NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3163-21

NORTH BERGEN MUNICIPAL
UTILITIES AUTHORITY,

Plaintiff-Appellant,

v.

I.B.T.C.W.H.A. LOCAL 125,

Defendant-Respondent.

APPROVED FOR PUBLICATION
February 8, 2023
APPELLATE DIVISION

Argued on December 7, 2022 – Decided February 8, 2023

Before Judges Currier, Bishop-Thompson and Puglisi.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C-000025-22.

Stephen J. Edelstein argued the cause for appellant (Weiner Law Group, LLP, attorneys; Stephen J. Edelstein, of counsel and on the briefs; Dustin F. Glass, on the briefs).

Matthew G. Connaughton argued the cause for respondent (Cohen, Leder, Montalbano & Connaughton, LLC, attorneys; Matthew G. Connaughton, on the brief).

The opinion of the court was delivered by

BISHOP-THOMPSON, J.A.D. (temporarily assigned).

In this appeal, we are asked to decide whether a union grievance based on language from an expired collective negotiations agreement (CNA) is arbitrable when a successor CNA clearly and unambiguously addresses the issue raised in the grievance. The trial court ordered the parties to arbitrate the grievance. Because the union's pending grievance is not within the scope of the arbitration clause of the successor CNA, we reverse.

Plaintiff North Bergen Municipal Utilities Authority (the Authority) challenges the April 29, 2022 Chancery Division order denying its request to permanently restrain a pending grievance arbitration with the Public Employment Relations Commission (PERC). The Authority also challenges the provision of the June 10, 2022 order denying reconsideration.

The Authority and defendant I.T.C.W.H.A. Local 125 (the Union) are parties to a CNA effective January 1, 2020 to December 31, 2023. The prior CNA began on January 1, 2016 and expired on December 31, 2019. The Authority, a public employer within the meaning of the New Jersey Employer-Employee Relations Act (the Act), N.J.S.A. 34:13A-1 to -64, is responsible for the collection and transport of household waste and recyclable material for the Township of North Bergen. The Union is the exclusive representative of

thirty-five sanitation and recycling drivers and loaders employed by the Authority.

We glean the following facts from the record. The parties were engaged in negotiations for a new contract when the COVID-19 pandemic struck. On March 9, 2020, in Executive Order No. 103 (EO103), Governor Murphy declared COVID-19 a public health-related State of Emergency (SOE). EO103 declared it was essential that State and local governments provide "flexibility" with their work rules to ensure the "continuous delivery" of State and local services performed by those governments and their employees. The SOE remained in effect for approximately twenty-four months.

Article VI of the expired CNA, entitled "Overtime," provided in paragraph H that "[c]ompensation for work performed during a State of Emergency shall be at two-and one-half times the [e]mployees hourly rate of pay for all hours worked." Because of the declared COVID-19 SOE, the Union filed a grievance and demanded that all employees covered by the expired CNA be paid at two and a half times their regular rate of pay for all hours worked outside their normal work hours commencing on March 9, 2020. The Union contended the Authority employees covered under the Act were designated as "essential" employees during the entirety of the COVID-19 pandemic.

The Authority rejected the Union's demand and asserted it was "beyond the scope" of the expired CNA. The Authority asserted the provision was added after the occurrence of Superstorm Sandy and paragraph H was "intended to refer only to [a] weather-related [SOE]." The Authority contended if the Union's demand was met, it would "change the [Authority's] monthly payroll for the covered employees from approximately $83,416 to approximately $208,540 for the same services, an unabsorbable increase of approximately $125,000 each month." The Authority further claimed "[t]hrough January . . . 2022, that demand, if implemented, would have increased the [Authority's] labor cost for covered employees by approximately $2.8 million."

Thereafter, the Union submitted the SOE grievance to binding arbitration through PERC. Although the parties continued negotiations towards a successor CNA, they could not reach an agreement on the terms as a result of the pending grievance. In accordance with PERC's negotiation impasse procedures, the parties proceeded to mediation with a PERC appointed mediator. Mediation proved to be likewise unsuccessful, and the parties then proceeded to the terminal step of fact-finding.

A fact-finding hearing took place on May 14, 2021 pursuant to N.J.A.C. 19:12-4.3. The parties waived testimony and relied upon their submissions

and arguments. They agreed paragraph H was added after Superstorm Sandy "devastated" New Jersey and placed a "hardship on Union members required to work outdoors." Although the parties agreed on most economic terms and contract duration, the primary obstacle to reaching a successor agreement was the definition of SOE.

The Authority presented its "last, best and final" proposal which limited SOE pay to weather-related events declared by the Governor. The Union remained entrenched in its position opposing any change to the language in the expired CNA. After considering the parties' proposals and sporadic negotiations, the fact-finder issued a Fact-Finder's Report and Recommendations (Report) on October 6, 2021. In the Report, he concluded the Authority's "last, best and final" proposal was "more reasonable than that of the Union." The fact-finder recommended "the Authority's proposal [regarding] the definition of State of Emergency be adopted and made retroactive to January 1, 2020." He explained:

> I recommend that the definition of State of Emergency be limited to weather-related events as declared by the Governor. I recognize the [c]ontract does not contain this specific definition, however, I conclude that the [p]arties could not have contemplated a State of Emergency lasting well more than a year.

He further concluded, "[t]o accept the Union's argument that the phrase 'State of Emergency' includes non-weather-related emergencies 'would lead to harsh,

absurd, or nonsensical results, while the [Authority's more plausible position] would lead to [a more] just and reasonable result.'" Consequently, the fact-finder recommended the successor CNA be amended to read:

> Compensation for work performed during weather-related State of Emergency as declared by the Governor (SOE) shall be paid as follows: only employees specifically assigned by the Superintendent (or his designee) to work weather-related duties during that SOE that occurs during regular work hours shall receive double time and one half, if the weather-related duties occurring during the SOE continue for four consecutive hours. In such event, the double time and one-half rate shall be retroactive to the start of the shift applied to those employees actively engaged in weather-related duties (for four (4) hours during their regular work[]day). If employees are not expressly assigned to weather-related duties (during weather events occurring during regular work hours) they shall receive their regular pay. Weather[-]related duties performed before or after the regular work[]day shall be paid at double time and one-half.

In recognizing the pending grievance, the fact-finder further recommended the Authority provide each Union member with a one-time payment. He proposed, "in return for withdrawing the contract grievance and the resolution of any other litigation related to the [SOE], that each member of the bargaining unit be paid an additional one[-]time payment of five-hundred dollars ($500.00), for an approximate total cost of seventeen thousand five hundred dollars ($17,500)." Lastly, he stated all previously agreed upon terms be included in a successor agreement.

Following receipt of the Report, the Authority attempted to meet with the Union pursuant to N.J.A.C. 19:12-4.3(g)[1] to exchange positions to reach a successor CNA. The Union, however, "refused" to meet. Consequently, the Authority adopted a resolution on November 10, 2021, which accepted and implemented all of the fact-finder's recommendations into a successor CNA. The Union conceded the successor CNA reflected the language as proposed in the Report. The Authority subsequently issued the $500 payments to Union employees, which were cashed.

In February 2022, the Authority filed an Order to Show Cause to restrain the grievance arbitration. The Authority argued paragraph H, as relied upon by the Union, was superseded by the successor CNA once the Report was adopted and implemented. Thus, the expired paragraph H terminated by operation of law.

In April 2022, following oral argument, the Chancery Division judge denied the Authority's request to permanently restrain arbitration. The judge determined the grievance arbitration should be conducted on the SOE pay, finding "the terms of the expired CNA are still out there . . . and it doesn't mean [the Authority] . . . get[s] to stop paying [Union employees] and

[1] Subparagraph (g) requires the parties to meet "within five days after receipt of the fact-finder's findings of fact and recommended terms of settlement, to exchange statements of position and try to reach an agreement."

unilaterally write a new contract. So[,] I believe it's still arbitrable." The judge further concluded "a new contract was not created" despite the employees accepting the additional $500 from the Authority.

The Authority moved for reconsideration. On June 10, 2022, a different Chancery Division judge rendered an oral opinion, stating in relevant part:

> [T]he court acknowledges an error in the application of the law such that a new CNA was created in the wake of the [f]act [f]inding. Neither the creation of the new CNA nor the acceptance of the individual $500 payments extinguishes the right of [d]efendant[,] [the Union][,] to grieve the State of Emergency pay rate and that shall proceed to arbitration.

Accordingly, the judge granted the motion for reconsideration in part but denied the restraint on arbitration. The judge also agreed to stay the grievance arbitration pending appeal.

On appeal, the Authority presents a single issue for our consideration: whether the Union's SOE grievance is within the scope of the arbitration clause in the successor 2020-2023 CNA to warrant a permanent restraint on arbitration. The Union contends this is not an issue of "contract interpretation" and the Authority is "attempting to relitigate the Chancery Division's conclusion." The Union also contends both the Authority's Order to Show Cause and motion for reconsideration "advanced arguments separate and apart from simple 'substantive arbitrability.'"

Generally, a trial court's decision pertaining to injunctive relief is reviewed for an abuse of discretion. Stoney v. Maple Shade Twp., 426 N.J. Super. 297, 307 (App. Div. 2012). However, appellate review is de novo where the disputed issue relating to the injunctive relief is a question of law. Ibid. We consider the factual record in the light most favorable to the non-moving party and accord no special deference to the trial court's resolution of purely legal questions. See Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010).

Here, the Union's grievance is grounded solely on the SOE language from the expired CNA, which was superseded by the successor CNA. The Union's grievance presents a substantive arbitrable issue and not a contract interpretation issue. See Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489, 496-97 (2007) ("[I]f the question to be decided is whether the particular grievance is within the scope of the arbitration clause specifying what the parties have agreed to arbitrate, then it is a matter of substantive arbitrability for a court to decide." (internal quotation marks omitted)).

We turn then to a consideration of whether the court erred in requiring arbitration of the grievance after a successor CNA was in place, limiting the Union employees' pay to a "weather-related" emergency.

Pursuant to N.J.S.A. 34:13A-5.4e, PERC is required to adopt rules to regulate the time of commencement of negotiations and to institute impasse procedures so that there will be a full opportunity for negotiations and the resolution of impasses prior to required budget submission dates. Under these statutory obligations, PERC establishes impasse procedures for a successor contract. See N.J.A.C. 19:12-4.1. Further, N.J.S.A. 34:13A-6(b) provides that whenever negotiations between a public employer and exclusive representative concerning terms and conditions of employment reach an impasse, PERC is empowered upon the request of either party to provide mediation to effect a voluntary resolution of the impasse, and, if necessary, to invoke fact-finding.

We find the parties acted in accordance with N.J.S.A. 34:13A-5.3 and negotiated terms and conditions of a successor CNA in good faith. We are also mindful neither party has an obligation to concede their proposals. We further find pursuant to N.J.A.C. 19:12-4.1, the parties utilized PERC's impasse procedures when a successor agreement was not reached.

Guided by PERC's statutory purpose and regulations, we consider PERC's principles that a public employer may act unilaterally to change terms and conditions of employment if it has negotiated in good faith, exhausted PERC's impasse procedures of mediation and fact-finding and reached a genuine impasse, the employer can implement its last best offer. See N.J.S.A.

34:13A-5.4(a)(1) and (5) (prohibiting public employers from "[i]nterfering with, restraining, or coercing employees in the exercise of the rights guaranteed" by the Act and 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 Union employees).

Having reviewed the record and the applicable legal principles, we find the judge erred in denying the Authority's motions to restrain arbitration. Here, in accordance with the Act and regulations, the Authority implemented the last best offer incorporated in the Report. N.J.S.A. 34:13A-33 We also find that Article VI, paragraph H as set forth in the parties' successor CNA is clear and unambiguous. It states "[c]ompensation for work performed during weather-related State of Emergency as declared by the Governor (SOE) shall be paid as follows: only employees specifically assigned by the Superintendent (or his designee) to work weather-related duties." (emphasis added). The contract language is then consistent—it speaks in terms of the pay calculations based on the start time, weather duration, employee shift assignment, and shift duration. The successor CNA effectively limited the SOE to weather-related events, contrary to the Union's interpretation which is the gravamen of the grievance. On its face, the March 2020 grievance regarding SOE pay is not covered by the 2020-2023 CNA. Thus, the Union

may only arbitrate a grievance pertaining to a weather-related emergency for the specific contract term from January 1, 2020 to December 31, 2023.

We, therefore, hold that the grievance between the parties is not covered by the arbitration clause of the 2020-2023 CNA. Accordingly, the grievance arbitration is restrained.

Reversed. We remand to the trial court to vacate the stay. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION