

P.E.R.C. NO. 2009-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF OCEAN CITY,
Respondent,

-and-

Docket No. CI-1999-076

EDWIN YUST,
Charging Party.

OCEAN CITY BEACH PATROL
ADMINISTRATIVE ASSOCIATION,
Respondent,

-and-

Docket No. CI-1999-077

EDWIN YUST,
Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the City of Ocean City's motion for summary judgment on consolidated unfair practice charges filed by Edwin Yust. The amended charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when the Director of Public Safety refused to grant Yust a hearing concerning his grievance challenging the elimination of Yust's Assistant Captain position; the Director colluded with members of the Association's negotiating team in retaliation for Yust's alleged refusal to follow the dictates of City officials; and the City retaliated against Yust because of his activity as a representative of his union. The City argues that certain allegations in the charge are untimely; the elimination of Yust's position was a managerial right and not grievable and Yust's activities on the Pension Commission were not protected under the Act. The Commission holds that there are material facts in dispute as to the timeliness issues; the City can not eliminate a position in retaliation for protected activity as alleged by Yust; and Yust was covered by the Act as a member of the Pension Commission.

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, City of Ocean City, Montgomery,
McCracken, Walker & Rhoads, LLP, attorneys (Gerard J.
Corcoran, on the brief)

For the Charging Party, Joseph C. Ruddy, attorney

DECISION

The City of Ocean City has moved for summary judgment in this consolidated unfair practice case. It seeks dismissal of all claims against it. Charging party, Edwin Yust, opposes summary judgment. We deny the City's request.^{1/}

^{1/} We deny the charging party's request for oral argument.

This case arises out of an unfair practice charge and amended charges filed by Edwin Yust against the City of Ocean City and the Ocean City Beach Patrol Administrative Association.^{2/} The charge against the City alleges that it violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (4) and (5),^{3/} when the Director of Public Safety refused to grant Yust a hearing concerning his grievance challenging the elimination of his Assistant Captain position; the Director colluded with members of the Association's negotiating team in retaliation for Yust's alleged refusal to follow the dictates of City officials; and the City retaliated against Yust because of his activity as a representative of his union. The charge against the Association

2/ The original charge was filed on June 9, 1999 and processing was held in abeyance due to illness and related federal court litigation.

3/ 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. (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. . . . [and] (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."

alleges that it violated the Act when it did not support or fight to maintain Yust's Assistant Captain position. The charge against the Association is not at issue in the City's motion for summary judgment.

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).

The City argues that the unfair practice charge is untimely because it was originally filed against Dominick Longo, the City's Director of Public Safety. The City asserts that on March 20, 1999, Longo informed Yust that his grievance would not be processed because it was untimely. Three months later, on June 4, Yust filed an unfair practice charge against Longo claiming that he committed an unfair practice by failing to process his grievance. On September 5, 2000, Yust amended his charge and for the first time named the City as a respondent. The City argues that the alleged unfair practice took place on March 20, 1999 and that under N.J.S.A. 34:13A-5.3c, Yust had until September 20, 1999 to file a charge naming the City.

Yust responds that the City is estopped from invoking the statute of limitations because it did not assert that affirmative defense in its Answer. Yust further responds that his initial

charge of June 4, 1999 identified Longo as the Director of Public Safety for the City of Ocean City. Yust argues that in so doing, he, as a pro se litigant, enunciated that the respondents were Longo and the City of Ocean City.

We deny the City's motion for summary judgment on timeliness grounds. Public employers act through representatives. Thus, section 5.3 of the Act provides that "designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." Similarly, section 5.4 of the Act prohibits public employers, their representatives or agents from committing unfair practices. The charging party filed his charge against Dominick Longo as the Director of Public Safety for the City of Ocean City. Longo was the City's representative for purposes of this unfair practice charge alleging that the employer violated the Act. The charge was initially filed on June 4, 1999, less than six months after the alleged unfair practice. Accordingly, we deny summary judgment on this ground.

The City next argues that the allegation that it violated 5.4a(5) when Longo refused to process Yust's grievance should be dismissed because the grievance was untimely.^{4/} The City asserts

^{4/} An individual employee does not generally have standing to allege a violation of 5.4a(5) because the right to have an
(continued...)

that the event giving rise to the grievance occurred no later than December 23, 1998, when Yust received the letter informing him that the position of Assistant Captain was being eliminated and that a grievance had to be filed within seven calendar days. Yust certifies that after receiving the December 23 letter, he contacted the Beach Patrol Captain and they agreed to an extension of the time to file a grievance until Yust had the opportunity to meet with Longo regarding the proposed elimination of the position. That meeting took place on March 3, 1999. In addition, Yust argues that the City failed to raise this defense in its Answer.

Given Yust's assertion that the Beach Patrol Captain extended the time for him to file a grievance and the City's assertion that the grievance needed to be filed within seven days of December 23, 1998, there are material facts in dispute. Accordingly, we deny summary judgment on this ground.

The City argues that the elimination of Yust's position was a managerial right and not a grievable event under Articles II

4/ (...continued)
employer negotiate in good faith is held by the majority representative, not an individual employee. However, if an individual employee can prove that the majority representative breached its duty of fair representation, the individual may be able to stand in the representative's shoes and pursue an a(5) allegation. Rutgers and AFSCME, Council No. 52 and Jennings, P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988). As noted above, Yust also filed an unfair practice charge against his majority representative.

and III, the contract's Management Rights and Rules and Regulations clauses. Yust responds that the grievance also alleges a violation of Article XXI, which prohibits reductions in rank without cause. The City has not explained why an allegation under Article XXI would not be grievable. In addition, we note that although a public employer may have a managerial prerogative to eliminate a position, it cannot do so in retaliation for the exercise of protected rights, as alleged here. We deny summary judgment on this ground.

The City argues that Yust's allegations in his September 5, 2000 amendment are untimely. Specifically, that amendment alleges that Longo and other City officials retaliated against Yust because of his activity on behalf of the Ocean City Beach Patrol Life Guard Pension Commission. Yust responds that this defense also was not plead by the City in its Answer. In addition, Yust responds that his initial unfair practice charge incorporates by reference the allegations in his previously filed grievance. That grievance alleges retaliation for Yust's activity on the Pension Commission. Under these circumstances, the March amendments date back to the allegations in the original charge and are timely. Ocean Tp., P.E.R.C. No. 2007-44, 33 NJPER 5 (¶5 2007) (whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original

pleading, the amendment relates back to the date of the original pleading). We deny summary judgment on this issue on timeliness grounds.

Finally, the City argues that Yust's activities on the Pension Commission were not protected activities under the Act. Members of the Commission are appointed by the mayor of Ocean City pursuant to N.J.S.A. 43:13-28.^{5/} The City contends that membership on the Pension Commission does not correlate to membership in the Association. According to Yust, the rank and file and superior officer members of the Pension Commission were recommended for appointment to the Commission by their respective majority representatives.

Even where a pension is not a negotiable subject, employee activity to secure rights associated with this fundamental term

5/ That statute provides:

The mayor or chief executive officer shall appoint, with the advice and consent of the governing body of the city, a life guard pension commission of four members. One member shall be a superior officer of the life guard force, one a life guard and two citizens who are not members of the force. They shall serve for a term of four years and until their successors are appointed and have qualified and shall not receive any compensation for their services. Each person so appointed shall take an oath of office before the mayor or other chief executive officer of the city that he will faithfully discharge the duties of his office.

and condition of employment is protected. City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987). Members of boards or commissions are not public employees for purposes of coverage under the Act. N.J.S.A. 34:13A-3, 5.3. We will assume for purposes of this decision that membership on the Pension Commission does not make someone a public employee. However, the City has not shown that the statutory exclusion would permit it to retaliate against a covered employee for his activity on the Pension Commission, an appointment that by statute must be held by a public employee. Cf. Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981) (when an employee's conduct as a union representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the representative's employment). Accordingly, we deny summary judgment on this ground.

ORDER

The City's motion for summary judgment is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Joanis was not present.

ISSUED: February 26, 2009

Trenton, New Jersey