

P.E.R.C. NO. 84-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON COUNTY SHERIFF,
BOARD OF CHOSEN FREEHOLDERS,
HUNTERDON COUNTY,

Respondent,

-and-

Docket No. CO-83-127-68

HUNTERDON COUNTY SHERIFF'S
OFFICERS' ASSOCIATION, FRATERNAL
ORDER OF POLICE, LODGE #94,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting a recommendation of a Hearing Examiner, dismisses a Complaint based on an unfair practice charge the Hunterdon County Sheriff's Officers' Association, Fraternal Order of Police, Lodge #94 filed against the Hunterdon County Sheriff, Board of Chosen Freeholders, Hunterdon County. The Commission holds that the Charging Party failed to prosecute its charge.

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ORDER OF POLICE, LODGE #94,

Charging Party.

Appearances:

For the Respondent, Harper, Hansbury & Mulvaney, Esqs.
(John J. Harper, of Counsel)

For the Charging Party, Bernhard, Durst & Dilts, Esqs.
(Edward R. Bernhard, of Counsel)

DECISION AND ORDER

On November 18, 1982, the Hunterdon County Sheriff's Officers' Association, Fraternal Order of Police, Lodge #94 ("Association") filed an unfair practice charge against the Hunterdon County Sheriff, Board of Chosen Freeholders, Hunterdon County ("County") with the Public Employment Relations Commission. The charge alleged that the County violated subsection 5.4(a)(1)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when the County's Sheriff allegedly intimidated and discriminated against the Association's president and other employees whom the Association represented.

^{1/} This subsection prohibits 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."

On February 16, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The hearing was scheduled for February 16, 1983 before Commission Hearing Examiner Joan Kane Josephson.

On February 28, 1983, the County filed an Answer which denied the allegations of the charge.

On April 6, 1983, the Hearing Examiner conducted a pre-hearing conference. Both parties appeared. The hearing was rescheduled for May 23 and 24.

On June 27, 1983, the Hearing Examiner rescheduled the hearing once again, for July 25 and 26, 1983. The hearing was to be held at the Commission's offices in Trenton.

On July 22, 1983, the County's attorney requested that the hearing be held at the Hunterdon County Court House. He made this request because five sheriffs had been subpoenaed to testify^{2/} and it would not be possible to meet the criminal court schedule of the New Jersey Superior Court sitting in Hunterdon County if these officers all simultaneously went to a hearing in Trenton. The Association's attorney consented to this request. The Hearing Examiner therefore agreed to convene the hearing at 10:00 a.m. on July 25 at the Hunterdon County Court House.

On the morning of July 25, the hearing commenced. The Association's attorney appeared and stated that he would not

^{2/} The Association's attorney issued these subpoenas. The Hearing Examiner was not involved with their issuance.

participate in the hearing because he was allegedly not permitted to meet with his witnesses before the hearing. He introduced two memoranda into the record. The first, dated July 20, 1983, was from the Sheriff to the Association's president regarding the scheduled Commission hearing. It stated:

I am not able to allow any more than one person to be gone from the Department on either Monday or Tuesday because of Court schedule at this time. If another one is needed they will have to be replaced by the one who would be at the PERC hearing.

It will not be possible to allow the use of any vehicle for transportation to the hearing.

The second, dated July 22, 1983, was from the Sheriff to four individual sheriff officers regarding the scheduled Commission hearing. It stated:

The hearing for Monday, 7/25/83, has been changed from Trenton to the Hunterdon County Freeholder's Meeting Room, at 10:00 a.m.

You will remain on duty until excused to testify. If work schedule permits, we will excuse as many as possible at a time.

The Association's attorney asserted that these memoranda undermined the integrity of the proceeding, intimidated the employees, and frustrated his ability to meet with his witnesses. He also stated that the Association's president had informed him on the day of the hearing that everyone but he had been assigned out.

The County's attorney moved to dismiss the proceedings in light of the refusal of the Association's attorney to go forward with his case. He offered to present testimony concerning

the Sheriff's scheduling arrangements and denied that she attempted to interfere with the ability of the Association's attorney to prepare his case. The Sheriff stated that all officers had in fact been available by 9:15 a.m. as she had arranged with the Association's attorney the previous Friday.

The Hearing Examiner declined to adjourn the hearing solely on the basis of the two memoranda and requested that the parties present evidence on the scheduling arrangements. The Association's attorney, after being warned that the case could be dismissed if he failed to participate further, left the room.

The County's attorney then presented the following evidence concerning the scheduling arrangements. On July 20, undersheriff James L. Totten sent the Sheriff a memorandum advising her of the scheduling arrangements he had made for the Monday and Tuesday criminal court sessions. There were ten officers available for assignment. Two criminal trials were scheduled for the hearing days; each criminal trial required the attendance of four officers. One officer was on vacation. The remaining officer, the Association's president, was left unassigned. Based on these assignments, Totten then prepared the July 20 memorandum quoted above. He signed it and the Sheriff initialed it.

Totten was on vacation on July 21 and 22. Robert W. Schottman took over his scheduling duties. At about 10:00 a.m. on July 21, the Association's president informed him that he

(the president) and four other officers had been subpoenaed to appear at the Commission hearing in Trenton on July 25 and 26. Realizing the problem this would pose for staffing the criminal trial courtrooms, Schottman called the County's labor attorney. The attorney then contacted the Association's attorney and the Hearing Examiner and arranged for the hearing to be relocated in the County Administration Building in Flemington so that the criminal court sessions could be properly staffed.

The Sheriff wrote the July 22, 1983 memorandum quoted above to inform the officers of the change in location. She also testified that she spoke with the Association's attorney on July 22 concerning the scheduling arrangements. The attorney told her he wanted to meet with the subpoenaed officers at 9:00 a.m. on Monday, July 25. She responded that there were two emergency transportations that morning which required coverage and that the officers might not be available until 9:30 a.m. The attorney and the Sheriff compromised by agreeing that the Sheriff would try her best to have everyone available by 9:15 a.m.

The Association's attorney did not contact the Sheriff on July 25 about meeting with the officers before the hearing. Neither did he contact the undersheriff (Schottman) in charge of scheduling that day. In fact, all officers were available for consultation by 8:45 a.m, but the Association's attorney met only with the Association's president.

After presenting this testimony,^{3/} the County's attorney renewed his motion to dismiss based on the Association's

^{3/} The County's attorney also adduced testimony from the Sheriff and introduced exhibits concerning the merits of the charge. We will not review this testimony.

failure to prosecute. The Hearing Examiner reserved decision on this motion.

On August 8, 1983, the Hearing Examiner issued her report and recommendations. H.E. No. 84-10, 9 NJPER ____ (¶ ____ 1983) (copy attached). She recommended dismissal of the Complaint with prejudice because of a failure to prosecute. She specifically found that the testimony of the undersheriffs and Sheriff was credible and that the Association's attorney had ample opportunity to prepare his case and meet with his sheriffs.

On August 29, 1983, the Association's attorney filed a letter with the Commission asserting that the Hearing Examiner's findings should be stricken because of her alleged bias and collusion with the County.^{4/} The letter further alleged that the actions of the Hearing Examiner prevented the Association from adequately presenting evidence in this matter.

On August 31, 1983, the County filed a letter requesting that the Commission adopt the Hearing Examiner's report and recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact, with one minor exception,^{5/} are accurate and are adopted and incorporated.

Under all the circumstances of this case, we are in complete agreement with the way the Hearing Examiner conducted the July 25 proceeding and the conclusion she reached that the

^{4/} Assuming that this letter was meant to represent Exceptions pursuant to N.J.A.C. 19:14-7.3, it was untimely since not filed within 10 days of service of the report.

^{5/} There are ten sheriffs' officers, not nine, and two undersheriffs.

Complaint should be dismissed for failure to prosecute. The Hearing Examiner gave the Association's attorney every opportunity to support his allegation that he had been unfairly hindered in his ability to meet with officers before the hearing. She properly requested the parties to present evidence on this issue, but the Association's attorney refused to do so and left the hearing.^{6/} The record shows that the Sheriff did not hinder the attorney's ability to meet with his witnesses and, to the contrary, that she made every effort, consistent with the legitimate scheduling needs of the criminal court system, to accommodate him, including agreeing to have the witnesses available for consultation by 9:15 a.m. on July 25 and carrying out this agreement. Further, the Association's attorney had one month's notice of the July 25 hearing date and ample time to meet with his witnesses. Thus, the refusal of the Association's attorney to go forward with his case can in no way be considered the fault of the County or the Sheriff. Under all these circumstances, we dismiss the Complaint for failure to prosecute.

^{6/} The Association's allegations of bias and collusion are completely unsubstantiated and baseless. The record reflects the Hearing Examiner's patience in considering the Association's objection to the hearing and giving the Association every opportunity to support its objection through properly presented testimony.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioner Graves voted against the decision.

DATED: Trenton, New Jersey
October 19, 1983
ISSUED: October 20, 1983

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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OFFICERS' ASSOCIATION, FRATERNAL
ORDER OF POLICE, LODGE #94,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission grant the Respondent's motion to dismiss for lack of prosecution the unfair practice charge filed against the Respondent. Counsel for Charging Party refused to participate in the hearing. He claimed the Respondent refused to allow time for his witnesses to meet with him prior to the hearing. The Hearing Examiner found there had been sufficient notice of the hearing to afford counsel opportunity to prepare; that he did not request enforcement of subpoenas (the subpoenas were not properly issued); and that he had not requested an adjournment of the hearing.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent
Harper, Hansbury & Mulvaney, Esqs.
(John J. Harper, Of Counsel)

For the Charging Party
Bernhard, Durst & Dilts, Esqs.
(Edward R. Bernhard, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 18, 1982 by the Hunterdon County Sheriff's Officers' Association, Fraternal Order of Police, Lodge #94 ("Charging Party" or "Association") against the Hunterdon County Sheriff, Board of Chosen Freeholders ("Respondent" or "Sheriff"). The charge alleged that the Sheriff violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically §5.4(a)(1) ^{1/} by intimi-

1/ This subsection prohibits 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."

dating Association officers for engaging in protected activity.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 16, 1983, scheduling a hearing for April 13 and 14, 1983.

A prehearing conference was held on April 6, 1983. Counsel for both parties agreed at the prehearing conference to investigate the charges and exchange certain information and adjourned the hearing date to May 23 and 24, which was subsequently also adjourned. On June 27, 1983 the undersigned issued an order rescheduling the hearing to be held on July 25 and 26.

On July 22, 1983 counsel for the Respondent, with the consent of his adversary, requested that the July 25 hearing be held at the Hunterdon County Court House. Counsel to the Respondent requested the change of hearing site because six sheriff's officers had been served with subpoenas to appear at the 10:00 a.m. hearing in Trenton, ^{2/} and that it would not be possible to meet the criminal court schedule of the New Jersey Superior Court sitting in Hunterdon County if six sheriff's officers were away from the Court House simultaneously. ^{3/} The undersigned agreed, therefore, to convene the hearing at 10:00 a.m. at the Hunterdon County Court House.

Counsel for the Charging Party appeared at the hearing, and told the undersigned he would not participate in the hearing,

2/ There are nine sheriff's officers; one was on vacation July 25.

3/ Sheriff's officers are assigned to court rooms at all trials. In criminal cases, if participants are in custody, they appear in court unshackled, but are assigned extra sheriff's officers as guards.

because he was not permitted to meet with his witnesses that morning to prepare for the hearing. He placed in the record copies of two memoranda (CP-1 and 2) from the Sheriff to his clients indicating that because of the court schedule the hearing would be held in Hunterdon County and that the individuals should remain on duty until called to testify. One of the memos stated that an attempt would be made to excuse as many officers together at one time as possible. The undersigned reminded counsel for Charging Party that pursuant to N.J.A.C. 19:14-6.8 he had the burden of prosecuting the case and proving all allegations of the complaint and that by refusing to participate in the proceedings the case might be dismissed for lack of prosecution.

Counsel did not request subpoenas from the undersigned pursuant to N.J.A.C. 19:15-1.2. The undersigned was unaware subpoenas had been issued. Assuming arguendo they were valid subpoenas, no request was made to the Commission for enforcement of the subpoenas, which clearly would have been the appropriate course of action had the subpoenas not been honored.

Counsel for the Respondent indicated he intended to place evidence on the record which would show how the Respondent arranged to have witnesses available for the PERC hearing while complying with the Judges trials requirements for July 25, 1983. Nevertheless, counsel for the Charging Party left the hearing room and refused to participate in this proceeding further.

Sheriff Ruth S. Carpenter, Undersheriffs Robert W. Schottman and James L. Totten all testified credibly as to the court

room assignments required of Sheriff's officers for Monday, July 25, and Tuesday, July 26.

On Friday counsel for the Charging Party contacted Sheriff Carpenter and requested that the six officers be available to meet with him at 9:15 a.m. prior to the 10:00 a.m. hearing on Monday, July 25, 1983. The Sheriff agreed. The six officers were at the office on Monday, July 25, as agreed but their counsel did not meet with them. Instead he appeared at the hearing after 10:00 a.m. and accused the Sheriff of not releasing her employees in order for him to prepare his case Monday morning.

Respondent moved that the unfair practice charge be dismissed for lack of prosecution. He noted that the order re-scheduling the hearing for July 25 had been issued on June 25 by the undersigned, which afforded both parties one month to prepare for the hearing. ^{4/}

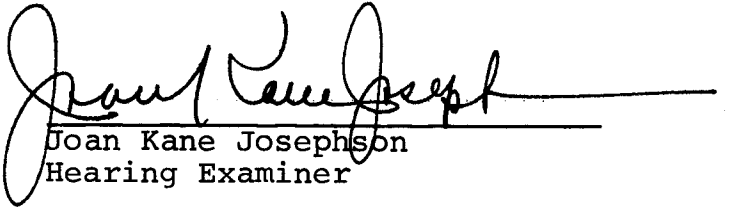
The undersigned recommends that the Commission grant the Respondent's motion to dismiss the unfair practice charge and I further recommend that the charge be dismissed with prejudice.

The Charging Party's counsel had adequate notice to prepare his case for the hearing. Also, while the Sheriff complied with his request to have his witnesses available at 9:15 a.m. for the 10:00 a.m. hearing, he did not meet with them. His "subpoenas" were served one working day prior to the hearing. He made no request for enforcement of the subpoenas. He made no request

^{4/} Respondent also placed on the record evidence concerning defenses to the specific allegations of the charge. They are not considered in this decision because the undersigned does not believe it is necessary to reach the merits of the charge in disposing of this matter.

for adjournment of the hearing. He consented to the changing of the site of the hearing.

Based on the above the undersigned recommends that the Commission ORDER that the Complaint be dismissed with prejudice in its entirety.


Joan Kane Josephson
Hearing Examiner

Dated: August 8, 1983
Trenton, New Jersey