P.E.R.C. NO. 2017-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

Respondent,

-and- Docket No. CO-2016-216

PLAINFIELD FIRE OFFICERS
ASSOCIATION, LOCAL 207,

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the City in an unfair practice case alleging that it 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 failing to execute a written memorandum of agreement (MOA) regarding vacation spots, convention leaves, and emergency appointments, and by failing to negotiate in good faith. The Commission finds that there are genuine issues of material fact regarding whether the parties entered into a verbal agreement, and if so, whether the Association's draft MOA accurately reflects that verbal agreement.

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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PLAINFIELD FIRE OFFICERS
ASSOCIATION, LOCAL 207,

Charging Party.

Appearances:

For the Respondent, Ruderman, Horn & Esmerado, P.C. (Marc S. Ruderman, of counsel)

For the Charging Party, Law Offices of Craig S. Gumpel LLC (Craig Gumpel, of counsel)

DECISION

This case comes to us by way of a motion for summary judgment filed by the City of Plainfield (City) seeking dismissal of an unfair practice charge filed against it on April 13, 2016 by the Plainfield Fire Officers Association (FOA). The FOA alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (5) and (6)[1/] when it failed to execute a

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
(continued...)

written memorandum of agreement "regarding the implementation of agreed-upon terms pertaining to vacation spots, convention leave, and emergency appointments" and failed to negotiate in good faith.

On June 21, 2016, the City filed a statement of position, denying that there had been a meeting of the minds with regard to the memorandum of agreement and denying that it negotiated in bad faith. On August 11, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 16, the City filed an answer to the complaint, admitting some but not all of the allegations set forth in a rider to the unfair practice charge and reiterating the denials set forth in its position statement.

On January 3, 2017, the City filed its motion for summary judgment, supporting brief, and exhibits appended to the certification of its attorney. On January 27, 2017, the FOA filed its opposition brief along with exhibits appended to the certification of its attorney, and the certification of its President. The motion for summary judgment was referred to the Commission on January 31, 2017. N.J.A.C. 19:14-4.8(a).

1/ (...continued)
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."

We derive the undisputed facts from the rider to the unfair practice charge, the exhibits, and the certification of the FOA's President.[2/3/] The FOA is the exclusive representative of all uniformed fire officers employed by the City, excluding firefighers. The FOA and the City are parties to a collective negotiations agreement (CNA) covering the period January 1, 2014 through December 31, 2017.

On or about November 15, 2015, the FOA filed a grievance alleging that Special Order #15-37, entitled "Mixing of Time" and having an implementation date of January 1, 2016, violated the CNA. That order provides that fire personnel would no longer be permitted to mix vacation time with any other type of time off. The parties were unable to resolve the grievance, and on December 16, 2015, the FOA filed a Request for Submission of a Panel of Arbitrators with this agency.

On January 5, 2016 the City announced that it intended to make promotions to lieutenant, which would result in an

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2/ The City did not submit a certification from a person with personal knowledge as to the pertinent facts. N.J.A.C. 19:14-4.8(b). Its counsel's certification serves to furnish exhibits, the authenticity of which are not in dispute, and to advise that the FOA indicated at an exploratory conference on October 11, 2016 that it would not pursue its claim regarding emergency appointments. The City did not request leave, as permitted by N.J.A.C. 19:14-4.8(d), to file a reply to the certification of the FOA's President.

3/ The FOA's President served as its Vice President for 2 years before becoming President on January 1, 2017.

additional fire officer on each shift. Also on January 5, the FOA's legal counsel sent an email to the City's attorney requesting negotiations over the impact of the promotions on vacation spots per shift. The parties later agreed to meet on February 8 to "discuss/negotiate over a number of issues ... including mixed use of time off and vacation spots."

Special Order #16-03, which had an implementation date of February 1, 2016, concerned emergency appointments - i.e., the City's filling of fire officer vacancies by taking a lower ranking officer and placing him in a higher rank when it determined that a need to fill such a vacancy existed. On January 7, the FOA's counsel sent a letter to the City's counsel demanding that the City immediately cease and desist from making emergency appointments to fill in for scheduled absences.

On February 8, 2016 the parties met. In attendance for the FOA was its then-President, then-Vice President, and a negotiations team member. The City's attendants included its Business Administrator, the Director of Public Affairs and Safety (Director), and the Fire Chief. They agreed to resolve issues pertaining to the mixed use of time off, vacation spots, emergency appointments, and a new issue, convention leave.[4/] On

4/ This information comes from the rider to the charge with additional information from the certification of the FOA's President. However, in its brief, the FOA states that "the February meeting did not result in a 'meeting of the minds' (continued...)

February 16, the City's counsel sent a draft memorandum of agreement (MOA) to the FOA's counsel. The FOA rejected the draft MOA and its attorney sent an email and a revised MOA to the City, which the City rejected.[5/]

The parties met again on March 16, 2016. The attendants were the same as those at the February 8 meeting. The Director stated that he wanted the issues resolved at that meeting. At the conclusion of the meeting, the Director shook hands with the FOA's then-President and then-Vice President.

The parties dispute whether a final agreement was reached at the meeting. According to the FOA President, the parties verbally agreed at the meeting that the number of fire personnel allowed to take vacation each shift would remain at 5, with 3 spots for fire officers and 2 spots for firefighters, that administrative time and supervisory days would be converted to vacation leave, and that convention leave would not count toward the 3 fire officer vacation spots. The City maintains that there was no meeting of the minds.

On March 17, 2016, a draft MOA was sent by the FOA's counsel to the City's counsel. On March 18, the Fire Chief sent a

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4/ (...continued)
regarding a dispositive term."

5/ The FOA rider alleges that the email from the attorney indicates that the City's draft MOA did not "fully reflect the February 8, 2016 agreement." Neither party furnished a copy of the email.

memorandum to the Director stating as follows with regard to the March 17 draft MOA:

> This agreement needs to be fully vetted by my staff. I spoke with 2 of my senior officers (Battalion Chief Blake and Deputy Chief McCue) this morning and I agree with their recommendations, that we hold this memorandum in abeyance until we review the dollar amount it will have on the overtime budget.
>
> My concerns are:
> 1) The granting of an additional vacation day to the officers (3 slots all year round) will make staffing considerations worse.
> 2) What will be the dollar amount for overtime coverage for 365 days?
> 3) Will there be a demand from the Firefighters to have another vacation day slot as well?
> 4) How do we develop controls to avoid staffing shortages acceptable to both unions?
>
> Until we can answer these questions, my recommendation is to allow the mixing of days, rescind all orders that are being grieved by the unions that pertain to scheduling time off.

On March 24, the City's counsel sent a letter to the FOA's counsel stating as follows:

> Subsequent to our meeting, I met with my client to discuss the ramifications of such memorandum. Please be advised that the City is not in a position to sign the Memorandum of Agreement at this time. It needs to do further investigation to ascertain the ramifications of the Memorandum of Agreement.
>
> However, in the interim, as the City reviews its alternatives, it will rescind the memorandum concerning mixed use of vacation and other scheduled time off, which obviates the need for the arbitration hearing ... on May 4, 2016.

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) and N.J.A.C. 19:14-4.8(e). In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the 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).

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 issues in this case are (1) whether a verbal agreement was made by the parties at the March 16, 2016 meeting of their representatives and (2) if so, whether the draft MOA prepared by the FOA's attorney and sent on March 17, 2016 to the City's attorney accurately reflects the terms of the oral agreement. Whether a valid oral contract was made is "solely a matter of intent determined in large part by a credibility evaluation of witnesses." McBarron v. Kipling Woods L.L.C., 365 N.J. Super. 114, 117 (App. Div. 2004). "The cases are legion that caution against the use of summary judgment to decide a case that turns on the intent and credibility of the parties." Id. (citing, among other decisions, Judson, supra).

Among the factors to guide a determination of whether the parties intended to enter into a binding oral agreement are (1) the circumstances surrounding the transaction, (2) the nature of the transaction, (3) the relationship between the parties, (4) the parties' contemporaneous statements, and (5) the parties' prior dealings. Morton v. 4 Orchard Land Trust, 180 N.J. 118, 126 (2004). Of particular importance here, the only contemporaneous statement presented as to what was said at the March 16 meeting - that the Director stated that he wanted the issues resolved today - if credited, is insufficient to support a finding that the parties intended to enter into a verbal agreement. We deny the City's motion for summary judgment because the question of whether a verbal agreement was made turns on intent and credibility evaluations and the record lacks the parties' contemporaneous statements regarding their discussions and the terms of the alleged agreement entered at the March 16 meeting. Of course, the second issue of whether the FOA's draft MOA accurately reflects the parties' verbal agreement requires a determination that a verbal agreement was made at the meeting.

As an alternative to its argument that it did not refuse to sign a negotiated agreement, the City argues that negotiations generally over the number of vacation spots and

whether convention leave should count toward those spots would impermissibly interfere with the City's managerial prerogative to "determine staffing levels and limit the number of employees on leave when minimum staffing levels would be jeopardized, and to determine the number and type of fire officers who must be on duty to provide fire services."

It is well settled that a public employer has a non-negotiable managerial prerogative to determine the manning levels necessary for the efficient delivery of governmental services. Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1982). However, the scheduling of vacations and other time off is mandatorily negotiable so long as an agreed-upon system does not prevent an employer from fulfilling its manning levels. An employer may deny a requested vacation day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take a vacation day even though doing so would require it to pay overtime compensation to a replacement employee. Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996).

On this record we cannot conclude that this dispute concerns the managerial prerogative of the City being unable

to meet its staffing levels. While the March 18 memorandum from the Chief to the Director shows that the Chief was concerned about the impact of an additional vacation slot on staffing considerations as well as firefighters, it also shows that he was concerned about potential overtime costs. Moreover, the memorandum does not state that the City would be unable to meet its minimum staffing levels to provide the public services it is charged with delivering.

The City next argues that the complaint must be dismissed because it acted in accordance with the CNA and a general order pertaining to vacation scheduling, both with respect to the number of fire officers from each platoon on vacation at one time and the counting of officers on convention leave against the allotment of officers on vacation. The City's asserted compliance with the CNA does not foreclose a finding that it negotiated a verbal agreement altering the terms of the CNA and refused to reduce it to writing or to execute a written agreement memorializing the terms of the verbal agreement.

If the developed record supports such a finding, the City may establish that the terms of the agreement would significantly interfere with its managerial prerogatives in the area of staffing and deployment. The City exercised its managerial prerogative to promote fire personnel, which

resulted in an additional fire officer on each shift. The FOA requested negotiations over the impact of the decision because it resulted in more fire officers competing for the same number of vacation spots. Vacation leave is generally a mandatorily negotiable subject. Borough of Rutherford, supra. But we have found non-negotiable a provision requiring a public employer to maintain a certain ratio of firefighters to fire captains in emergencies, finding that it would significantly interfere with the employer's managerial prerogative to set overall staffing levels. North Hudson Regional Fire and Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000). See also City of Plainfield, P.E.R.C. No. 2015-40, 41 NJPER 272 (¶91 2014)(provision in parties' previous CNA requiring the deployment of a set number of officers and firefighters not mandatorily negotiable). On this record, we cannot conclude that changing the ratio of fire officers to firefighters on vacation per shift would significantly encroach on the City's managerial prerogative to set its overall staffing levels. Additional facts are necessary to make that determination.

ORDER

The City's motion for summary judgment is denied. The case is remanded for an evidentiary hearing.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed.

ISSUED: June 29, 2017

Trenton, New Jersey