

D.U.P. NO. 2023-4

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

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and-

Docket No. CO-2020-273

JACKSON TOWNSHIP POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL NO. 168,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Jackson Township Policemen's Benevolent Association, Local No. 168 ("PBA") against the Township of Jackson ("Township"). The charge alleged that the Township violated N.J.S.A. 34:13A-5.4a(1), (2), (3), and (7) when it conducted an internal affairs investigation into whether a March 26, 2020 PBA Executive Board meeting violated State and Departmental orders related to the COVID-19 pandemic. The Director determined that the PBA failed to allege the occurrence of an adverse employment action resulting from the investigation. The Director also determined that the PBA failed to allege how the Township's investigation would tend to interfere with the statutory rights of PBA members.

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Appearances:

For the Respondent,
Apruzzese, McDermott, Mastro and Murphy, P.C. attorneys
(Arthur R. Thibault, Jr., of counsel)

For the Charging Party,
Detzky Hunter and DeFillippo, attorneys
(David J. DeFillippo, of counsel)

REFUSAL TO ISSUE COMPLAINT

On April 17, 2020, the Jackson Township Policemen's Benevolent Association, Local No. 168 ("PBA") filed an unfair practice charge and request for interim relief with the Public Employment Relations Commission ("Commission") against the Township of Jackson ("Township"). The PBA alleges that the Township violated section 5.4a(1), (2), (3), and (7)^{1/} of the New

^{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. (2) Dominating or interfering with the formation, existence or administration
(continued...)

Jersey Employer-Employee Relations Act ("Act") when it initiated an internal affairs investigation into the conduct of nine members of the PBA's Executive Board, following their attendance at a March 26, 2020 PBA Executive Board meeting held at a Township fire station. The PBA alleges that the Township's investigation was retaliatory and motivated by anti-union animus.

On April 24, 2020, a Commission Designee issued an Order to Show Cause setting a briefing schedule and hearing date for the interim relief application. On May 6, 2020, the Township filed its opposition to the PBA's unfair practice charge and request for interim relief. Both parties filed legal briefs, certifications, and exhibits.

On May 11, 2020, the Commission Designee conducted a telephonic hearing on the PBA's application for interim relief. On June 10, 2020, the Designee issued Jackson Tp., I.R. No. 2020-26, 47 NJPER 25 (¶42020), denying the PBA's request for interim relief and referring the case to the Director of Unfair Practices for further processing.

The Commission has authority to issue a complaint where it

1/ (...continued)
of any employee organization. (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 the act. (7) Violating any of the rules and regulations established by the commission.

appears that the Charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; 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.

I find the following facts^{2/}:

The PBA is an employee organization representing all full-time police officers employed by the Township below the rank of sergeant. The PBA and Township are parties to a collective negotiations agreement ("CNA") extending from January 1, 2019 through December 31, 2022.

From March 9, 2020 through March 21, 2020, in response to the escalating coronavirus pandemic, New Jersey Governor Philip Murphy issued Executive Orders 103, 104, and 107. The Executive Orders imposed these directives and conditions:

- Declares that a Public Health Emergency and a State of Emergency exists in New Jersey;
- Bans large public gatherings and mandates "social distancing" of at least six feet between individuals;
- Closes most retail businesses and other commercial facilities;
- Suspends the in-person operation of schools at all educational levels;

^{2/} Certain findings of fact also appear in the Commission Designee's Interlocutory Decision denying the PBA's request for interim relief.

- Directs that, where feasible, employees work from home.

Paragraph 20 of Executive Order 107 provides:

Nothing in this Order shall be construed to limit, prohibit, or restrict in any way the operations of law enforcement agencies.

Paragraphs 10 and 11, in relevant part, provide:

10. All businesses or non-profits in the State, whether closed or open to the public, must accommodate their workforce, wherever practicable, for telework or work-from-home arrangements. . .

* * *

11. To the extent a business or non-profit has employees that cannot perform their functions via telework or work-from-home arrangements, the business or non-profit should make best efforts to reduce staff on site to the minimal number necessary to ensure that essential operations can continue. Examples of employees who need to be physically present at their work site in order to perform their duties include, but are not limited to, law enforcement officers, fire fighters, and other first responders

On March 20, 2020, PBA President Candido sent an email to all Township police officers regarding the monthly PBA meeting scheduled for March 26, 2020. The email provided, in part:

“. . . [d]ue to the current situation, the March PBA meeting is cancelled. There will be a (sic) executive board meeting and if you have any concerns that need to be addressed please email me or one of the executive board members so that we may address the issue.”

Later on March 20, 2020, Chief Matthew Kunz issued Special Orders 2020-02, 2020-03 and 2020-04 related to the COVID-19 pandemic. Special Order 2020-02 provides that it is enacted for the purpose of ". . . protecting employees and continuing essential operations by limiting unnecessary exposure to others and adopting the essential practices of 'social distancing'." Special Order 2020-02 enacts various measures in response to the pandemic, including restricting access to Township facilities (including the Justice Complex/Police Headquarters) and generally prohibiting meetings or office gatherings ". . . unless absolutely necessary." Special Order 2020-02 also provides revised operational procedures designed to limit an employee's exposure to others in the Department/community.

On March 23, 2020, Chief Kunz sent an email to department personnel highlighting provisions of Governor Murphy's Executive Orders 107 and 108. The email provided, in part, that, "[g]atherings of individuals, such as parties, celebrations, or other social events, are cancelled, unless otherwise authorized by the Order Through a separate Administrative Order, the Colonel of NJSP will make clear that gatherings of fewer than 10 people are presumed to comply with the Order." The email also provided that law enforcement officers are required to be present at their work site, and "[n]othing in the order shall be construed to affect the operations of . . . (4) law enforcement

. . . .”

On March 26, 2020, the PBA Executive Board held a meeting at a local fire house attended by nine of the twelve executive board members. President Candido certified that the executive board members practiced social distancing and concluded the meeting as quickly as possible. Chief Kunz, by contrast, certified that an unidentified attendee told him that the meeting lasted between two and three hours, and that the members in attendance were sitting “elbow to elbow” around a conference room table.

On March 27, 2020, President Candido called out sick with a headache from a chronic sinus condition. He also learned that his neighbor had tested positive for COVID-19. On March 30, 2020, President Candido was tested for influenza and COVID-19.

On March 31, 2020, President Candido learned that he had tested positive for COVID-19 and advised the Department’s patrol commander of his positive result. Chief Kunz ordered that the eight other attendees of the March 26, 2020 meeting self-quarantine while expedited COVID-19 testing was conducted.

On April 1, 2020, Chief Kunz ordered that an internal affairs investigation be conducted concerning the March 26, 2020 meeting to determine whether the State or departmental COVID-19 orders were violated. On or about April 6, 2020, the nine executive board meeting attendees were issued letters advising that the department was investigating a complaint related to the

meeting and that each member would be interviewed. No alleged facts indicate that the Chief or his designee ordered additional disciplinary/investigative actions related to the internal affairs investigation.

On April 2, 2020, all PBA executive board meeting attendees (except President Candido) received negative COVID-19 test results. The eight officers were directed to continue to quarantine and return to duty on April 9, 2020 if COVID-19 symptoms did not emerge.

On April 9, 2020, the eight officers that had tested negative for COVID-19 returned to duty. On April 28, 2020, President Candido was cleared to return to duty.

Chief Kunz certified that the Department “. . . lost hundreds of hours of manpower and incurred related overtime expenses” because of officer unavailability following the March 26, 2020 meeting.

President Candido certified that Chief Kunz’s anti-union animus is evident in his “. . . selective enforcement of department policies and directives” For example, Candido certified that on March 31, 2020, Chief Kunz posed for a picture with a retiring Township sergeant, standing only a few feet from him, and apparently endorsed the taking of another photograph in which the sergeant posed with about ten patrol officers.

ANALYSIS

Public employees have a right to engage in "protected conduct" and retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.3; 5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) ("Bridgewater"). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. At 246. If the charging party proves those elements, the burden shifts to the responding party to demonstrate that it would have taken the same actions regardless of the protected activity. Id.

An adverse employment action is an essential element of 5.4a(3) and (4) claims. State of New Jersey (Dept. of Comm. Affairs), D.U.P. No. 2015-8, 41 NJPER 102; Ridgefield Park Bd. of Ed., H.E. No. 84-052, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER Supp. 2d 150 (¶133 App. Div. 1985). In Ridgefield Park Bd. of Ed., a section 5.4a(3) allegation was dismissed because " . . .

there was no threat [or] change in any terms or conditions of employment." 10 NJPER at 438. Under Commission precedent, adverse employment actions normally require actual harm to a term and condition of employment. See, e.g., Rutgers University, H.E. No. 2003-2, 28 NJPER 466 (¶33171 2002) (finding no adverse personnel action resulted from staff reorganization where charging party's title, salary, and benefits remained the same); Seaside Heights, P.E.R.C. No. 99-67, 125 NJPER 96 (¶30042 1999) (finding no violation where the charging party, a lifeguard, considered an assignment less desirable and prestigious, as well as a punishment and demotion, but suffered no loss in pay).

Nothing in the charge suggests that initiation of the internal affairs investigation impacted terms and conditions of employment for PBA members, and therefore, the investigation does not, by itself, constitute an adverse employment action. Even assuming that attendance at the executive board meeting is protected activity and that the Township knew of the meeting and the individuals who attended it, I glean no facts indicating that PBA members faced discipline or any other adverse employment action as a result of the Township's investigation. The charge does not allege, for example, that members were suspended at the conclusion of the investigation, or that wages or benefits were wrongfully withheld during the required quarantine period. Without an allegation of an adverse employment action, the PBA

cannot meet the standard set forth in Bridgewater to establish a violation of section 5.4a(3).

The PBA has also failed to allege an independent violation of section 5.4a(1). Section 5.4a(1) proscribes an an employer's action(s) that tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 284 (¶25146 1994). As noted above, no facts indicate that the investigation resulted in an adverse employment action, nor do I infer that conducting such an investigation tends to interfere with the statutory rights of PBA members. Accordingly, I dismiss the section 5.4a(1) allegation.

Even if initiating an investigation is deemed a cognizable or possible interference with employee statutory rights, the facts and timing indicate that the investigation was launched to determine whether the executive board meeting violated either Executive Order 107 or Department Special Order 2020-02. Both Orders implement measures aimed at containing the spread of COVID-19, including banning or limiting in-person gatherings and operations. The department had a legitimate and substantial interest in assuring compliance with the orders, especially in light of the importance of maintaining law enforcement operations during the public health emergency. Upon learning that President Candido had tested positive for COVID-19 after the meeting, the

Township directed the meeting attendees to quarantine in accordance with guidance from the United States Center for Disease Control and the New Jersey Department of Health.

Section 5.4a(2) of the Act prohibits a public employer from dominating or interfering with the formation, existence, or administration of any employee organization. In Atlantic Cty. Community College, P.E.R.C. No. 87-33, 12 NJPER 764, 765 (¶17291 1986), the Commission explained conduct that might give rise to a section 5.4a(2) violation:

Domination exists when the organization is directed by the employer, rather than the employee. Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed instead at the employee organization as an entity.

The charge fails to allege facts showing that the Township dominated or interfered with the formation, existence, or administration of the PBA. As noted, the PBA has not alleged an adverse employment action against its members, nor has it alleged that its operation or administration has been negatively impacted as a result of the Township's internal affairs investigation. Since the charge contains no allegation of domination or interference in the organization, the section 5.4a(2) allegation must be dismissed.

The charge also alleges a violation of section 5.4a(7). But the charge does not cite to a rule or regulation of the Commission that the Township allegedly violated. Accordingly, I must dismiss the 5.4a(7) violation.

For all the reasons set forth above, 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.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

Dated: August 25, 2022
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by September 6, 2022.