

D.U.P. NO. 2014-9

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

In the Matter of

COUNTY OF SALEM,

Respondent,

-and-

Docket No. CO-2013-223

SALEM COUNTY CORRECTION
OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Deputy Director of Unfair Practices dismisses an unfair practice charge alleging that the County of Salem unlawfully disciplined a vice-president of the Salem County Correction Officers Association in retaliation for the vice-president's filing of a contractual grievance. The charge alleges that the County's conduct violated 5.4a(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. Applying the standard set forth in In re Bridgewater Tp., 95 N.J. 235 (1984), the Deputy Director determined that the facts did not indicate that the County knew of the vice-president's protected conduct at the time it initiated both the investigation of the vice-president's work-related infractions and issued the report (signed by the Warden of the facility) detailing those infractions. The Deputy noted that no facts indicated that the County's conduct violated 5.4a(5) and (7) of the Act.

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Appearances:

For the Respondent
Gilmore & Monahan, attorneys
(Andrea E. Wyatt, Esq.)

For the Charging Party,
Alterman & Associates
(Stuart Alterman, Esq.)

REFUSAL TO ISSUE COMPLAINT

On February 5, 2013 and June 12, 2013, the Salem County Correction Officers Association (Association) filed an unfair practice charge and amended charge against the County of Salem (County). The charge, as amended, alleges that the County violated section 5.4(a)(1), (2), (3), (5) and (7)^{1/} of the New

^{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

(continued...)

Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by issuing a notice of discipline on December 19, 2012 against the Association's Vice-President in retaliation for his filing of a grievance.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

On December 26, 2013, I issued a letter to the parties tentatively dismissing the charge and inviting responses. No responses were filed.

I find the following facts.

The Association is the majority representative of all rank and file County corrections officers below the rank of sergeant.

1/ (...continued)
employment to encourage or discourage employees in the exercise of the rights guaranteed to them by 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. (7) Violating any of the rules and regulations established by the commission."

The County and Association signed a collective negotiations agreement extending from January 1, 2009 through December 31, 2012 (Agreement).

Robert J. Flinn is a County corrections officer and Vice-President of the Association. In or around December 2012, Internal Affairs (IA) officer Robert Stussy was reviewing video evidence in connection with an investigation of another County corrections officer. Stussy observed Flinn sleeping on duty in the video recordings. Following his discovery, an investigation of Flinn's conduct was initiated on December 13, 2012. The investigation revealed that Flinn slept during his work shift on November 3, 8, 18, 19, 27 and 28, 2012, and December 1, 2012. Flinn was observed on the video recordings sleeping for periods of time ranging from four (4) minutes to sixteen (16) minutes. According to the charge, Flinn suffers from sleep apnea and has received medical treatment for this condition.

At the conclusion of the investigation, Warden of the Salem County Correctional Facility (SCCF) Raymond C. Skradzinski issued a Notification of Allegation (NOA) Report to Flinn. The NOA Report describes in detail the allegations against Flinn and notifies him that his neglect of duties may violate the SCCF Disciplinary Policy. Skradzinski signed the NOA Report on December 16, 2012 at 10:30 a.m. Flinn acknowledged receipt of the NOA Report on December 19, 2012.

On December 18, 2012, Skradzinski received a grievance filed by Flinn. The grievance was signed by Flinn on December 18, 2012. The grievance contends that the County violated the Family and Medical Leave Act (FMLA) and Article 4 of the Agreement by disciplining employees for using FMLA leave and by not informing employees of their FMLA rights until they had exhausted their sick leave. The grievance also alleges that the County is using FMLA leave as a "negative factor of employment."

On or about December 21, 2012, Skradzinsky issued a written reply to the December 18 grievance. Skradzinsky acknowledged the existence of a practice by which employees were being disciplined for continuing to take leaves of absence after exhausting their sick leaves because they had not applied for FMLA leaves. Skradzinski noted that, ". . . the Correctional Administration has been adamant with the County Human Resources Office to abandon this practice and not discipline employees who were retroactively approved for FMLA leave." Skradzinsky sustained the grievance in part by dismissing disciplinary charges against Officer Michael L. Shimp for Shimp's retroactive use of FMLA leave.

On January 31, 2013, Captain Edward L. Lape served a Preliminary Notice of Disciplinary Action against Flinn. The notice indicates that Flinn slept while on duty on nine (9) separate occasions and that he allegedly violated Article II,

Sections 2.1(b) and 2.2 of the SCCF Disciplinary Code. The notice proposes a thirty six (36) hour suspension without pay as an appropriate penalty for the alleged violations. The notice also affords Flinn the option of requesting an official departmental hearing to respond to the allegations, which Flinn exercised.

On February 5, 2013, the Association filed the above-captioned unfair practice charge in an apparent response to the Preliminary Notice of Disciplinary Action. The gravamen of the charge is that the County initiated the investigation of Flinn and issued a NOA report and Preliminary Notice of Discipline against Flinn in retaliation for Flinn's FMLA grievance. The County has not disciplined Flinn, and a departmental hearing on the proposed discipline has been postponed pending the outcome of this charge.

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4(a)(3). The standards for determining whether an employer has violated N.J.S.A. 34:13A-5.4(a)(3) are set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be demonstrated by direct evidence or

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 protected rights. Id. at 246.

Adverse employer conduct cannot be a retaliatory response to a grievance if the conduct was initiated without the public employer's prior knowledge of the grievance. State of New Jersey (Dept. of Environmental Protection), H.E. No. 95-2, 20 NJPER 306 (¶25153 1994), adopted P.E.R.C. No. 95-6, 20 NJPER 324 (¶25166 1994); State of New Jersey (Montclair State College), D.U.P. No. 89-12, 15 NJPER 201 (¶20085 1989).

In Dept. of Environmental Protection, the Commission adopted a Hearing Examiner's decision which found that an employer's disciplinary suspension of an employee was not in retaliation for that employee's filing of a grievance. The employee filed and delivered a grievance to the employer on February 5, 1993. However, the employer recommended suspending the employee on January 29, 1993. The Hearing Examiner rejected the charging party's contention that the suspension was in retaliation for the employee's grievance since there was no evidence demonstrating the employer initiated the disciplinary process with prior knowledge of the grievance. Critical to this determination was the fact that significant decisions about the discipline were made before the grievance was delivered to the employer. 20

NJPER at 307; State of New Jersey (Montclair State College), 15 NJPER at 202 (Director dismisses charge and holds that the employer's decision to deny a promotion to an employee was not in retaliation for the employee's filing of a grievance since the employee's grievance was filed after the employer's promotional decision was made).

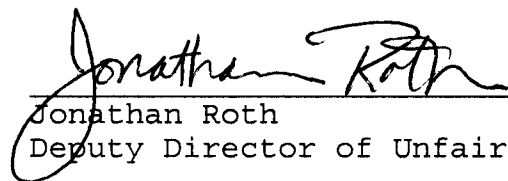
In this matter, the County's investigation of Flinn was not in retaliation for Flinn's FMLA grievance because the investigation preceded the filing of Flinn's grievance. The County did not become aware of the FMLA grievance until December 18, 2012, when Flinn signed and delivered the grievance to Skradzinsky. Skradzinsky received the grievance two days after he signed the NOA Report and five days after the county initiated the investigation resulting in the Report. No factual allegations indicate that the County was aware of the FMLA grievance at the time it initiated the investigation of Flinn's conduct. Therefore, the investigation and NOA Report were not motivated by Flinn's FMLA grievance.

No facts or circumstances suggest that the Preliminary Notice issued in January, 2013 is something other than a direct consequence of Warden Skradzinsky's December, 2012 written NOA, which preceded the grievance filing. It also seems anomalous that a public employer would sustain a grievance while discriminating against the individual who filed the grievance.

Accordingly, I find that the Association's 5.4a(3) and, derivatively, (a)(1) allegations do not satisfy the complaint issuance standard.^{2/}

ORDER

The unfair practice charge is dismissed.


Jonathan Roth
Deputy Director of Unfair Practices

DATED: January 15, 2014
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 27, 2014.

^{2/} The Association has alleged no facts indicating that the County's conduct violates 5.4a(2), (5) and (7) of the Act. I dismiss those allegations, also.