P.E.R.C. NO. 2017-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NUTLEY,

Respondent,

-and-

Docket No. CO-2015-186
CO-2015-187

PBA LOCAL 33 (SUPERIORS),

Charging Party,

-and-

PBA LOCAL 33,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies motions for summary judgment filed by Local 33 (Superiors) and Local 33 in unfair practice cases alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (5) and (6), by refusing to execute draft collective negotiations agreements consistent with the definition of the term "new hires" set forth in the parties' memorandum of agreement. The Commission finds that there is a genuine issue of material fact regarding the parties' intent as to the term that precludes summary judgment.

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.

P.E.R.C. NO. 2017-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NUTLEY,

Respondent,

-and-

Docket No. CO-2015-186
CO-2015-187

PBA LOCAL 33 (SUPERIORS),

Charging Party,

-and-

PBA LOCAL 33,

Charging Party.

Appearances:

For the Respondent, Scarinci & Hollenbeck, LLC, attorneys (Ramon E. Rivera, of counsel; Christina M. Michelson Abreu, on the brief; Shana T. Don, on the brief)

For the Charging Parties, Detzky, Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel and on the brief)

DECISION

This case comes to us by way of motions for summary judgment filed by PBA Local 33 (Superiors) (SOA) and PBA Local 33 (PBA) (collectively, Charging Parties) in unfair practice cases filed against the Township of Nutley (Township). The unfair practice charges allege that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act),

specifically 5.4a(1), (5) and (6),[1/] by refusing to execute draft collective negotiations agreements (CNA) consistent with the definition of the term "new hires" set forth in the parties' memorandum of agreement (MOA).

PROCEDURAL HISTORY

The Charging Parties filed both unfair practice charges on February 11, 2015. On December 30, the Director of Unfair practices consolidated these matters and issued a complaint with a notice of hearing. Additionally on January 8, 2016, the Township filed an answer and counterclaim alleging that the Charging Parties violated sections 5.4b(1), (2), (3), (4) and (5)[2/] of the Act by refusing to execute drafts CNAs consistent

---

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. . . .(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievance. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to

(continued...)

with the Township's understanding of the term "new hires." On January 11, the Township filed an amended answer and counterclaim.[3/] In February 2016, the Township served the Charging Parties with interrogatories. On April 20, the Charging Parties provided the Township with answers to interrogatories.

On June 17, 2016, the Charging Parties filed a brief, exhibits, and the certification of PBA President Gerard Tusa (Tusa) in support of the instant motion for summary judgment. On July 26, the Township filed an opposition brief, exhibits, the certification of the Township's attorney, and the certification of Sandra C. Carella (Carella), Assistant to Township Commissioner Alphonse Petracco.[4/] On July 26, the Charging Parties' motion for summary judgment was referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a).

FACTS

The SOA is the majority representative for all lieutenants, captains, and deputy chiefs employed by the Township's Police

---

2/ (...continued)
reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission.

3/ We note that the despite asserting a counterclaim in its answer, the Township never filed an unfair practice charge.

4/ We take judicial notice that according to the Township's website, "Alphonse Petracco is currently serving his third term on the Township's Board of Commissioners and previously served as Mayor from 2012-2016. Elected in May 2008, he is the Township's Director of Public Safety."

Department. The PBA is the majority representative for all patrol officers and sergeants employed by the Township's Police Department. The Township and the Charging Parties' most recent CNAs were in effect from January 1, 2004 through December 31, 2007. The parties negotiated a one-year extension for the period January 1, 2008 through December 31, 2008. An interest arbitration award issued on November 26, 2011 established the terms and conditions of employment for the period January 1, 2009 through December 31, 2012.[5/]

Throughout 2012 and 2013, the parties engaged in collective negotiations for successor agreements. On September 10, 2013, the PBA President executed a MOA on behalf of the Charging Parties covering the period January 1, 2013 through December 31, 2016. On September 11, the Charging Parties' attorney forwarded the partially executed MOA to the Township. On October 1, the Township's Board of Commissioners ratified the MOA and the Mayor executed it. In pertinent part, the fully-executed MOA provides:

> -New hires (i.e. those officers hired after the date of the full execution of the new Collective Negotiations Agreement) shall not be eligible for longevity compensation.
>
> * * *
>
> -The vacation entitlement for new hires (i.e. those officers hired after the date of the full execution of the new Collective Negotiations Agreement) shall be based upon the officer's years of service with the

5/ The parties did not incorporate the terms of the interest arbitration award into CNAs.

> Township.
>
> * * *
>
> -Paragraph 1 shall be revised so as to provide that new hires (i.e. those officers hired after the date of the full execution of the new Collective Negotiations Agreement) shall be entitled to three (3) personal days per year.
>
> * * *
>
> -Upon the full execution of the new Collective Negotiations Agreement, the outside employment rate shall be increased from $55.00 per hour to $65.00 per hour.

On February 18, 2014, the Township adopted Ordinance No. 3275 which increased the outside employment rate from $55.00 per hour to $65.00 per hour. Unit members have been paid the increased hourly rate, an aggregate amount of $86,385.00, since February 2014.

On March 19, 2014, the Township forwarded draft CNAs to the Charging Parties that provided in pertinent part:

> -Employees hired after January 1, 2013 shall not be eligible for longevity compensation.
>
> * * *
>
> -The vacation for employees hired after January 1, 2013 shall be based upon the officer's years of service with the Township.
>
> * * *
>
> -Employees hired after January 1, 2013 shall be entitled to three (3) personal days per year.
>
> * * *
>
> -Effective February 18, 2014, the outside employment rate shall be increased to $65.00 per hour.

On August 6, 2014, the Charging Parties advised that the Township's draft CNAs were acceptable provided that certain revisions were incorporated. Specifically, the Charging Parties

requested that "new hires" be defined consistent with the terms of the MOA as "those officers hired after the date of the full execution of the new Collective Negotiations Agreement" rather than "employees hired after January 1, 2013."

On September 4, 2014, the Township advised as follows:

> It is the Township's position that any reference in the Memorandum of Agreement relating to new hires . . . that provides "upon full execution of the new collective negotiations agreement" language refers specifically to the date the Memorandum of Agreement was ratified by the parties. ...The Township provided the date of January 1, 2013 in the draft CBA for purposes of continuity as the other dates for new salary guide[s] were effective January 1, 2013. However, if the PBA objects to the January 1, 2013 date for new hires, then the Township asserts that the proper date would be October 1, 2013 as that was the date the MOA was completely ratified by both parties. This issue was discussed at length during negotiations that new hires were considered any employee hired after the expiration of the previous CBA.

On September 27, 2014, the Charging Parties advised that they would continue to insist that "new hires" be defined consistent with the terms of the MOA. On November 6, the Charging Parties forwarded draft CNAs to the Township reflecting the revisions that they had requested. On December 4, the Township forwarded revised CNAs to the Charging Parties defining "new hires" as "employees hired after October 1, 2013." On December 18, the Charging Parties rejected the Township's revised CNAs and advised that they would continue to insist that "new

hires" be defined consistent with the terms of the MOA.

To date, the parties have refused to execute either version of the draft CNAs.

LEGAL ARGUMENTS

The Charging Parties argue that summary judgment should be granted in their favor. Specifically, the Charging Parties maintain that the Township was under no obligation or time constraint to review, approve, or execute the MOA; the Township could have requested revisions, additions, modifications or other changes to the MOA before ratifying and executing it. However, given that the MOA is unambiguous – it specifically, concisely and consistently defines "new hires" as "those officers hired after the date of the full execution of the new Collective Negotiations Agreement" – the Charging Parties contend that the Township's refusal to execute corresponding CNAs is a clear violation of the Act.

The Township argues that the Charging Parties have failed to satisfy the standard for summary judgment. Specifically, the Township maintains that its understanding was that "new hires" meant "officers hired after the current and ongoing negotiations culminating in the MOA." The Township contends that its interpretation is supported by the language of the MOA's preamble, "the common understanding of how collective negotiations and drafting of agreements concluding same are

conducted," and other documents referenced in the MOA that defined "new hires" consistent with the Township's understanding. Given that the Charging Parties' self-serving assertions fail to demonstrate a meeting of the minds regarding this term, the Township contends that there are genuine issues of material fact making summary judgment inappropriate. The Township also asserts that this matter is not ripe for summary judgment because it will be prejudiced by the Charging Parties' failure to adequately respond to outstanding discovery requests that were served months before the instant motion was filed.

STANDARD OF REVIEW

We note that 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); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).[6/] In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the

---

6/ 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.

light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006). We have denied summary judgment when the facts in the record do not definitively answer whether a public employer has or has not committed the unfair practices alleged. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. 2006-97, 32 NJPER 232 (¶97 2006).

N.J.S.A. 34:13A-5.4a(6) makes it an unfair practice for a public employer to refuse "to reduce a negotiated agreement to writing and to sign such an agreement." Such a refusal "also violates N.J.S.A. 34:13A-5.4a(5), prohibiting a refusal to negotiate in good faith, and N.J.S.A. 34:13A-5.4a(1), prohibiting interference with employees exercising their rights under the Act." Irvington Tp., P.E.R.C. No. 2010-44, 35 NJPER 458 (¶151 2009); see also, Moorestown Ed. Ass'n, P.E.R.C. No. 94-120, 20 NJPER 280 (¶25142 1994). "Summary judgment is properly granted

in a case alleging a violation of 5.4a(6) if the material facts of record establish without any genuine dispute that the parties have reached an agreement and that the respondent has refused to sign that agreement." Id.

The Commission has held that its jurisdiction in 5.4a(6) matters "is limited to determining whether an agreement has been reached, and whether a party refused to sign that agreement." Fair Lawn Bor., H.E. No. 91-33, 17 NJPER 201 (¶22085 1989), adopted P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991). In Fair Lawn Bor., the Commission stated:

> In order to determine whether an agreement has been reached we must first discover the intent of the parties. The Supreme Court in Kearny P.B.A. Local #21 v. Town of Kearny, 81 N.J. 208, 221-222 (1979) listed a number of interpretative devices that have been used to discover the parties' intent. They included consideration of: the particular clauses; circumstances leading up to the creation of the contract; and review of the parties' conduct regarding the disputed provisions. In addition, in Jersey City Bd. of Ed.[, P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983),] the Commission explained that the intent of the parties, as clearly expressed in writing, is the controlling factor, thus it concluded that the starting point in determining what the parties agreed to was an examination of their memorandum of agreement.
>
> [17 NJPER at 205][7/]

7/ In Karl's Sales & Serv. v. Gimbel Bros., 249 N.J. Super. 487, 492-493 (App. Div. 1991), certif. den. 127 N.J. 548 (1991), the Appellate Division stated:

(continued...)

The Commission "has expressed a reluctance to set aside an agreement which is clear on its face" and "[a] party seeking such relief must establish by 'clear, satisfactory, specific and convincing evidence that the written agreement does not accurately reflect what the parties had intended.'" Paterson Bd. of Ed., P.E.R.C. No. 90-42, 15 NJPER 688 (¶20279 1989) (citing Hillside Bd. of Ed., P.E.R.C. No. 89-57, 15 NJPER 13 (¶20004 1988)). "While the Commission has recognized that harmonious

---

7/ (...continued)

> The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them. To this end, the language used must be interpreted "in accord with justice and common sense." . . .[W]here an ambiguity appears in a written agreement, the writing is to be strictly construed against the party preparing it. . . .However, where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written. The court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of another.
>
> [citations omitted]

Accord Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004) ("[w]hen the terms of a contract are clear and unambiguous, the court must enforce the contract as it is written; the court cannot make a better contract for the parties than the one that they themselves agreed to").

labor relations would not be served by enforcing contract language that conflicts with both parties' intent, it has warned that a party may not be excused from the unintended consequences of a negotiated agreement" and "cannot expect relief merely because it did not realize the consequences of its assent." Id. (citations omitted).

ANALYSIS

In order to determine the parties' intent, we begin with an examination of the MOA. Fair Lawn Bor. The MOA clearly states that "new hires" are "those officers hired after the date of the full execution of the new Collective Negotiations Agreement" in three separate provisions pertaining to longevity pay, vacation, and personal days.[8/] The MOA also clearly states that the "outside employment rate" will be increased "[u]pon the full execution of the new Collective Negotiations Agreement." Further, the MOA clearly specifies the effective date for other undisputed provisions as follows:

> -The parties agree to a four-year agreement covering January 1, 2013 to December 31, 2013.
>
> -All current supervisors shall immediately be placed at the top step for their respective rank for each year of the agreement, retroactive to January 1, 2013.

8/ Black's Law Dictionary, 2nd Ed. defines "execution" as the "completion, fulfillment, or perfecting of anything, or carrying it into operation and effect."

> -Salary Schedule A (Officers hired before January 1, 2012)
>
> -Salary Schedule B (Officers hired on or after January 1, 2013)
>
> -Increase the Detective Differential from $600 per annum to $1,000, retroactive to January 1, 2013.
>
> -Increase the annual clothing maintenance allowance by $25 per year, retroactive to January 1, 2013.
>
> -Sick Leave Incentive shall be revised, effective January 1, 2014, so as to stipulate the six-month period.

On its face, we find that the MOA demonstrates the parties' intent to selectively enumerate the effective date for various contractual changes on a provision-by-provision basis. Moreover, we find that the language within the MOA itself is clear and unambiguous with respect to the definition of "new hires."

From this starting point, we turn to the circumstances leading up to the execution of the MOA. Fair Lawn Bor. The PBA President has certified that "the verbiage contained in the MOA is consistent with the Charging Parties' prior proposals as well as with the discussions by and between the parties." See Charging Parties' Answers to Interrogatories at ¶ 12.

However, Ms. Carella has submitted a certification indicating that the parties negotiated and exchanged proposals "which consistently reflected the Township's understanding that 'new hires' meant those hired after the expiration of the

previous agreement . . . [on] January 1, 2013" in accordance with "longstanding practice." She also certifies that the "terms of the MOA as they related to 'outside employment' were implemented with [the] understanding that the effective date was ratification of the MOA." See Carella Certification at ¶¶ 6, 8, 17, 22. However, notes taken during contract negotiations submitted by the Township do not corroborate this interpretation. Id. at ¶ 8; Exhibit E.

Given the conflicting certifications and absence of corroboration either way, we find that there is a genuine issue of material fact regarding the parties' intent leading up to the execution of the MOA.

Finally, we review the parties' conduct regarding the disputed provisions. Fair Lawn Bor. Although five months elapsed before the Charging Parties responded to the Township's draft CNAs, the Charging Parties have consistently maintained that the MOA unambiguously defines the term "new hires."

However, the Township's position has changed over time. Originally, the Township insisted that "new hires" include anyone hired after January 1, 2013 (i.e., after the previous agreement expired). After September 4, 2014, the Township revised its position and has maintained since then that "new hires" include anyone hired after the MOA was executed on October 1, 2013. Ms. Carella has certified that the Township hired six new police

officers and increased the outside employment rate from $55.00 per hour to $65.00 per hour based upon its understanding of the parties' agreement. Ms. Carella also certifies that the Charging Parties have not filed any grievances "with respect to the treatment of these officers as 'new hires' with respect to salary or any other term of employment as embodied in the MOA." See Carella Certification at ¶¶ 22-28.

We find that the parties' conduct regarding the disputed provisions is generally consistent with their respective positions and further demonstrates a genuine issue of material fact regarding the parties' intent leading up to - and after - the execution of the MOA.

Under these circumstances, we find that this matter is not ripe for summary judgment. Although the MOA is clear and unambiguous on its face, the facts in the record do not definitely demonstrate the parties' intent or whether an agreement was reached regarding the definition of "new hires." The parties' supporting certifications paint different pictures regarding the circumstances leading up to the execution of the MOA and the parties' conduct regarding the disputed provisions. Final resolution requires a thorough consideration of competing evidence, a task we cannot accomplish through a motion for summary judgment.

ORDER

PBA Locals 33 (Superiors) and 33 motion for summary judgment is denied. This matter is returned to the Hearing Examiner for further proceedings.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. Commissioner Jones abstained from consideration. Commissioner Wall recused himself.

ISSUED: January 26, 2017

Trenton, New Jersey