P.E.R.C. NO. 2001-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MIDDLESEX,

Respondent,

-and- Docket No. CO-H-99-360

PBA LOCAL 156,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the County of Middlesex's request for special permission to appeal a Hearing Examiner's ruling partially denying the County's motion for summary judgment. The County sought summary judgment on a Complaint based on an unfair practice charge filed by PBA Local 156. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act when it allegedly violated its purported promise not to lay off officers during the term of the 1996-1999 contract. That promise was allegedly made in exchange for the PBA's promise to accept lower salary increases than those awarded by an interest arbitrator. The Hearing Examiner granted the County's motion to the extent that parol evidence could not be admitted to alter or impugn the terms of the 1996-1999 memorandum/collective agreement signed by the County and PBA Local 156. He denied the motion to the extent that the Complaint alleges that the County violated the Act by repudiating a promise not to lay off police officers in exchange for concessions on wages during the term of the agreement. Absent extraordinary circumstances, the Commission will not review an interlocutory ruling of a Hearing Examiner. The County may raise its concerns during the course of the hearing and the Commission will review any exceptions to the Hearing Examiner's rulings at the end of the case.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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STATE OF NEW JERSEY
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In the Matter of

COUNTY OF MIDDLESEX,

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-and- Docket No. CO-H-99-360

MIDDLESEX PBA LOCAL 156,

Charging Party.

Appearances:

For the Respondent, Bruce J. Kaplan, County Counsel (Benjamin Liebowitz, Deputy County Counsel)

For the Charging Party, Loccke & Correia, attorneys (Joseph Licata, of counsel)

DECISION

On May 11, 1999, Middlesex PBA Local 156 filed an unfair practice charge against the County of Middlesex. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),[1/] when it allegedly violated

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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

Footnote Continued on Next Page

its purported promise not to lay off officers during the term of the 1996-1999 contract. That promise was allegedly made in exchange for the PBA's promise to accept lower salary increases than those awarded by an interest arbitrator. Two other counts of the charge were later dismissed pursuant to a memorandum of agreement.

On January 7, 2000, a Complaint and Notice of Hearing issued. On April 5, the employer moved for summary judgment. The PBA opposed the motion. The motion was referred to the Hearing Examiner pursuant to N.J.A.C. 19:14-4.8.

On August 10, 2000, the Hearing Examiner granted the motion to the extent that parol evidence could not be admitted to alter or impugn the terms of the 1996-1999 memorandum/collective agreement signed by the County and the PBA. He denied the motion to the extent the Complaint alleges that the County violated 5.4a(1) and (5) by repudiating a promise not to lay off police officers in exchange for concessions on wages during the term of the agreement.

1/ Footnote Continued From Previous Page

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 August 15, 2000, the County requested special permission to appeal. It asserts that the decision partially denying the County's motion for summary judgment rests on the union's assertion that the County "acted in bad faith" in submitting a proposed layoff plan to the New Jersey Department of Personnel seeking to lay off 19 County police officers. The County further asserts that this claim was waived by the union in a partial settlement with the County that is part of the record. It argues that, in essence, the Hearing Examiner improperly disregarded the partial settlement.

Absent extraordinary circumstances, we will not review an interlocutory ruling of a Hearing Examiner. Although the parties settled two counts of the unfair practice charge, the settlement agreement does not appear to specify that the PBA waived its right to argue that the employer breached its duty to negotiate in good faith. The County may raise its concerns during the course of the hearing and we will review any exceptions to the Hearing Examiner's rulings at the end of the case.

ORDER

Special permission to appeal is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey
ISSUED: September 29, 2000

H.E. NO. 2001-5

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

In the Matter of

COUNTY OF MIDDLESEX,

Respondent,

-and- Docket No. CO-H-99-360

PBA LOCAL 156,

Charging Party.

SYNOPSIS

A Hearing Examiner grants in part and denies in part an employer's motion for summary judgment. The Complaint alleges that the majority representative agreed to lower salary increases than those awarded by an interest arbitrator (and affirmed by the Commission), based "exclusively" on the employer's promise not to layoff unit employees during the contractual term. The employer effected a layoff during the term, an action which allegedly violates 5.4a(1), (3) and (5) of the Act.

The Hearing Examiner found that the parol evidence rule barred extrensic evidence (the oral agreement not to layoff) from altering or impugning the terms of the memorandum of agreement/ collective agreement signed by the parties. The Hearing Examiner granted this portion of the motion.

He also found that the disputed fact of the "promise" was material; and that it precluded summary judgment because the duty to negotiate in good faith applies at all times. This portion of the motion was denied and a hearing was scheduled.

H.E. NO. 2001-5

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

In the Matter of

COUNTY OF MIDDLESEX,

Respondent,

-and- Docket No. CO-H-99-360

PBA LOCAL 156,

Charging Party.

Appearances:

For the Respondent
Bruce J. Kaplan, County Counsel
(Benjamin Liebowitz, Deputy County Counsel)

For the Charging Party
Loccke & Correia, attorneys
(Joseph Licata, of counsel)
(Leonard C. Schiro, on the brief)

HEARING EXAMINER'S DECISION
ON MOTION FOR SUMMARY JUDGMENT

On May 11, 1999, Middlesex PBA Local 156 filed an unfair practice charge against the County of Middlesex. The charge alleged three separate counts entitled "bad faith layoff", "unlawful repudiation", and "unit work dispute." The County's actions cited in the counts allegedly violated 5.4a(1), (3) and

(5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/]

On January 7, 2000, a Complaint and Notice of Hearing issued. On February 10, 2000, counts I and III of the Complaint were dismissed, pursuant to a memorandum of agreement signed by the parties.

Local 156 alleges in Count II that on March 8, 1999, the County submitted a proposed layoff plan to the New Jersey Department of Personnel seeking to layoff 19 County police officers. The County's action allegedly violates its earlier purported promise not to layoff officers during the term of the 1996-1999 collective agreement signed by the parties. In particular, Local 156 contends that it agreed to lower salary increases than those awarded by an interest arbitrator, based "exclusively" on the County's promise not to layoff unit employees during the contractual period. The County has allegedly "acted in bad faith."

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."

On April 5, 2000, the County filed a motion for summary judgment. On April 20, the motion was referred to me for a decision. N.J.A.C. 19:14-4.8.

On May 26, 2000, Local 156 filed a brief opposing the motion.

Summary Judgment will be granted:

> 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 the movant...is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder 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 factfinder to resolve the alleged disputed issue in favor of the non-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 trial. 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); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

1. On June 9, 1997, an interest arbitration opinion and award was issued to the parties in IA-96-115. In a pertinent part, the award provides split salary increases of nearly 4 per cent per year for the term January 1, 1996 - December 31, 1998. The arbitrator noted; "the County cautions that an award in excess of the County offer might move the County to eliminate the County Police, a position it does not currently favor." The arbitrator wrote that his award, which exceeded the County's offer, would not "significantly detract" from the County's stated fiscal goals. The arbitrator also denied a PBA proposal prohibiting a full-time employee from being replaced by any "non-police officer or part-time or other personnel."

2. On October 30, 1997, the Commission issued a decision affirming the opinion and award. Middlesex Cty. and PBA Local No. 156, P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997).

3. On December 1, 1997, PBA President Richard Chartier sent then-counsel for the County a partially executed memorandum of agreement, together with a cover letter referring to "fragmented vacation days" and to a "medical benefits addendum." The memorandum provides annual wage increases of 3.5 per cent over an "extended" four-year term, 1996-1999. In the immediate next and pertinent part of the memorandum, Chartier wrote, "Based on the foregoing, the County agrees not to file an appeal of PERC's decision.... The parties agree that the arbitrator's award is null and void and that

this agreement shall be substituted for such award in all respects." The memorandum was expressly subject to ratification by the PBA membership and approval by the County.

4. On December 4, 1997, the County formally approved by resolution the proposed memorandum of agreement and approved "conforming the expired labor contract with the terms and conditions of said memorandum of agreement." Nothing in the memorandum or in the resolution identifies any collateral agreement or understanding.

5. The parties exchanged correspondence on a proposed collective agreement throughout the following year. On March 30, 1998, the PBA filed an unfair practice charge (CO-98-356) alleging that certain patrol officers were improperly paid, pursuant to the memorandum of agreement. On June 3, 1998, counsel for the PBA sent a letter to counsel for the County concerning the "proposed collective bargaining agreement", particularly noting the "corrections" needed before execution. None of the 7 enumerated corrections concern "layoffs." Other correspondence was dated July 20, September 4 and 29 and November 20, 1998.

On November 22, 1998, the PBA president sent a proposed agreement, together with a memorandum, to a County Freeholder. The memorandum notes that "3 areas agreed to" were incorporated, none of which concerned "layoffs."

6. On December 28, 1998, the County produced a proposed "outline" for "restructuring the County police and implement[ing] a

park ranger program." It notes that over the next 4 years, 16 of the 37 officers will be eligible to retire and that through transfers and attrition, the workforce "can be reduced to 20 officers." The outline also states that the average police officer salary is $55,000, compared to the average $30,000 salary for park rangers and that "replacing" 17 officers with 16 rangers will save $455,000 annually.

In late January 1999, Cost Cutters Group, Inc., issued recommendations to the County, including one to eliminate the County police force and substitute park rangers.

7. On February 18, 1999, the County passed a resolution to abolish the County police by September 11, 1999.

On the same date, the PBA president and vice president signed the 1996-1999 collective agreement. On an unspecified date, the County Clerk signed the agreement. No provision of the agreement refers to layoffs.

8. On March 8, 1999, the County sent a letter to the State of New Jersey, Department of Personnel, advising that, "...due to budgetary constraints, the Board of Chosen Freeholders has decided to disband the County's Park Police." It further proposed a "layoff for 19 employees on August 27, 1999." An attachment to the letter states that "adequate security" would be provided "through the utilization of Park Rangers."

ANALYSIS

The County contends that any evidence of its purported "promise" not to layoff police officers is barred by the parol evidence rule. It also contends that assuming that the Freeholders promised not to layoff officers in exchange for a constant .5 per cent annual reduction in salary over the term of the arbitrator's award, such a promise is legally unenforceable because a layoff decision is a non-negotiable managerial prerogative.

Local 156 contends that the summary judgment motion must be denied "because it is the employer's duty to negotiate in good faith that is at issue in this case." Conceding that layoff decisions are non-negotiable, Local 156 asserts that the "monetary concessions" must be paid back to the employees because "[they] were gained through bad faith bargaining", demonstrated when the layoff was implemented.

For purposes of this decision, I assume that the County promised not to layoff police officers if the PBA accepted annual 3.5 per cent across-the-board wage increases during the contractual term. This promise was not memorialized in any document and Local 156 does not contend it was. If "written" evidence of the promise exists at all, it must be the annual 3.5 per cent wage increases in the memorandum of agreement, which reduced by .5 percent annually the increases awarded by the arbitrator and then affirmed by the Commission. In other words, one must <u>infer</u> the employer's purported consideration for the agreement.

Such an inference is rebutted and belied by the expressed consideration in the memorandum. Not only was the duration of the agreement extended from 3 years to 4 in which the 3.5 per cent annual increases were to be paid, the County "...agree[d] not to file an appeal of PERC's decision affirming the Award of Arbitrator Kurtzman." Neither the cover letter/memorandum nor the collective agreement references a collateral promise, agreement or understanding that no layoffs would occur.

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 Mercer Cty. Voc-Tech. Schls. Bd. of Ed., P.E.R.C. No. 85-90, 11 NJPER 142 (¶16063 1985), adopting H.E. No. 85-5, 10 NJPER 476 (¶15213 1984).

No writing or portion of any writing in this matter may be read even as an ambiguous or debatable reference to a no-layoff promise. Accordingly, I find that the parol evidence rule prevents alteration or impugnment of the memorandum of agreement and collective agreement by the asserted contradictory prior or contemporaneous (oral) agreement. Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485, 496 (App. Div. 1963), cert. den., 40 N.J. 226 (1963). See also Allen v. Metropolitan Life Ins. Co., 83 N.J. Super. 223, 227 (App. Div. 1964).

I agree with Local 156 that the duty to negotiate in good faith "applies at all times." Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). If a promise not to layoff employees, a non-negotiable subject, extracts concessions on wages, a mandatorily negotiable subject and the employer repudiates that promise, the duty to negotiate in good faith is implicated. Cf., Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569, 570 (¶5265 1984) ("A public employer may negotiate in bad faith if it hides an already-made decision to subcontract and negotiates benefits for the affected employees in exchange for concessions concerning other retained employees"). See also Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 304 (¶22134 1991). Such a determination will

depend upon a review of the totality of circumstances in the case. In re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976).

Whether the County promised not to layoff police officers is a disputed and material fact which precludes summary judgment. Similarly, I have not yet learned all the circumstances of the County's decision to layoff police officers, although it purportedly notified the interest arbitrator of the possibility. Assuming that Local 156 prevails, I believe that a compensation remedy is unlikely, given my ruling on parol evidence.

DECISION

The motion is granted to the extent that parol evidence is barred from altering or impugning the terms of the 1996-1999 memorandum/collective agreement signed by the County and PBA Local 156. It is denied to the extent that the Complaint alleges that the County violated 5.4a(1) and (5) of the Act by repudiating a promise not to layoff police officers in exchange for concessions on wages during the term of the agreement.

Jonathon Roth
Hearing Examiner

DATED: August 10, 2000
Trenron, New Jersey