

P.E.R.C. NO. 2009-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FAIRFIELD,

Respondent,

-and-

Docket No. CO-2007-276

PBA LOCAL No. 81,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants a motion for summary judgment filed by the Township of Fairfield seeking dismissal of an unfair practice charge filed by PBA Local No. 81. The Commission denies a cross-motion for summary judgment filed by the PBA. The unfair practice charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by unilaterally changing disciplinary procedures when it appointed a Retired Judge to conduct a disciplinary hearing and when it asserted that the hearing would not be held in public. The Commission finds that, based on the undisputed facts in the police chief's certification, the Township did not unilaterally change disciplinary procedures; the Commission does not have jurisdiction to enforce N.J.S.A. 40A:14-147; and an announcement that the hearing would not be held in public when the hearing was subsequently held in public is not an unfair practice.

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, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault Jr., of counsel and on the brief)

For the Charging Party, Klatsky Sciarabone & De Fillippo, attorneys (David J. De Fillippo, of counsel and on the brief)

DECISION

_____This case comes to us by way of a motion and cross-motion for summary judgment. PBA Local No. 81 filed an unfair practice charge against the Township of Fairfield. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally changed disciplinary procedures, in particular when it appointed a retired Superior Court Judge to conduct a disciplinary hearing and by asserting that the hearing would not be open to the public. Based on the undisputed facts in Deputy Police Chief Steven Gutkin's certification, we grant the Township's motion, deny the PBA's cross-motion, and dismiss the Complaint.

The Township and PBA entered into a collective negotiations agreement effective from January 1, 2006 through December 31, 2008. Article 14 is entitled Management Rights. It provides, in relevant part, that the Township may "suspend, discharge or otherwise discipline officers and/or police officers for just cause."

Township Ordinance Section 2-11.1 establishes the Police Department and Section 2-11.11 adopts the Police Department's Rules and Regulations. Relevant portions of those regulations follow:

5:6.6 Disciplinary hearings shall be public in nature. However they should be within the bounds of reasonableness and good order.

5:6.8 The Chief of Police may prosecute the complaint him/herself or delegate the duty to any member of the Department.

5:8.1 Each member is entitled to a hearing before the Chief of Police or his/her designee for any charge, which shall become a permanent record of his/her personnel file.

On November 29, 2006, a Police Officer was served with disciplinary charges. The charges arose from an incident that occurred during a Township Council Meeting. The Council resolved to appoint an independent hearing officer to preside over the hearing and render a decision on the charges.

The disciplinary hearing began on February 21, 2007 and was open to the public. The hearing continued as an open hearing for

another 11 days over the next eight months. A retired Superior Court Judge served as the hearing officer and recommended a two-day suspension.

On January 25, 2008, the Township Administrator issued the Police Officer a notice of two-day suspension. The officer then filed a grievance challenging the discipline. An arbitration hearing was scheduled for December 2.

In the meantime, the PBA filed its unfair practice charge alleging that the Township violated 5.4a(1), (2), (3), (4), (5) and (7) of the Act.^{1/} The Director of Unfair Practices issued a Complaint on the 5.4a(1) and (5) allegations only. Those allegations raise three points:

- (1) the Township violated the Act when it appointed the retired Judge as hearing officer;

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 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 this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. . . . [and] (7) Violating any of the rules and regulations established by the commission."

(2) the Township violated N.J.S.A. 40A:14-147 when it designated the Judge to hear and decide the charges; and

(3) the Township violated the Act by asserting that it had a right to determine whether a disciplinary hearing is open to the public.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

As to point (1), the Township argues that it has a managerial prerogative to select the hearing officer to preside over a disciplinary hearing and to determine the scope of the hearing officer's authority. The PBA argues that Department Rule 5:6.8 identifies the chief as the appropriate official to conduct a disciplinary hearing and specifies that if the chief delegates that authority, it must be to a member of the department. The Township responds that Rule 5:6.8 does not provide that the hearing officer duty can be delegated only to someone within the police department. It asserts that that limitation applies to the chief's right to delegate prosecutorial authority, not the authority to conduct a disciplinary hearing.

We agree with the Township that Rule 5:6.8 does not require that the hearing officer come from within the police department or prohibit the Township from appointing a retired judge as a

hearing officer. Thus, the Township did not unilaterally change that disciplinary procedure. Accordingly, we grant the Township's motion on this issue and dismiss this allegation.^{2/}

As to Point (2), the Township argues that we do not have jurisdiction to enforce N.J.S.A. 40A:14-147. That statute provides a police officer with a right to a written complaint setting forth the charges and a hearing. It further provides that a complaint must be brought within 45 days, except in criminal matters; that discipline must be for just cause; and that an officer may waive a hearing and appeal the charges directly to any available authority specified by law or regulation, or follow any other procedure recognized by contract, as permitted by law.

We agree with the Township that we do not have unfair practice jurisdiction to enforce that statute. Nor has the PBA specified how the statute has been violated. Accordingly, we grant the Township summary judgment and dismiss this allegation.

^{2/} The PBA's reliance on Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), aff'd sub nom. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997), is misplaced. That decision restrained arbitration over a portion of a grievance seeking to have an arbitrator rather than an employer's own representative hear disciplinary charges. The decision does not support the proposition that a union can negotiate over whom the employer will select to conduct disciplinary hearings.

As to Point (3), the Township argues that the claim is moot because the disciplinary hearings were, in fact, held in public. The PBA argues that unless and until the Township withdraws its prior position and acknowledges in writing that such hearings shall be open to the public consistent with Department Rule 5:6.6, the issue is not moot.

It is undisputed that the disciplinary hearing was held in public. Under these circumstances, the Township did not unilaterally change that term and condition of employment. Announcing a position contrary to the Department Rule, but then complying with the Rule did not amount to an unfair practice. Accordingly, we grant the Township's motion for summary judgment on this issue and dismiss this allegation.

ORDER

The Township's motion for summary judgment is granted. The PBA's cross-motion is denied. The Complaint is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: January 29, 2009

Trenton, New Jersey