

P.E.R.C. NO. 93-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SOMERVILLE,

Respondent,

-and-

Docket No. CO-H-92-401

SOMERVILLE PBA LOCAL NO. 147

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission finds that the Borough of Somerville violated the New Jersey Employer-Employee Relations Act when two Council members on the Borough's negotiations team failed to recommend and vote in favor of ratification of a memorandum of agreement with Somerville PBA Local 147.

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In the Matter of

BOROUGH OF SOMERVILLE,

Respondent,

-and-

Docket No. CO-H-92-401

SOMERVILLE PBA LOCAL NO. 147,

Charging Party.

Appearances:

For the Respondent, Woolson, Sutphen, Anderson & Nergaard, P.C., attorneys (William R. Sutphen, III, of counsel)

For the Charging Party, Abramson & Liebeskind, consultants (Arlyne K. Liebeskind, consultant)

DECISION AND ORDER

On June 12, 1992, Somerville PBA Local No. 147 filed an unfair practice charge against the Borough of Somerville. Local 147 alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} when two Borough Council members, serving as members of the employer's negotiations team, did not recommend to

^{1/} These subsections 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. (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."

the full Council that it ratify a memorandum of agreement and when the two Council members voted against ratifying the memorandum of agreement.

On August 10, 1992, a Complaint and Notice of Hearing issued. On August 24, Local 147 moved for summary judgment. Additionally, since the Borough did not file its Answer within ten days from service of the Complaint, Local 147 moved to have the allegations in the Complaint deemed admitted to be true in accordance with N.J.A.C. 19:14-3.1. On August 31, the Borough filed a brief opposing summary judgment, and requested that its previously filed statement of position be deemed a timely Answer. I referred the motions to the Hearing Examiner.

The Hearing Examiner accepted the Borough's statement of position as its Answer, but he found that the Answer did not meet the requirements of N.J.A.C. 19:14-3.1. H.E. No. 93-10, 18 NJPER 486 (¶23222 1992). He therefore deemed the factual allegations of the Complaint to be admitted to be true. The Hearing Examiner also granted Local 147's motion for summary judgment. He found that the Borough breached its duty to negotiate in good faith when the two Council members on its negotiations team failed to recommend that the Council ratify the memorandum of agreement reached by the parties and when they voted against ratification. Since the parties had already proceeded to interest arbitration, the Hearing Examiner recommended that the Borough abide by the ratification terms of all future memoranda of agreement and post a notice of its violation.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due October 7, 1992. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's undisputed findings of fact (H.E. at 4-6) are accurate. I incorporate them here.

Pursuant to authority granted to me by the full Commission in the absence of exceptions, I find that the Borough violated subsections 5.4(a)(1) and (5) of the Act when two Council members on its negotiations team failed to recommend and vote in favor of ratification of a memorandum of agreement with Local 147.

ORDER

The Borough of Somerville is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of their rights under the Act by two Council members on its negotiations team failing to recommend and vote in favor of ratification of a memorandum of agreement with Somerville PBA Local No. 147.

2. Refusing to negotiate in good faith with Local 147 concerning terms and conditions of employment by two Council members on its negotiations team failing to recommend and vote in favor of ratification of a memorandum of agreement with Local 147.

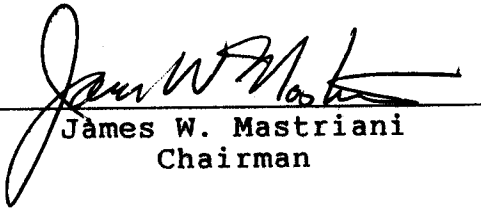
B. Take this action:

1. Abide by the ratification terms of all future memoranda of agreement.

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

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: November 17, 1992
Trenton, New Jersey



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 in the exercise of their rights under the Act by two Council members on our negotiations team failing to recommend and vote in favor of ratification of a memorandum of agreement with Somerville PBA Local No. 147.

WE WILL cease and desist from refusing to negotiate in good faith with Local 147 concerning terms and conditions of employment by two Council members on our negotiations team failing to recommend and vote in favor of ratification of a memorandum of agreement with Local 147.

WE WILL abide by the ratification terms of all future memoranda of agreement.

Docket No. CO-H-92-401

BOROUGH OF SOMERVILLE

(Public Employer)

Dated: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 93-10

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

In the Matter of

BOROUGH OF SOMERVILLE,

Respondent,

-and-

Docket No. CO-H-92-401

SOMERVILLE PBA LOCAL NO. 147

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission grant the Charging Party's Motion for Summary Judgment and find that the Borough of Somerville violated the New Jersey Employer-Employee Relations Act when two members of the Borough's negotiating team, who also serve as Borough Council members, failed to recommend that Borough Council ratify the Agreement reached by the parties and the two negotiating team/Council members themselves voted against ratification. The Memorandum of Agreement contained a preamble term requiring that members of the negotiating teams recommend ratification.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 93-10

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

In the Matter of

BOROUGH OF SOMERVILLE,

Respondent,

-and-

Docket No. CO-H-92-401

SOMERVILLE PBA LOCAL NO. 147

Charging Party.

Appearances:

For the Respondent, Woolson, Sutphen, Anderson & Negaard,
attorneys
(William R. Sutphen, III, of counsel)

For the Charging Party, Abramson & Liebeskind, Consultants
(Arlyne Liebeskind)

**HEARING EXAMINER'S RECOMMENDED REPORT AND
DECISION ON MOTION FOR SUMMARY JUDGMENT**

On June 12, 1992, Somerville PBA Local No. 147 (Local 147) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the Borough of Somerville (Borough). Local 147 alleges that the Borough failed to negotiate in good faith when two Council members, serving as members of its negotiations team, did not recommend the ratification of a Memorandum of Agreement reached by the parties to the full Borough Council and voted against the Agreement. Local 147 contends that the Council members' actions violate the New Jersey

Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-5.4(a)(1) and (5).^{1/}

On August 10, 1992, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 24, 1992, Local 147 filed a Motion for Summary Judgment pursuant to N.J.A.C. 19:14-4.8. Additionally, since the Borough did not file its Answer within ten days from service of the Complaint, Local 147 also moved the Commission to deem as true all allegations in the Complaint in accordance with N.J.A.C. 19:14-3.1. On August 31, 1992, the Borough filed a brief in opposition to the Motion for Summary Judgment, and, at the same time, moved that the Answer filing date be extended to August 31, 1992. The Borough based its extension motion on the grounds that certain unforeseeable circumstances arose. I find that by extending the time period within which the Borough may file its Answer, no hardship or prejudice is imposed on Local 147. Accordingly, the Borough's motion for an extension of time to file its Answer is granted. As its Answer, the Borough filed its Statement of Position dated July 6, 1992, previously submitted to the Commission staff agent who conducted the initial investigation.

^{1/} These subsections 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. (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 September 3, 1992, the Chairman referred Local 147's Motion for Summary Judgment, motion to have all allegations deemed admitted as true, and the Borough's motion for an extension of time to file an Answer to me.

N.J.A.C. 19:14-3.1 states in relevant part:

The respondent shall specifically admit, deny or explain each of the charging party's allegations set forth in the Complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the Complaint, if no Answer is filed, or any allegation not specifically denied or explained, unless the respondent shall state that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Commission, unless good cause to the contrary is shown. The Answer should normally include a specific detailed statement of any affirmative defenses. The Answer shall be in writing and signed, and either shall be sworn to before a person authorized by the laws of this State to administer oaths or shall contain the following dated certification immediately preceding the signature of the person signing it: 'I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.'

The Borough's Answer does not conform with the above-quoted rule requirements. Most importantly, the Borough has not specifically admitted, denied or explained each of Local 147's allegations contained in the Complaint, nor has it indicated it is without knowledge of such allegations. Consequently, all allegations in the Complaint are deemed to be admitted as true.

It is well settled law in this State that in considering motions for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion.

Additionally, in considering the instant Motion for Summary Judgment, no credibility determinations may be made. The motion must be denied if material factual issues exist. A motion for summary judgment must be granted with extreme caution, and the summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 117 N.J. Super. 182 (App. Div. 1981); State of N.J., Dept. of Personnel, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd App. Div. Dkt. No. A-3465-88T5 (6/14/90), pet. for certif. den. S. Ct. Dkt. No. 32,331 (10/11/90); AFT Local 481 (Jackson), H.E. No. 87-9, 12 NJPER 628 (¶17237 1986), adopted P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986); Essex Cty. Educ'l Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Upon application of the standards set forth above, and in reliance upon the record papers filed by the parties in this proceeding to date, I make the following:

FINDINGS OF FACT

1. The Borough is a public employer and Local 147 is a public employee representative within the meaning of the Act.
2. Local 147 represents a negotiations unit composed of all police employees holding the rank of patrol officer or sergeant, including detectives. Currently, there are approximately 29 police officers in the negotiations unit.

3. The parties' collective agreement expired December 31, 1991. The parties entered into negotiations during the latter part of 1991, and on December 3, 1991 filed a Petition to Initiate Compulsory Interest Arbitration with the Commission.

4. On or about April 23, 1992 the interest arbitrator conducted a mediation session. While that session did not result in an agreement, the parties agreed to meet again, without the arbitrator, in another attempt to resolve the dispute.

5. On May 13, 1992, the parties conducted another negotiations session which resulted in the resolution of all disputed issues. A Memorandum of Agreement was drafted and signed by negotiations team members Henry T. Moore and David Hollod for the Borough and by George Fazio and Robert Vail for Local 147. The preamble of the Memorandum provided the following: "The negotiations committees of the Borough of Somerville and PBA #147 agree to recommend the following as a settlement of the 1992-93 contract issues." Moore and Hollod also serve as members of the Borough Council.

6. On May 18, 1992, the Borough Council met to review the Memorandum of Agreement and vote on its ratification. Shortly after the Council meeting concluded, Local 147 President Fazio was informed that neither Council member Moore nor Hollod recommended the ratification of the Memorandum and that they, along with all of the other members of the Council, voted against it.

7. A few days after the Borough Council meeting, Local 147 met to consider the Memorandum of Agreement and conduct a membership ratification vote. The Memorandum was ratified by the membership.

8. As the result of the Borough's rejection of the Memorandum of Agreement, the parties proceeded with the interest arbitration process. On August 6, 1992, an interest arbitration hearing was conducted.

ANALYSIS

Local 147 contends that the Borough has negotiated in bad faith when the Council members serving on the Borough's negotiations team failed to recommend and vote in favor of the Memorandum of Agreement which expressly required such action. The Borough argues that the Council members failure to vote in favor of the Memorandum of Agreement does not constitute bad faith since there are no recorded cases or Commission regulations which support a determination that such conduct, alone, would constitute bad faith negotiations in violation of the Act.

The Commission has previously addressed a matter factually similar to this case. In Lower Tp. Bd. of Ed., P.E.R.C. No. 78-32, 4 NJPER 24 (¶4013 1977), the parties engaged in negotiations pursuant to a reopener provision in their then current agreement. Negotiations were conducted and the parties reached a tentative

agreement, subject to ratification, on an 8% salary increase. A dispute arose over whether, at the top of each salary guide, there should appear formulae which specify the amount by which each particular guide was increased. There was a complete meeting of the minds with respect to all aspects of the salary increase. The dispute was limited to the sole issue of whether or not the formulae used to arrive at each guide should be shown. 4 NJPER at 26. The Commission found that the parties' representatives agreed in the memorandum of agreement to show the computation formulae on the newly negotiated salary guides.

The memorandum of agreement reached on the salary increase stated that it was subject to ratification and that the signatories to the agreement would recommend its acceptance to their respective principals. Accordingly, under the terms of this agreement, the Lower Township Board's negotiations team representatives were under an obligation to present the memorandum to the full board for ratification and to recommend its acceptance. The Commission found that the board, through its negotiations team representatives who also served as board members, violated Section 5.4(a)(5) of the Act in two ways. First, by not showing the computation formulae on the top of the salary guide, the memorandum of agreement was not presented in the form in which it had been negotiated to the full board for ratification. Second, the board members who participated in the negotiations did not vote in favor of the negotiated memorandum of agreement but rather voted for the acceptance of the

salary guides only to the extent that they accurately represented the monetary amounts which the parties had tentatively agreed to in the memorandum. Id.

The Council members serving on the Borough's negotiations team did not alter the form of the negotiated Memorandum of Agreement. However, by failing to recommend and refusing to vote in favor of the adoption of the Memorandum, the Borough's signatories, and, consequently, the Borough, repudiated the preamble term of the Memorandum. Even assuming arguendo that Moore and Hollod orally recommended that the Memorandum be adopted by the Borough Council, their votes against ratification, alone, undermine any claim that they recommended the Memorandum. See Lower Tp. Bd. of Ed. Accordingly, I reject the Borough's argument that Lower Tp. Bd. of Ed. cannot be read to find that Moore's and Hollod's negative votes, by themselves, do not constitute bad faith negotiations. I note that in neither the Borough's Answer nor its Brief in Opposition to the Motion for Summary Judgment does it affirmatively assert that Moore and Hollod in fact recommended that the Council vote in favor of ratifying the Memorandum.

In reaching my determination here, I find that the violation of the Act occurred when the Borough's signatories did not fulfill their obligation to recommend and vote in favor of the Memorandum's ratification. However, since the Memorandum contained the express reservation that the tentative agreement was subject to ratification by the principals of both parties, the failure of a

majority of the Council who were not signatories to the Memorandum to ratify it, does not constitute a violation of the Act. 4 NJPER at 27.

Accordingly, based upon the entire record and above analysis, I make the following:

CONCLUSIONS OF LAW

The Borough of Somerville violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (1)^{2/} when the signatories to the Memorandum of Agreement repudiated the preamble term by failing to recommend and vote in favor of the ratification of the Memorandum of Agreement.

RECOMMENDATIONS

In a case such as this, a remedial order might typically include a direction to negotiate. However, since the facts show that the parties have already proceeded through the hearing level of

^{2/} In the "Conclusion" paragraph of Local 147's brief in support of its Motion for Summary Judgment it requests a finding that the Borough violated Section 5.4(a)(2). I assume the request for a finding of a subsection (a)(2) violation is merely a typographical error, since such violation is not set forth in the pleadings. However, in the event Local 147 is, in fact, seeking a finding of an (a)(2) violation, I find no facts which support such violation and recommend that such allegation be dismissed. Further, the (a)(2) allegation must be dismissed because it is not set forth in the pleadings.

the interest arbitration process, an order to negotiate would not be productive. Accordingly, I recommend that the Commission ORDER:

A. That the Borough of Somerville cease and desist from:

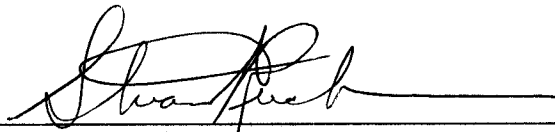
1. Interfering with, restraining or coercing employees in the exercise of their rights under the Act and from refusing to negotiate in good faith by failing to abide by the negotiated preamble term of the Memorandum of Agreement executed by the parties which requires the signatories to recommend the Memorandum to the Borough Council.

B. That the Borough of Somerville shall take the following affirmative action:

1. Abide by the ratification terms of all future memoranda of agreement.

2. 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 shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.^{3/}



Stuart Reichman
Hearing Examiner

Dated: September 24, 1992
Trenton, New Jersey

^{3/} Pursuant to N.J.A.C. 19:14-4.8(e), a decision on a motion for summary judgment which resolves the complaint in its entirety may be appealed to the Commission in accordance with N.J.A.C. 19:14-7.3(a).

NOTICE TO ALL 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 NOT interfere with, restrain or coerce our employees in the exercise of their rights under the Act.

WE WILL NOT refuse to negotiate in bad faith by failing to abide by the negotiated preamble term of the Memorandum of Agreement executed by the parties which requires the signatories to recommend the Memorandum to the Borough Council.

WE WILL abide by the ratification terms of all future memoranda of agreement.

Docket No. CO-H-92-401

Borough of Somerville

(Public Employer)

Dated _____

By _____

(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.