D.U.P. No. 2012-9

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

In the Matter of

TOWNSHIP OF EDISON,

Respondent,

-and- Docket No. CO-2011-301

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL 1197,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by IAFF Local 1197 against the Township of Edison. The charge alleges that the Township violated 5.4a(1), (3), and (5) of the Act when it unilaterally transferred emergency medical services work from Local 1197's negotiations unit to emergency medical technicians (EMTs) in another unit. The charge also alleges that the Township unlawfully instituted a sick leave verification policy because of the firefighters' membership in and activities on behalf of Local 1197.

The Director found that the Township was not obligated to negotiate before transferring emergency medical services work from the firefighters' unit to civilian EMTs in another unit because the work had not been within the exclusive province of the firefighters' unit. The Director found that the allegation that the Township unlawfully instituted a sick leave verification policy was not pled with the specificity required by N.J.A.C. 19:14-1.3(a)(3).

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Charging Party.

Appearances:

For the Respondent,
DeCotiis, FitzPatrick & Cole, LLP
(Louis N. Rainone, of counsel)

For the Charging Party,
Kroll Heineman Carton, attorneys
(Raymond G. Heineman, of counsel)

REFUSAL TO ISSUE COMPLAINT

On February 3, 2011, the International Association of Firefighters Local 1197 (Local 1197) filed an unfair practice charge against the Township of Edison (Township). The charge alleges that on January 15, 2011, the Township violated 5.4a(1), (3), and (5)[1/] of the New Jersey Employer-Employee Relations Act

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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; (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 (continued...)

(Act) when it unilaterally transferred emergency medical services work from Local 1197's negotiations unit to emergency medical technicians (EMTs) in another unit. The charge also alleges that on January 15, the Township unlawfully instituted a policy of home visitation of firefighters on sick leave because of their membership in and activities on behalf of Local 1197.

The Township disputes the charge, contending that under its current budgetary constraints, it has a paramount need for firefighters to perform firefighting functions, exclusively. It asserts that its decision improves the effectiveness and efficiency of the department and is a lawful exercise of its managerial prerogative. The Township also contends that sick leave verification is a non-negotiable managerial prerogative and denies that the policy was instituted in retaliation for protected union activity.

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

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1/ (...continued)
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."

standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. On October 26, 2011, I wrote a letter to the parties, advising that I was not inclined to issue a complaint in this matter and set forth the reasons for that conclusion. The parties were provided an opportunity to respond. On November 14, 2011, Local 1197 filed a response.

The complaint issuance standard has not been met. These facts appear.

Local 1197 represents a unit of nonsupervisory firefighters, firefighter/EMTs, and firefighter/inspectors employed by the Township. Local 1197 and the Township are operating under a collective negotiations agreement which expired on December 31, 2009.

Local 3997 represents a unit of nonsupervisory civilian EMTs employed by the Township. Local 3997 and the Township are operating under an agreement which expired on December 31, 2007.

The EMTs in Local 3997's unit formerly responded to first aid calls Monday through Friday between 6 a.m. and 7 p.m. Before January 15, 2011, the firefighters in Local 1197's unit "supplemented" the EMTs' response by providing emergency medical services (i.e., first aid response) on weekends and during the week between 7 p.m. and 6 a.m., when the civilian EMTs were off-duty. On January 15, the Township decided to assign exclusively firefighting functions to firefighters and to direct all

emergency medical services work to the EMTs. To that end, the Township hired additional EMTs to perform emergency medical services work on weekends and on the night shift. The decision did not result in the layoff of any firefighters.

Also on January 15, the Township instituted a sick leave verification policy, including home visits.

ANALYSIS

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by unit employees alone. See Hudson Cty. Police Dept., P.E.R.C. No. 2004-14, 29 NJPER 409, 410 (¶136 2003). In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998), our Supreme Court held that the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) must be explicitly applied to determine whether in a given set of circumstances, an employer may unilaterally transfer duties previously performed by police officers to civilians. That test provides:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the

> public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [88 N.J. at 404-405]

In applying the dispositive third prong, the Court agreed with the City that its actions (civilianization of dispatching duties) were taken primarily to augment its ability to combat crime by increasing the number of police officers in field positions. It concluded that because the City implemented the reorganization for the purpose of improving the police department's "effectiveness and performance," the City's actions constituted an inherent policy determination that under Local 195, would be impermissibly hampered by negotiations. Id. at 573.

In Bogota Bor., P.E.R.C. No. 99-77, 25 NJPER 129 (¶30058 1999), the Commission applied Jersey City to another civilianization/unit work case. Following a hearing examiner's report, the Commission determined that the employer had acted ". . . to reduce police overtime costs, maintain department resources and avoid layoffs, improve supervision and increase the availability of superior and other police officers for patrol [and other] duties." Bogota, 25 NJPER at 131. The Commission, in approving the change, noted that, ". . . nothing in Jersey City indicates that an employer's interests may not be found to

predominate because, in a particular civilianization context, cost savings are one concern." Id., 25 NJPER at 133.

The unit work rule contemplates three exceptions in which the transfer of unit work is not mandatorily negotiable. The exceptions apply where (1) the union waived its right to negotiate over the transfer of unit work; (2) historically, the job was not within the exclusive province of unit personnel; and (3) the municipality is reorganizing the way it delivers government services. Jersey City, 154 N.J. at 577.

In this case, the Township cites both budgetary constraints and its desire to increase the number of firefighters available to fight fires as its motivations for assigning exclusively firefighting functions to the firefighters represented by Local 1197 and directing emergency medical services work to the EMTs represented by Local 3997. In its November 14, 2011 reply to my letter, Local 1197 argues that the Township acted in order to save money. An unresolved issue is whether the Township's desire to increase the number of firefighters available to fight fires was the predominant motivation for its decision. See Bogota. Assuming that Local 1197 could show that cost savings was the predominant motivation, rendering the Township's action mandatorily negotiable, I find that no complaint may issue because the union cannot prevail on its unit work claim.

In Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112), recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989), the Commission, reversing a hearing examiner's decision (H.E. No. 89-6, 14 NJPER 555 (¶19233 1988), found that the public employer did not violate a negotiations obligation when it laid off civilian dispatchers and assigned work out of the unit to police officers who had previously performed dispatching functions.[2/] Civilian dispatchers provided 24 hour coverage on weekdays and police officers provided the coverage on weekends. The Commission wrote that the record did not prove that the Town had shifted unit work, noting that police officers did dispatching when no dispatchers were employed in the previous 25 years (i.e., the three laid off dispatchers had each worked one, two and four years); continued to do the functions every weekend; and "filled in" during the week. Under those circumstances, the Commission ". . . did not believe that negotiations were required before the Town assigned more dispatching duties to police officers who had historically performed those duties alone or in conjunction with civilian dispatchers." Id., 15 NJPER at 265.

The same rationale applies to this case. Emergency medical services work has not been within the exclusive province of the

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2/ Jersey City describes the special status of police officers for the purpose of making negotiability determinations. I infer that firefighters also qualify for a similar status. Dover, written many years before Jersey City, draws no such distinction and is based on a unit work analysis.

firefighters' unit. Firefighters routinely "supplemented" the civilian EMTs' regular day shift emergency medical services work on weeknights and weekends, demonstrating an even greater sharing of work than police officers in Dover, who performed dispatching for civilians intermittently and on weekends. In contrast to the record in Dover, in which police officers exclusively performed dispatching duties before civilians were hired, Local 1197 has not alleged that firefighters have ever exclusively performed emergency medical services work. Like the employer in Dover, the Township is not obligated to negotiate before assigning more emergency medical services duties to civilians, who have historically performed them in conjunction with the firefighters.

Local 1197 also alleges that the Township instituted a sick leave verification policy because of the firefighters' membership in and activities on behalf of Local 1197. The Commission has held that a public employer has a non-negotiable managerial prerogative to establish a sick leave verification policy and to use reasonable means to verify employee illness or disability. Burlington Cty., P.E.R.C. No. 2011-72, 37 NJPER 149 (¶46 2011); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95, 96 (¶13039 1982). The Commission has also held that an employer may use home visits and telephone calls as reasonable means to

verify employee use of sick leave. Burlington Cty.; Maplewood Tp., P.E.R.C. No. 2011-22, 36 NJPER 350 (¶135 2010); Livingston Tp., P.E.R.C. No. 2008-11, 33 NJPER 218 (¶81 2007). In most instances, the employer's need to prevent sick leave abuse outweighs the absent employee's right to be free of the intrusion of telephone calls or a home visit. Maplewood Tp.

An employer does not have a right to exercise a managerial prerogative for anti-union reasons. Allegations that anti-union animus illegally taint the exercise of a managerial prerogative are reviewed under tests established by our Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984).

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

In my October 26, 2011 letter to the parties, I wrote that Local 1197 alleged no facts describing the unit employees' "activities on behalf of Local 1197" which motivated the Township's implementation of sick leave verification, nor had it

set forth any circumstances of unit employees' "membership" in Local 1197 which motivated the Township's conduct.

Local 1197 has replied, asserting that it traditionally engages in the aggressive defense of its membership "in both the collective negotiations and political arenas," including filing unfair practice charges, claims in state and federal court, and grievances challenging the Township's conduct regarding firefighter safety and working conditions. It contends that Local 1197 President Robert Yackel was quoted extensively in the press as opposing the Township's cuts in the fire department's staffing levels ". . . during the period leading up to the changes instituted by the Township." Local 1197 also alleges that William Stephens, interim Business Administrator and Assistant to the Mayor, has criticized it and its leadership since their opposition to his candidacy for Township mayor in 2005.

N.J.A.C. 19:14-1.3(a)(3) requires that a charge set forth:

> A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the date and place the alleged acts occurred, the names of the persons alleged to have committed such acts, the subsection(s) of the Act alleged to have been violated, and the relief sought.

Local 1197 has not met this administrative requirement. In order for a complaint to issue on a charge setting forth a violation of 5.4a(3) of the Act, the charging party must allege

that it engaged in protected conduct and that it sustained an adverse employment action as a result. As a predicate to complaint issuance, the protected conduct must be pled with the specificity required by N.J.A.C. 19:14-1.3(a)(3). Local 1197's alleged protected activity - that it "traditionally engages in the aggressive defense of its membership...including filing unfair practice charges, claims in state and federal court, and grievances" merely recites its inherent responsibilities, but does not meet the specificity requirement of the rule.

Local 1197's allegation that Yackel was quoted "extensively" in the press opposing the Township's cuts in the fire department's staffing levels "during the period leading up to the changes instituted by the Township" also does not provide the specificity required by N.J.A.C. 19:14-1.3(a)(3). No quotation(s), media source(s) or date(s) have been alleged. That Local 1197 President Yackel was quoted "during the period leading up to the changes instituted by the Township" fails for largely the same reasons. I am not persuaded that William Stephens' alleged criticisms of Local 1197 and its leadership since his 2005 candidacy for mayor meets the specificity required by the rule.

Finally, Local 1197 alleges that in 2005 Stephens commented to his campaign staff that after his election to Township mayor, he would retaliate against Local 1197 for opposing his campaign.

Events occurring outside the statute of limitations period cannot constitute unfair practices. N.J.S.A. 34:13A-5.4c. They may be considered evidence of a discriminatory motive leading to an adverse action within the six month period. Township of West Orange, P.E.R.C. No. 99-13, 24 NJPER 429 (¶29197 1998); State of New Jersey, P.E.R.C. No. 93-116, 19 NJPER 347, 351 (¶24157 1993); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. and notice of app. dism. 149 N.J. 35 (1997); accord, Lodge No. 1424, I.A.M. v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 45 LRRM 3212 (1960).

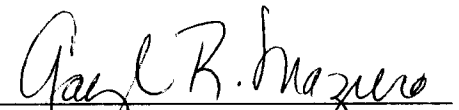
Stephens lost the 2005 mayoral election, and no facts suggest that he has served as Township Mayor. He is employed as the interim Township Business Administrator and assistant to the mayor. No facts suggest that Stephens caused or participated in the Township's decision to commence home visitations as part of a sick leave verification policy. In Local 1197's November 14 letter, Counsel wrote that the firefighters are the "only Township group subjected to home visits," raising a matter of possible disparate treatment. The charge however, alleges no facts regarding disparate treatment in the implementation of the Township's sick leave verification policy. The charge does not set forth with any detail or specificity a nexus between Stephens' alleged remark in 2005 and the sick leave verification

process commenced in 2011. Under these particular circumstances, I am not persuaded that formal proceedings should be instituted to provide the parties an opportunity to litigate the relevant legal and factual issues. N.J.A.C. 19:14-2.1.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Gayl R. Mazuco
Director of Unfair Practices

DATED: December 30, 2011
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 January 11, 2012.