

P.E.R.C. NO. 2009-8

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and-

Docket No. CI-2007-032

PATRICK DESMOND and  
ANTHONY LOPEZ,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission affirms a motion to dismiss an unfair practice charge filed by Patrick Desmond against the County of Hudson. The charge was initially filed by Desmond and Anthony Lopez, but a hearing examiner granted Lopez's request to withdraw from the charge. The Commission affirms the granting of the County's motion to dismiss, but without the sanctions recommended by the hearing examiner. The Commission dismisses the Complaint for lack of prosecution.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Scarinci Hollenbeck, attorneys  
(Sean D. Dias, of counsel)

For the Charging Parties, Patrick Desmond and Anthony  
Lopez, pro se

DECISION

On June 3, 2008, Hearing Examiner Stuart Reichman granted the request of Anthony Lopez to withdraw from an unfair practice charge filed by him and Patrick Desmond against the County of Hudson. H.E. No. 2008-10, 34 NJPER 151 (¶64 2008). The Hearing Examiner also granted the County's motion to dismiss as to Desmond for lack of prosecution and he recommended that sanctions be imposed. No exceptions were filed, but on July 21, the parties were notified that pursuant to N.J.A.C. 19:14-8.1, the

Commission would consider this matter further.<sup>1/</sup> We now affirm the dismissal but do not impose sanctions. N.J.A.C.

19:14-1.5(d) (dismissal when it appears that charging party has no further interest in processing charge).

Our rules provide that:

Misconduct at any hearing before a hearing examiner or the Commission shall be grounds for summary exclusion from the hearing. Misconduct of an aggravated character by a representative of a party shall be grounds for suspension or disbarment by the Commission from further practice before it after due notice and hearing. [N.J.A.C. 19:14-6.12]

The Hearing Examiner relied on this rule in recommending that charging party Desmond, appearing pro se, be suspended for one year from appearing before the Commission in a representational capacity because of his "egregious disregard for the time and resources of the Respondent and this Commission." 34 NJPER 65 at 152.

We do not believe that Desmond's failure to appear at hearing constitutes the kind of misconduct our rule is intended to address. More appropriate as a source of authority for sanctions would be N.J.A.C. 1:1-14.4(c), a rule of the Office of

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<sup>1/</sup> N.J.A.C. 19:14-8.1(b) provides that if no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

Administrative Law ("OAL") on "Failure to appear; sanctions for failure to appear." That rule provides:

(a) If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to 1:1-3.3(b) and (c).

(b) If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.

(c) If the judge receives an explanation:

1. If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing;  
or

2. If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may reschedule the matter and, at his or her discretion, order any of the following:

i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;

ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or

iii. Such other case-related action as the judge deems appropriate.

(d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

This OAL rule is authorized by N.J.S.A. 52:14F-5(t), a portion of the Administrative Procedures Act, which permits:

reasonable sanctions, including assessments of costs and attorneys' fees against parties, attorneys and other representatives who, without just excuse, fail to comply with any procedural order or with any standard or rule applying to a contested case and including the imposition of a fine not to exceed \$1000 for misconduct which obstructs or tends to obstruct the conduct of contested cases.

Although there is no basis to impose any fees or costs in this case because under the OAL rule, they can be imposed only if the

matter is rescheduled, we will not rule out the possibility of doing so in an appropriate case.<sup>2/</sup>

ORDER

The Complaint is dismissed for lack of prosecution.

BY ORDER OF THE COMMISSION

Acting Chairman Joanis, Commissioners Branigan, Buchanan and Watkins voted in favor of this decision. None opposed. Chairman Henderson and Commissioner Fuller recused themselves.

ISSUED: September 25, 2008

Trenton, New Jersey

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<sup>2/</sup> Commercial Tp. Bd. of Ed., 10 NJPER 78 (¶15043 App. Div. 1983), rejected a request for attorney's fees and costs as a remedy to an unfair practice case. The Court noted the absence of statutory authorization for such remedial authority under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Here, however, we are concerned with the possibility of imposing fees and costs for failure to appear under the authority of N.J.S.A. 52:14F-5 and N.J.A.C. 1:1-14.4.