

D.U.P. No. 2006-12

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

In the Matter of

BOROUGH OF FRANKLIN LAKES,

Respondent,

-and-

Docket No. CO-2006-145

FRANKLIN LAKES PBA LOCAL 150,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint on an unfair practice charge filed by Franklin Lakes PBA Local 150 against the Borough of Franklin Lakes. The PBA alleges the Borough repudiated the parties' collective negotiations agreement when it rescinded an officer's previously approved holiday for the purpose of avoiding overtime payment. The Director found that there was no clear language preventing the rescission and some contract language, arguably, permitted the Borough's actions. He further determined that the appropriate forum for reviewing whether the Borough's actions were permitted by the collective agreement was through the parties grievance procedure.

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Appearances:

For the Respondent,
Ruderman & Glickman, P.C.
(Mark Ruderman, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Paul Kleinbaum, of counsel)

REFUSAL TO ISSUE COMPLAINT

On December 6, 2005, Franklin Lakes PBA Local 150 (PBA) filed an unfair practice charge against the Borough of Franklin Lakes (Borough), alleging that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5)^{1/}. The PBA specifically alleges that the

^{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."

Borough repudiated the parties' collective negotiations agreement when it rescinded an officer's previously approved holiday for the purpose of avoiding overtime payment.

The Borough denies it violated the Act and notes that the parties' collective agreement permits the Borough to rescind a holiday because of operational needs of the Department. The Borough denies that it rescinded the officer's holiday to avoid overtime. Additionally, the Borough asserts that the Chief issued a memorandum in 2002 addressing the need to rescind previously approved requested days off in the event of a staffing shortage. The Borough contends that the memorandum was disseminated to squad members through squad supervisors and posted on a bulletin board. It further alleges that the memorandum was applied on several occasions when previously approved days were rescinded, and the PBA never grieved these actions.

The Commission has authority to issue a complaint where it 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. In correspondence dated May 30, 2006, I advised the parties that I was not inclined to issue a complaint

in this matter and set forth the basis upon which I arrived at that conclusion.^{2/} I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following facts and analysis, I find that the complaint issuance standard has not been met.

The PBA represents all full-time officers and patrolmen employed by the Borough excluding captains, lieutenants and the Chief. The Borough and the PBA are parties to a collective negotiations agreement effective from January 1, 2004 through December 31, 2008.

Article XIV of the agreement, entitled "Grievance Procedure" provides for a four-step grievance process. The first step is a discussion between the employee and his immediate supervisor. Step two is a written grievance presented to the Chief. Step three provides for appeal of the Chief's decision to the Borough's governing body. If no satisfactory resolution of the grievance is reached at Step Three, the grievance may be pursued in a plenary action before a court of competent jurisdiction.

Article VI, entitled "Holidays/Personal Day", provides in pertinent part:

Holidays shall be granted and taken at a time which is mutually agreeable to the

^{2/} The May 30, 2006 correspondence was incorrectly served on the Borough's attorney, not on its labor counsel who is the attorney of record in this matter. We subsequently served labor counsel.

employee and the officer in charge of the squad with which the employee is assigned, provided that the operational needs of the Department and the safety of the Borough are not impaired thereby.

On March 23, 2002 Lieutenant Seltenrich on behalf of Chief Conklin issued a memorandum to supervisory personnel titled "Please make your squad members aware of the following:"

Because of the fact that requested days off are frequently written onto the work schedule far ahead of time, and realizing that circumstances might occasionally occur (such as an unexpected resignation or an extended illness) which could cause a squad to suffer a shortage of manpower, days off which may have been previously entered into the schedule, may be rescinded within a reasonable period of time and notice. This memorandum will not apply to vacation weeks.

The memorandum was also posted for several weeks on the administrative bulletin board in the main hallway of police headquarters.

On August 29, 2005 the Department rescinded a holiday which had been granted to Officer Matthew Kern a month earlier. The PBA filed a grievance which was denied by the Mayor and Council at Step 3. It is not known whether the PBA pursued the grievance at the final step to a court of competent jurisdiction.

The Borough cited several instances in 2005 where an officer's requested day off was rescinded due to staffing considerations. None of the examples included the rescission of

a requested holiday, rather, examples included the rescission of a vacation day, compensatory time and a training day.

ANALYSIS

The PBA argues that the Borough unilaterally changed terms and conditions of employment and repudiated the contract by rescinding Kern's holiday.

N.J.S.A. 34:13A-5.3 requires the employer and the majority representative to negotiate in good faith over terms and conditions of employment. N.J.S.A. 34:13A-5.4(5) prohibits an employer from refusing to negotiate in good faith. Where the parties expressly agree in the collective agreement to provide employees a benefit during the life of the agreement, there may be nothing more to negotiate regarding that benefit. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997). aff'd 25 NJPER 357 (¶30151 App. Div. 1999), aff'd 166 N.J. 112 (2000), 26 NJPER 453 (¶31177 Sup. Ct. 2000).

Here, the parties negotiated a contract provision concerning days off. The PBA maintains that the Borough repudiated that contract provision by rescinding an individual officer's approved day off. The Borough, on the other hand, relies on the same contract provision to support its argument that it had the right to rescind Kern's holiday when staffing needs so dictated.

Where the parties each have a good faith dispute over the application of a particular contract term, the Commission usually

will not exercise unfair practice jurisdiction, but leave such disputes to be resolved through the parties grievance procedure.

New Jersey State Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). However, one exception to that policy is where the employer has acted in bad faith by repudiating a clear contractual obligation. Human Services; State of New Jersey, P.E.R.C. No. 2000-36, 26 NJPER 12 (¶13101 1999). As the Commission observed in Human Services:

A claim of repudiation may also be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. (Citations omitted). Human Services, p. 423.

Here, the PBA claims that the Borough unlawfully repudiated the parties' agreement by rescinding the officer's holiday to avoid overtime. The mere rescission of the holiday, however, does not constitute repudiation because there is no clear language preventing such a rescission, and because of the inference that can be drawn by the "operational needs" language. The language in Article VI arguably permitted the Borough's actions here because it provides that holidays shall be taken provided that the operational needs of the Department are met. This language might permit rescission of a pre-approved holiday if staffing shortages occur. Whether operational needs actually

justified the rescission of Kern's holiday in this particular instance is a matter for review through the grievance procedure and not, on its face, a contract repudiation. Additionally, the PBA has not set forth a past and consistent practice in administering this clause which supports an inference of bad faith.^{3/}

A public employer has the right to rely on the collective agreement as a defense for its actions, and meets its negotiations obligation if it acts pursuant to the collective agreement. Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Twp. Ed. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). While the PBA may disagree over whether Article VI permitted the Borough to rescind Officer Kern's prior approved holiday day, the appropriate place to review that issue is the parties grievance procedure, and not normally through an unfair practice charge. Human Services. I note that the PBA had, and may still have, the

^{3/} The Borough contends that its March 2002 memorandum and subsequent actions support that it has rescinded individual days off to meet manpower needs consistent with the collective agreement. The PBA challenges this assertion because the Borough has provided no examples of rescinding an approved holiday - only rescinding a vacation day, training day or compensatory day. However, it asserts no factual support that the contract clause at issue was consistently administered in another way so as to raise an inference of bad faith.

opportunity to have that issue finally decided by a neutral court of competent jurisdiction. Based upon the above facts and analysis, the PBA's claim of a contract repudiation by the Borough is not supported by these facts, thus, I dismiss this allegation.

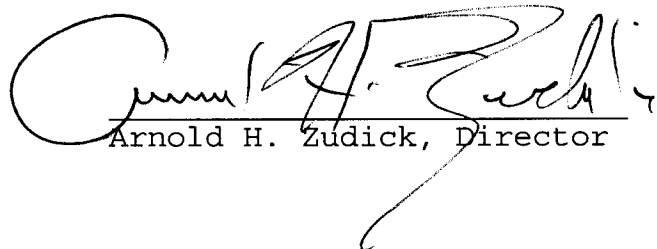
Finally, no facts in the charge support an independent 5.4a(1) violation.

Accordingly, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{4/}

ORDER

The unfair practice charge is dismissed

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: June 20, 2006
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 July 3, 2006.

^{4/} N.J.A.C. 19:14-2.3.