim relief is denied.

/s/ Don Horowitz
DON HOROWITZ
Commission Designee

July 2, 2020
Trenton, New Jersey