P.E.R.C. NO. 2018-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Respondent,

-and- Docket No. CO-2016-251

NEW JERSEY CIVIL SERVICE ASSOCIATION,
CUMBERLAND COUNCIL 18,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's report and recommended decision granting Council 18's motion for summary judgment and denying the City's cross-motion. Council 18's charge alleged 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) and (5), by adopting ordinances that unilaterally reduced the maximum salary range of unit members in contravention of the parties' collective negotiations agreement. The Commission holds that by unilaterally reducing salary ranges for titles included within the negotiations unit, the City repudiated the parties' collective negotiations agreement and violated subsection 5.4a(5), and derivatively 5.4a(1), of the Act.

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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Appearances:

For the Respondent, Blaney & Karavan, P.C., attorneys (John R. Dominy, of counsel and on the brief)

For the Charging Party, O'Brien, Belland & Bushinsky, LLC, attorneys (Kevin D. Jarvis, of counsel and on the brief; David F. Watkins, Jr., of counsel and on the brief)

DECISION

On May 16, 2016, New Jersey Civil Service Association, Cumberland Council 18 (Council 18) filed an unfair practice charge against the City of Millville (City) alleging that the City violated subsections 5.4a(1) and (5)[1/] of the New Jersey

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 employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by adopting ordinances on November 16, 2015 and February 16, 2016 that unilaterally reduced salary ranges for unit members in contravention of the parties' CNA.

On August 4, 2016, the Director of Unfair Practices issued a complaint and notice of pre-hearing. On August 18, the City filed an answer. A pre-hearing conference was held on September 16. On November 15, Council 18 filed an amended unfair practice charge that included an ordinance adopted on April 5, 2016.

On November 15, 2016, Council 18 filed a motion for summary judgment.[2/] On November 28, the City filed opposition and a cross-motion for summary judgment. On December 9, Council 18 filed a reply brief. On December 13, the motion and cross-motion for summary judgment were referred to a Hearing Examiner for decision pursuant to N.J.A.C. 19:14-4.8(a).

On April 26, 2017, the Hearing Examiner issued a report and recommended decision [H.E. No. 2017-9, 43 NJPER 413 (¶114 2017)(H.E.)] concluding that the City violated subsections 5.4a(1) and (5) of the Act by adopting ordinances that unilaterally reduced the maximum salary range of unit members in contravention of the parties' CNA.

2/ Council 18's letter brief in support of its motion for summary judgment set forth a footnote in which it referenced its simultaneous filing of the amended charge.

On May 4, 2017, the City filed the following exceptions to the Hearing Examiner's report and recommended decision:

> Exception 1: In the section under "Appearances" on page 1, William G. Blaney, Esquire is incorrectly identified as the attorney on behalf of the City.
>
> Exception 2: In footnote 2 on the bottom of page 2, the Report correctly states that Council 18 amended its underlying unfair practice charge contemporaneously with the submission of its amended charge but offers no evidence that the underlying unfair practice charge was ordered or permitted to be amended.
>
> Exception 3: In the Section entitled "Analysis," the City excepts to paragraph 3 on page 8 through paragraph 1 on page 9 in its entirety in which the Report refers to the "express terms" of Article 6 of the parties' CNA.
>
> Exception 4: In the Section entitled "Analysis," the City excepts to paragraph 3 on page 9 in its entirety in which the Report refers to the fact that no unit members were negatively impacted by the City's adoption of the revised Salary Ordinance.

On May 26, 2017, Council 18 filed opposition to the City's exceptions.

We have reviewed the record. Except as supplemented or modified below in the summary of facts, we find that the Hearing Examiner's findings of fact (H.E. at 3-5) are supported by the record and we adopt them.

SUMMARY OF FACTS

Council 18 represents all full-time City employees except police officers, fire fighters, confidential employees, managerial executives, and supervisors, as well as all part-time City employees who work a full calendar year and at least 21 hours per week, excluding seasonal employees, summer employees, temporary emergency employees, and newly-hired provisional employees while working a test period. The City and Council 18 were parties to a collective negotiations agreement (CNA) in effect from January 1, 2015 through December 31, 2016.

Article 6 of the parties' expired CNA, entitled "Salary Job Guide," provides in pertinent part:

> The City shall supply to the Council a list of the job titles and salary ranges covered by this Contract with the understanding that the list of job titles and salary ranges does not prevent the governing body of the City from adopting a Salary Ordinance that may increase the salary range of a particular job title without the necessity of negotiating that change with the Union.

On November 16, 2015, the City adopted Ordinance No. 32-2015, which changed the salary range for Payroll Clerk from $20,000 - $51,234.26 to $30,000 - $40,500.

On February 16, 2016, the City adopted Ordinance No. 3-2016, which changed the salary range for Code Enforcement Officer from $20,000 - $50,054.13 to $20,000 - $40,000.

On April 5, 2016, the City adopted Ordinance No. 15-2016, which changed the salary range for Assistant Engineer from $20,000 - $80,075.95 to $50,000 - $72,900.

The City did not negotiate these changes in salary range with Council 18.[3/]

STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision is set forth in pertinent part at N.J.S.A. 52:14B-10(c):

> The head of the agency, upon a review of the record submitted by the [hearing officer], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . . , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness

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3/ The Hearing Examiner determined that two emails attached as exhibits to the City's opposition and cross-motion for summary judgment were not appropriate for consideration because they were not verified by certification. (H.E. at 5, n.5). Parties are required to support facts asserted in their briefs by submitting certifications based on personal knowledge. Here, however, the emails were from the City Clerk to Council 18 representatives, and there is no indication that Council 18 objected to the documents or raised an issue as to their authenticity or receipt. Under these circumstances, it would not have been inappropriate to consider the emails. See, N.J.A.C. 1:1-15.6 (any writing offered in evidence that has been disclosed to the other party at least 10 days before the hearing is presumed authentic, but where a genuine question of authenticity is raised, judge may accept submission of proof in the form of affidavit, certified document, or other similar proof no later than 10 days following the hearing).

> testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.[4/]

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).[5/] In determining whether summary judgment

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4/ N.J.A.C. 19:14-7.2 provides:

> The record shall consist of the charge and any amendments; notice of hearing; answer and any amendments; motions; rulings; orders; any official transcript of the hearing; and stipulations, exhibits, documentary evidence, and depositions admitted into evidence; together with the hearing examiner's report and recommended decision and any exceptions, cross-exceptions, and briefs and answering briefs in support of, or in opposition to, exceptions and cross-exceptions.

5/ 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

(continued...)

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). 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). We have also denied summary judgment when credibility determinations need to be made. See, e.g., New Jersey State (Corrections), H.E. No. 2014-9, 40 NJPER 534 (¶173 2014).

5/ (...continued)
relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). "[P]roof of actual interference, restraint or coercion is not necessary to make out a violation of N.J.S.A. 34:13A-5.4a(1). . . ." Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd, 10 NJPER 78 (¶15043 App. Div. 1983) (When a public employer "threatens an employee with dismissal in a deliberate attempt to restrain the employee's participation in protected activity, subsection 5.4(a)(1) is violated, regardless of whether the threatened employee is actually intimidated"). This provision will be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[r]efusing 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. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

ANALYSIS

The City's first exception pertains to a clerical error. While we acknowledge the discrepancy in H.E. No. 2017-9 and have made the appropriate change in the "Appearances" section of this decision, the parties are advised that clerical errors should be raised with the agency immediately – and informally – rather than by way of exceptions.

The City's second exception contends that the Hearing Examiner did not specify whether "she permitted or ordered" the complaint to be amended as a result of Council 18's amended unfair practice charge.[6/] N.J.A.C. 19:14-1.5(a) provides that

6/ Commission regulations related to the amendment of unfair practice charges are similar, but not identical, to other New Jersey forums. See, e.g., R. 4:9-1 (after a responsive pleading has been served, "a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice"); R. 4:9-2 ("amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to (continued...)

"[a]fter a complaint issues, any proposed amendment shall be filed with the hearing examiner." N.J.A.C. 19:14-2.2(a) provides that "any complaint may be amended by the hearing examiner to conform to the allegations set forth in any amended charge filed pursuant to N.J.A.C. 19:14-1.5(a)." N.J.A.C. 19:14-6.3(a)(8) authorizes a hearing examiner to "[d]ispose of procedural requests, motions, or similar matters, including motions . . . to amend pleadings."

Nothing in the record explicitly indicates whether the Hearing Examiner "permitted or ordered" the complaint to be amended by Council 18's amended charge or whether the Hearing Examiner granted the Charging Party leave to amend its charge. However, the recommended decision identifies the City's position regarding the amendment, notes that the Hearing Examiner held additional telephone conferences in an effort to resolve this matter, as suggested by the City, and references pertinent regulations regarding unfair practice charge amendments. See, City's November 28, 2016 Br. at 1-5. (H.E. at 2-3, n.3)

6/ (...continued)
raise these issues may be made upon motion of any party at any time, even after judgment"); N.J.A.C. 1:1-6.2(a) ("Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice").

While our regulations contemplate an application for leave to amend as well as a ruling upon the motion, there is no substantive difference between Council 18's original and amended unfair practice charges – both allege 5.4a(1) and (5) violations based upon the City's adoption of ordinances that unilaterally reduced salary ranges for unit members, the former with respect to ordinances adopted in November 2015 and February 2016, the latter with respect to an ordinance adopted in April 2016. Cf. R. 4:9-4 ("[o]n a motion by a party the court may, upon reasonable notice and on terms, permit that party to serve a supplemental pleading setting forth transactions or occurrences which took place after the date of the pleading sought to be supplemented"). While it would have been better practice to promptly notify the parties whether the amendment was permitted, the City has failed to demonstrate any undue prejudice as a result of the Hearing Examiner's oversight or as a result of the amendment. Cf. N.J.A.C. 1:1-6.2(a) (pleadings may be amended "when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice"). Accordingly, we reject this exception.

The City's third exception claims that Article 6 of the parties' expired CNA is ambiguous and that "a mere breach of contract . . . cannot amount to an unfair practice." The City's

fourth exception asserts that the Hearing Examiner's report is advisory in nature given that no unit members were impacted when the salary ordinances were adopted. We reject these exceptions.

Although the parties' expired CNA does not include a salary guide, it incorporates by reference salary ranges for job titles and only specifies that "the City . . . may increase the salary range of a particular job title without negotiating that change with the union." See CNA, Art. 6 (emphasis added). The City does not dispute that it failed to negotiate with Council 18 before it adopted ordinances that unilaterally reduced the maximum salary for the three titles within the negotiations unit. See, City's May 4, 2017 Br. at 1-4. (H.E. at 7)

The Commission has held that unilaterally changing salary ranges for titles included within a negotiations unit is a repudiation of the parties' CNA and a violation of subsection 5.4a(5), and derivatively, 5.4a(1) of the Act. City of Union City, H.E. No. 90-8, 15 NJPER 537, 540 (¶20222 1989), adopted P.E.R.C. No. 90-37, 15 NJPER 626 (¶20262 1989). We find that City of Union City is analogous to this matter and directly addresses the City's third and fourth exceptions:

> -the parties' CNA incorporated by reference a salary schedule for each job title in the negotiations unit and the salary schedule was set forth in the city's salary ordinance (15 NJPER at 538);
>
> -it was of no consequence that a position was vacant when the city changed the salary range

> given that the union clearly represented the position, even if no incumbent was in the title (15 NJPER at 539);
>
> -when a CNA sets a particular term and condition of employment, the employer has the burden to initiate negotiations with the majority representative over a proposed change before implementing the change and failure to engage in such negotiations violates the Act (15 NJPER at 540); and
>
> -contract repudiations or unilateral changes in terms and conditions of employment during successor negotiations are not considered mere breaches of contract that should be dismissed under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) (15 NJPER at 627).

Accordingly, we adopt the Hearing Examiner's recommended conclusions of law.

ORDER

The City of Millville is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the maximum salary of certain titles in the negotiations unit.

2. Refusing to negotiate with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by unilaterally reducing the maximum salary of certain titles in the negotiations unit.

B. Take the following affirmative action:

1. Rescind Ordinance Nos. 32-2015, 3-2016, and 15-2016 to the extent they reduce the maximum salary range of the titles of Payroll Clerk, Code Enforcement Officer, and Assistant Engineer.

2. Restore the maximum salary range of the titles of Payroll Clerk, Code Enforcement Officer, and Assistant Engineer to their respective ranges existing prior to the adoption of Ordinance Nos. 32-2015, 3-2016, and 15-2016.

3. 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.

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: August 17, 2017

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 the rights guaranteed to them by the Act and from refusing to negotiate with a majority representative of employees in the appropriate unit concerning terms and conditions of employment in that unit, particularly by unilaterally reducing the maximum salary of certain titles in the negotiations unit.

WE WILL rescind Ordinance Nos. 32-2015, 3-2016, and 15-2016 to the extent they reduce the maximum salary of the positions of Payroll Clerk, Code Enforcement Officer, and Assistant Engineer and restore the maximum salary of those titles to the maximum range that existed prior to the adoption of Ordinance Nos. 32-2015, 3-2016, and 15-2016.

Docket No. CO-2016-251

City of Millville
(Public Employer)

Date: _____ 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, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830