P.E.R.C. NO. 2018-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and- Docket No. CO-2016-288

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 560,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion and cross-motion for summary judgment filed by Local 560 and the Township, respectively, in an unfair practice case. Local 560's charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5), by unilaterally changing the timing of paychecks from weekly to bi-weekly. The Commission finds that there are genuine issues of material fact regarding whether the Township sought to negotiate before making the change and whether Local 560 waived negotiations.

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Appearances:

For the Respondent, Fox Rothschild, LLP, attorneys (Kenneth A. Rosenberg, of counsel and on the briefs; Justin Schwann, on the briefs)

For the Charging Party, Cohen Leder Montalbano & Connaughton, LLC, attorneys (Bruce D. Leder, of counsel; Matthew G. Connaughton and Brady M. Connaughton, on the briefs)

DECISION

On June 27, 2016, the International Brotherhood of Teamsters, Local 560 (Local 560) filed an unfair practice charge against the Township of West Orange (Township). The charge alleges that the Township violated subsections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)[1/], by unilaterally changing the timing of paychecks

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 (continued...)

for Local 560 unit members from weekly to bi-weekly. On March 16, 2017, a Complaint and Notice of Hearing issued.

On May 16, 2017, Local 560 filed a motion for summary judgment supported by a brief, exhibits, and the affidavits of three Local 560 members.[2/] On June 5, the Township filed a brief opposing Local 560's motion and a cross-motion for summary judgment. The Township's cross-motion was supported by a brief, exhibits, and the certifications of John K. Sayers, Business Administrator, and John Gross, Director of Finance and Chief Financial Officer. On June 27, Local 560 filed a brief opposing the cross-motion, supported by exhibits and the certification of its counsel. On July 11, the Township filed a reply brief. On July 20, the Chair referred the motions to the full Commission. N.J.A.C. 19:14-4.8(a).

FACTS

Local 560 represents a communications operators unit and a public works supervisors unit of Township employees. The Township and Local 560 are parties to separate collective

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1/ (...continued)
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."

2/ Local 560's motion was accompanied by the affidavits of Harold Welsh, Business Agent, Christopher Babinski, Shop Steward of the communicators' unit, and Louis Piserchio, Shop Steward of the supervisors' unit.

negotiations agreements (CNA) for each unit, both effective January 1, 2014 through December 31, 2017. The CNAs are silent regarding pay periods and timing of pay.

Prior to January 1, 2016, all Local 560 members in both units received weekly paychecks. Over the past thirty-one years, the only pay period longer than one week was the pay period between the last paycheck in December and the first paycheck in January. The longer pay period, ranging from eight to thirteen days, was established to avoid having fifty-three pay periods in the new year, rather than fifty-two. These pay period adjustments were made for single year-end transitional paychecks in twenty-three of the past thirty-one years, after which the regular weekly pay periods would resume.

By memorandum dated December 10, 2015, Gross informed all employees that beginning in January 2016, the Township would change from a weekly to bi-weekly payroll to avoid the need to continually change the pay date each year when there would otherwise be fifty-three paydays. He also noted that it would be necessary to again adjust the end-of-year pay period in 2021. The letter did not request consent for the change or negotiations with employee representatives.

Gross certifies that the Township changed the payroll period to reduce the administrative costs of maintaining a weekly pay period. He also certifies that the City faced a budget deficit

of $8,400,000 for the start of the 2016 fiscal year and that the Town would likely request layoffs or eliminate positions through attrition if it could not maintain the payroll change.

Sayers certifies that on December 8, 2015, he held a roundtable meeting with all Township employee representatives, including Local 560, to discuss the payroll change. He certifies that he previously mentioned the payroll change to some representatives, including Walsh. He certifies that at the December 8 meeting he explained how, given the Township's budget deficit, the change in the length of pay periods would allow the Township to prevent layoffs. He certifies that he advised Local 560 representatives that on December 15, 2015, the Township Council would consider a resolution authorizing the pay period change, so the Township needed any comments or requests by that date. He certifies that "IBT did not make a request to discuss or negotiate the proposed change after the roundtable meeting or before the change was implemented."

On December 15, 2015, the Township Council approved a resolution authorizing "the transition from weekly payment to bi-weekly payment of salaries to all employees, effective for all payroll periods subsequent to December 25, 2015." Local 560 unit members received their first bi-weekly paycheck on January 8, 2016.

Welsh certifies that prior to December 15, 2015, he "had no discussions with any representative of the Township of West Orange proposing to change from weekly salary payments." Welsh also certifies that he was not "given prior notice that at its Council meeting on December 15, 2015, the Township of West Orange was considering changing to a bi-weekly payment of salaries." Welsh certifies that he learned of the change after December 15, 2015. Walsh's certification does not mention Gross's letter to employees dated December 10, 2015.

Babinski and Piserchio certify that effective January 1, 2016, they were no longer paid weekly. Local 560's counsel certifies that he sent an email to Sayers on January 14, 2016 telling him that pay periods are mandatorily negotiable and that he would like to speak to Sayers before filing an unfair practice charge and/or grievance over the issue.

On March 9, 2016, Local 560's counsel and Welsh met with Sayers to discuss the pay period change but were unable to resolve the issue. On June 15, Local 560's counsel sent an email to Sayers proposing that if the Township gave unit members two more personal days, Local 560 would not file an unfair practice charge. On June 27, the unfair practice charge was filed.

STANDARD OF REVIEW

Summary judgment will be granted if there is no genuine issue of material fact and the movant is entitled to relief as a

matter of law. N.J.A.C. 19:14-4.8(e); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also North Hudson Regional Fire and Rescue and North Hudson Firefighters Ass'n, P.E.R.C. No. 2013-83, 40 NJPER 32 (¶13 2013), aff'd, 41 NJPER 353 (¶112 App. Div. 2015). In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we 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." Brill at 540.

ANALYSIS

Applying the negotiability test required by Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Commission has consistently held that the timing of paychecks is mandatorily negotiable and that changing the timing without first negotiating with the affected employees' majority representative violates subsection 5.4a(5) and, derivatively, 5.4a(1) of the Act. See, e.g., Brick Bd. of Ed., P.E.R.C. No. 2003-25, 28 NJPER 436 (¶33160 2002) (July payday delayed two days for 12-month employees and number of September paydays reduced for 10-month employees from three to two); Borough of Fairview, P.E.R.C. No. 97-152, 23 NJPER 398 (¶28183 1997) (pay period changed from weekly to bi-weekly); and

Township of Fairfield, P.E.R.C. No. 97-60, 23 NJPER 13 (¶28013 1996) (pay period changed from weekly to bi-weekly).

In Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985), the Commission stated that to establish a violation of subsection 5.4a(5) of the Act, the charging party must prove (1) a change; (2) in a term or condition of employment; (3) without negotiations, but that the employer may defeat such a claim if it has a managerial prerogative or contractual right to make the change. The Commission also ruled that a waiver of the right under N.J.S.A. 34:13A-5.3 to negotiate before new or modified rules governing working conditions are established will not be found based upon a contract unless it clearly and unequivocally authorizes a unilateral change.

Citing Elmwood Park Bd. of Ed., the Commission in South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd, NJPER Supp.2d 170 (¶149 App. Div. 1987), said a change in terms and conditions of employment imposed without negotiations violates subsection 5.4a(5) unless the employer can prove that the employee representative waived its right to negotiate. It gave these examples of a waiver:

> For example, if the contract explicitly allows the employer to make the changes, the employee representative has waived any right to negotiate the changes during the term of the contract. In addition, if the employee organization has been apprised of proposed changes in advance and declines the opportunity to negotiate, or has routinely

> permitted the employer to make similar changes in the past, it may have waived its right to negotiate those changes.

Employment conditions may arise not only from the parties' collective negotiations agreement, but also through an established practice not enunciated in the parties' agreement. An established practice arises "from the mutual consent of the parties, implied from their conduct." Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part, 180 N.J. Super. 440 (App. Div. 1981).

Here, the Township does not argue that it had a managerial prerogative or contractual right to unilaterally change from weekly to bi-weekly pay.[3/] Rather, it argues that Local 560's charge is untimely; Local 560 waived any right to negotiate by (1) failing to request same after employees were notified of the intended change in the payment schedule and (2) by acquiescing in the Township's thirty-one year practice of changing the timing of pay; and the Township's financial emergency justified the unilateral change. With regard to Local 560's motion, the Township asserts that it must be denied because there are genuine

3/ In its answer to the complaint, the Township alleged in general terms that it had a managerial prerogative to act; it did not mention or develop that defense in its motion papers. The Township's argument that its fiscal problems justified the payroll change was raised in defense of Local 560's subsection 5.4a(1) claim.

issues of material fact concerning when Local 560 first became aware of the Township's intention to change pay periods.

Turning first to the untimeliness defense, N.J.S.A. 34:13A-5.4(c) provides that absent circumstances not relevant here, "no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge." In this case, the alleged unfair practice is the unilateral change in employment conditions (that is, the change in the frequency of payment without prior negotiations). Local 560 filed the charge on June 27, 2016. Therefore, for the charge to be timely, the event that triggered the running of the limitations period must have occurred on or after December 27, 2015. The charge would be untimely if the triggering event happened before December 27.

The Township argues that the statute was triggered on December 15, 2015, when the Township passed the resolution authorizing the change, or on December 26, 2015, the first day of the new payroll period. Local 560 disputes that the charge is untimely, arguing that the operative date is January 14, 2016, when Walsh notified its counsel of the change.

We reject both arguments and find that the triggering event was the first date on which employees failed to receive a weekly paycheck because of the change to bi-weekly pay. That would have happened after December 27, 2015 given that employees received their final weekly paycheck on Thursday, December 24, 2015 with

the pay period ending the next day. If the Township had not changed from weekly to bi-weekly pay periods, the next earliest payday, or check distribution date, would have been Thursday, December 31. Alternatively, the next earliest payday might have been even later if, as per its past practice, the Township lengthened the pay period between the last pay in December and the first pay in January to ensure no more than fifty-two paydays in 2016. Therefore, we find that the charge is timely.

Next, we find that Local 560's acquiescence in the Township's unilateral setting of end-of-year pay periods did not also constitute a waiver with regard to the change to biweekly payments. It is undisputed that Local 560 has not challenged the Township's setting of single end-of-year pay periods in excess of one week when necessary to maintain fifty-two pay periods in the new year. However, the Township always immediately resumed regular weekly pay periods following the single lengthened pay period. The Township's 2016 change was significantly different because it instituted bi-weekly pay periods for the first time and maintained such extended pay periods for all remaining pay periods in the year. Accordingly, there was no waiver by acquiescence.

We next turn to the Township's waiver defense based upon Local 560's failure to seek negotiations until after its counsel intervened in mid-January 2016. The Township argues that Local

560 was obligated to demand negotiations once it learned, or should have known "that the change would be occurring." In response, Local 560 denies having knowledge that the change would occur until employees received the January 8, 2016 paycheck.[4/]

It is undisputed that representatives from Local 560 attended Sayers' December 8, 2015 meeting at which the payroll change was discussed and that Gross sent all employees a memorandum dated December 10, 2015 announcing the payroll change. Although nothing in the memorandum suggested that the change was merely a proposal or invited negotiations, there are disputed issues of material fact concerning the December 8 meeting and whether Sayers previously spoke to Welsh or another representative of Local 560 regarding the proposed change. The record is undeveloped regarding whether the Township's December 8 meeting with Local 560 was merely informational and meant to announce an impending decision that had already been made, or if the meeting was an attempt to negotiate or seek consent to the change. The specific facts of what was actually said by the parties during the December 8 meeting and during any earlier discussions may be pertinent to determining whether Local 560 waived its right to negotiate. Accordingly, finding genuine

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4/ This information is not in any of the certifications submitted on behalf of Local 560. Only Walsh's certification addresses when he discovered the change. He certifies that it was after December 15, 2015.

issues of material fact on the issue of whether Local 560 waived negotiations, we deny both motions for summary judgment.

Finally, we reject the Township's claim that its budgetary problems provided a substantial and legitimate business justification to make the payroll change unilaterally. A public employer's economic crisis does not in and of itself permit the employer to forego negotiations on an issue that is otherwise mandatorily negotiable. North Hudson Reg'l Fire and Rescue, supra, 41 NJPER 353 (¶112 App. Div. 2015) (public employer's ability to pay is not material to whether it engaged in an unfair practice by failing to negotiate in good faith and unilaterally changing terms and conditions of employment).

ORDER

The motion and cross-motion for summary judgment are 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 did not vote.

ISSUED: January 25, 2018

Trenton, New Jersey