

D.U.P. NO. 2022-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

CITY OF LINDEN,

Respondent,

-and-

Docket No. CO-2021-223

IBT LOCAL 125,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by IBT Local 125 against the City of Linden. The charge alleges that the City violated section 5.4a(1), (3), (5), and (6) of the New Jersey Employer-Employee Relations Act (Act) when it failed to provide Local 125 with an integrated contract, and when the Mayor issued a memo to employees explaining the reason for the delay in processing retroactive payments was due to the COVID-19 virus, and in doing so, violated HIPAA laws and placed the two employees responsible for processing those payments, "in the cross hairs of other employees" and subjected them to harassment. Local 125 withdrew the failure to provide an integrated contract allegation, and the Director found that no facts exist to show that the memo violated HIPAA laws. The Director further found that any harassment experienced by employees could not be attributed to the Mayor's memo.

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Appearances:

For the Respondent,
(Allan Roth, Esq.)

For the Charging Party,
Oxfeld Cohen, P.C., attorneys
(Randi Doner April, of counsel)

REFUSAL TO ISSUE COMPLAINT

On April 16, 2021, IBT Local 125 (Union or Local 125) filed an unfair practice charge against the City of Linden (City). The charge alleges a violation of N.J.S.A. 34:13A-5.4(a) (1), (3), (5), and (6) of the New Jersey Employer-Employee Relations Act (Act).^{1/} Count one of the Union's charge alleges that the City

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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
(continued...)

violated the Act, when, on February 25, 2021, the Mayor issued a memo to employees explaining that the reason for the delay in processing retroactive payments was due to the COVID-19 virus, and in so doing, it violated HIPAA laws and placed Theresa Vitale (Vitale) and Tanya Calenicoff (Calenicoff), two unit employees responsible for processing those payments, "in the cross-hairs of other employees" and subjected them to harassment. Count two of the Union's charge alleges that the City failed to provide the Union with an integrated collective negotiations agreement. This count was withdrawn by the Union on July 29, 2021.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent.

N.J.S.A. 34:13A-5.4; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint.

N.J.A.C. 19:14-2.3. Here, I find that the complaint issuance standard has not been met. I find the following facts.

Vitale and Calenicoff work in the finance department at the City of Linden, and according to the Union, both are outspoken members of Local 125. Vitale has previously served on the Union's negotiating team. For the past year, one of Vitale's and

1/ (...continued)
majority representative. (6) Refusing to reduce a negotiated agreement to writing and sign such agreement."

Calenicoff's primary duties was to process retroactive payments owed to City employees. At the beginning of the pandemic, on or about March 15 or 16, 2020, Vitale and Calenicoff were informed that they could work remotely. However, on March 18, 2020, the City informed them that they were "essential employees." Vitale requested and was denied intermittent leave, while other employees' requests were granted. Calenicoff never requested leave but it is alleged that she was constantly called in on her time off and was never provided compensatory time-off. Vitale and Calenicoff were provided flexible work time, but it was allegedly and arbitrarily taken away. The Union allegedly filed multiple grievances over these issues.

On or about February 25, 2021, Mayor Derek Armstead issued a memo attached to every employee's paycheck. The memo provided in a pertinent part:

I have met with the Chief Financial Officer and her staff and expressed my concerns about the timeliness of the payment[s] that are still due several of our [u]nions. She had apologized extensively for the delay however, it was due to her staff and Department being plagued by illness due to the COVID-19 virus. The office has been seriously handicapped since March of 2020. Employees were out and illnesses hit extensively. Key employees who work on the payroll, pension, and retro were out due to the COVID pandemic.

The Union alleges that this memo informed City employees that Vitale and Calenicoff may have had COVID-19, in violation of HIPAA laws and of personnel policy Article 17 that provides:

"medical information should be treated confidentially." The Union also alleges that the memorandum subjected them to unspecified harassment by other City employees that violated municipal personnel policy Article 32, which prohibits making threatening remarks. Vitale and Calenicoff each filed a complaint with the City's Office of Personnel, claiming harassment and an unsafe working environment.

N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

. . . that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of stale claims, and cautioned that it would consider the circumstances of individual cases. Id. at 337-338. The Court noted that it would look to equitable considerations in deciding whether a charging party slept on its rights.

The Union filed the instant charge on April 16, 2021. Any alleged unlawful conduct by the City before October 16, 2020 could not be the subject of a complaint under our Act unless the

Union was equitably "prevented" from filing a timely charge. No facts suggest that it was prevented from filing a charge within the statutory period. Accordingly, I dismiss all allegations in the charge occurring from March 2020 through October 16, 2020 (*i.e.*, six months before the charge was filed). See Somerset Cty., D.U.P. No. 2018-5, 44 NJPER 252 (¶71 2018).

The only timely allegation concerns the February 25, 2021 memo from the Mayor to all employees that violated HIPAA and subjected Vitale and Calenicoff to harassment.

In Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235, 244-246 (1984), the New Jersey Supreme Court upheld the Commission's standard for determining whether an employer's action violates 5.4a(3) of the Act. The charging party must prove by a preponderance of the evidence on the entire record that protected activity was a substantial or motivating factor in the employer's adverse decision. This may be done by direct or circumstantial evidence which demonstrates all of the following: (1) the employee engaged in protected activity under the Act; (2) the employer knew of this activity; and (3) the employer was hostile toward the exercise of the protected activity. Protected activity in this context refers to conduct by public employees that implicates their right under the Act "to form, join and assist any employee organization or to refrain from any such activity" N.J.S.A. 34:13A-5.3.

Local 125 hasn't asserted any facts indicating that the City is subject to HIPAA^{2/} regulations, and therefore subject to its privacy laws. Even if I assume that the City is a covered entity, I do not find that the Mayor's memo may have violated HIPAA, or the Act. The Mayor did not name Vitale or Calenicoff in the memo, and it does not specify who, if anyone, tested positive for COVID-19. The memo is ambiguous enough to mean that key employees could have been out due to an exposure, or to care for a family member who tested positive. The purpose of the memo was to explain the cause for the delayed receipt of money; no facts indicate that it was sent in retaliation for the filing of any grievances, or in retaliation for specified instances of advocating on behalf of members of Local 125. To the extent Vitale and Calenicoff have been harassed by coworkers, no facts indicate that such behavior is attributable to the City; the

^{2/} The Health Insurance Portability and Accountability Act of 1992, 42 U.S.C.S. P1320 et seq., is a federal law. One of its primary purposes is to provide for the privacy of health information. To accomplish that purpose, Congress mandated the Secretary of Health and Human Services to develop standards to ensure the privacy of health information. The Secretary promulgated regulations, collectively known as the Privacy Rule, which set forth standards and procedures for the collection, maintenance and disclosure of certain health care information by "covered entities." 42 U.S.C.A. P1320d-1; 45 C.F.R. P160.102, P160.103. The Privacy Rule prohibits covered entities from using or disclosing protected health information except as permitted by regulation. 45 C.F.R. P164.502(a).

named employees have appropriately filed complaints with the City's Office of Personnel.

I find that the Commission's complaint issuance standard has not been met, and decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.3(a).

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: October 20, 2021
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3(b) within 10 days.

Any appeal is due by November 1, 2021.