H.E. NO. 2014-9

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

In the Matter of

NEW JERSEY STATE (CORRECTIONS),

Respondent,

-and-

Docket No. CO-2012-347

NEW JERSEY SUPERIOR
OFFICERS LAW ENFORCEMENT ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denies a motion for summary judgment. After review of the summary judgment standards, the Hearing Examiner concluded that material factual issues remain in dispute that could not be resolved in a summary judgment proceeding.

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Appearances:

For the Respondent,
John Jay Hoffman, Acting Attorney General
(Lisa Dorio Ruch, Deputy Attorney General)

For the Charging Party,
O'Brien Belland and Bushinsky, Attorneys
(Kevin Jarvis, of counsel)

HEARING EXAMINER'S DECISION
ON THE STATE'S MOTION FOR SUMMARY JUDGMENT

On June 20, 2012, the New Jersey Superior Officers Law Enforcement Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission against the State of New Jersey, Department of Corrections ("State" or "DOC") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. Specifically, the Association alleges that the State violated N.J.S.A. 34:13A-5.4(a)(1) and (5)[1/] when,

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1/ Pursuant to N.J.S.A. 34:13A-5.4(a), public employers are prohibited from: "(1) Interfering with, restraining or (continued...)

on December 23, 2011, it refused to permit Lieutenant Glen Eisinger ("Eisinger") to use 20 vacation days in lieu of disability leave or carry them over into 2012. On March 26, 2013, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On April 2, 2013, the State filed its answer to the complaint by incorporating its previously submitted statement of position. It states that Eisinger was on SLI [sick leave injury] from May 13, 2010 through April 10, 2011. The SLI was treated as leave with pay and vacation leave continued to accrue. Eisinger carried over 20 days of vacation leave from 2010 to 2011. He returned to work on April 11, 2011 through April 28, 2011, and was again on SLI from April 29, 2011 through May 11, 2011. Thereafter, he was on Workers' Compensation from May 12, 2011 through January 20, 2012, which time was treated as leave without pay; vacation time did not accrue, but was pro-rated. For 2011, he earned vacation credit of 66.5 hours (the hours were earned from SLI and three weeks of work). On December 12, 2011, Eisinger requested permission to carry over vacation time in excess of his annual allotment. On December 23, 2011, the State

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1/ (...continued) coercing employees in the exercise of the rights guaranteed to them by 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."

denied his request. Eisinger then filed a grievance seeking to carry over the 2010 vacation time into 2012; the grievance was denied on May 10, 2012. The State contends that Eisinger did not request to use vacation time in lieu of Workers' Compensation. The State also contends that it acted in accordance with N.J.A.C. 4A:6-1.2(g) and that Eisinger's 2010 vacation time cannot be carried over into 2012.

On October 28, 2013, relying on R. 4:46-2, the State filed a motion for summary judgment. It reasserts that the DOC acted in accordance with N.J.A.C. 4A:6-1.2(g) and that Eisinger's 2010 vacation time cannot be carried over into 2012. It repeats its contention that Eisinger did not ask to use his vacation time in lieu of Workers' Compensation.

On November 18, 2013, the Association submitted its opposition to the State's motion for summary judgment. The Association contends that the DOC did not follow its own human resources bulletin 95-03 when it failed to send to each Lieutenant a vacation selection request form by October 1, 2011. Vacations are scheduled by seniority. Eisinger is the most senior officer and has priority over other officers in selecting his vacation time. The Association also argues that the regulation relied upon by the State, N.J.A.C. 4A:6-1.2(g), requires that vacation shall be scheduled to avoid loss of leave and that DOC violated that provision of the regulation.

Public employers are prohibited from "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4(a)(1). The Commission has determined that: "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422-423 (¶4189 1978); New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550, 551 note 1 (¶10285 1979). The Commission has held that proof of actual interference, intimidation, restraint, coercion or motive is unnecessary to prove an independent N.J.S.A. 34:13A-5.4(a)(1) violation. Commercial Tp. Bd. Ed. and Commercial Tp. Support Staff Assn. and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd, 10 NJPER 78 (¶15043 App. Div. 1983). The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees

without discrimination and without regard to employee organization membership. N.J.S.A. 34:13A-5.3. It is an unfair practice for an employer to refuse to negotiate in good faith. N.J.S.A. 34:13A-5.4(a)(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Township of Teaneck, P.E.R.C. No. 2011-33, 36 NJPER 403, 404 (¶156 2010), citing, City of Jersey City, P.E.R.C. No. 80-55, 5 NJPER 495, 496 (¶10252 1979), recon. granted, P.E.R.C. No. 80-113, 6 NJPER 177 (¶11085 1980).

Summary judgment may be granted if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant is entitled to its requested relief as a matter of law. N.J.A.C. 19:14-4.8(e). 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). "All inferences of doubt are drawn against the moving party and in favor of the opponent of the motion." Perez v. Professionally Green, LLC, 215 N.J. 388, 405 (2013) (citations omitted); Brill v. Guardian Life Ins. Co. of America, supra, 142 N.J. at 540; Ocean County Vocational Bd. of Ed., P.E.R.C. No.

2014-53, 40 NJPER __ (¶137 2014); Borough of Paramus, P.E.R.C. No. 2010-5, 36 NJPER 78 (¶36 2010). The motion cannot be granted if material facts are in dispute. Mandel v. UBS/Paine-Webber, 373 N.J. Super. 55, 71-72 (App. Div. 2004); North Bergen Tp., P.E.R.C. No. 78-28, 4 NJPER 15, 16 (¶4008 1978). A motion for summary judgment should be granted cautiously; the procedure may not be used as a substitute for a plenary trial. Mandel v. UBS/Paine-Webber, supra; Baer v. Sorbello, 177 N.J. Super. 182, 185 (App. Div. 1981); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695, 696 (¶19297 1988); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19, 20 (¶14009 1982).

The State contends that Eisinger did not request vacation leave in lieu of Workers' Compensation. However, the State submitted as an exhibit appended to its motion Eisinger's request to carry over vacation time (which was also submitted by the Association), in which he refers to Workers' Compensation and a past practice of unit members being afforded the opportunity to carry over time. No affidavits or certifications were submitted by the State. A credibility determination needs to be made regarding this issue. Additionally, the State contends that it is legally prohibited by N.J.A.C. 4A:6-1.2(g)[2/] to carry over the

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2/ N.J.A.C. 4A:6-1.2(g) states, in part, "Appointing authorities may establish procedures for the scheduling of vacation leave. Vacation leave not used in a calendar year because of business necessity shall be used during the next (continued...)

vacation time. There is no supporting analysis or argument for this position.[3/]

The Association argues not only that the regulation permits the carry over requested, but also that DOC has policies and a past practice that it ignored. The Association submitted certifications in support of its assertions. The gravamen of its position is that Eisinger was prevented from using or carrying over vacation leave. A credibility determination needs to be made as to whether the policy or past practice was ignored by DOC.

Having considered the parties' arguments, and having applied the summary judgment standards, I deny the motion for summary judgment. The parties' respective arguments, to be accepted, require me to make credibility determinations and draw inferences from certain facts in favor of their respective positions. That is the antithesis of the summary judgment standard. In summary judgment motions, I cannot draw inferences in support of the parties' respective positions when there is even the slightest

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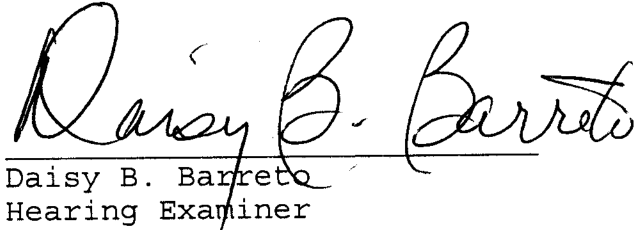
2/ (...continued) succeeding year only and shall be scheduled to avoid loss of leave...."

3/ For example, the State is not contending that the regulation preempts the issue under the Act, nor does the State rely on the parties' CNA. I cannot make any inferences at this juncture.

possibility that those inferences may be drawn against their positions. That is the case here.

For the foregoing reasons, I deny the motion for summary judgment.



Daisy B. Barreto
Hearing Examiner

DATED: April 17, 2014
Trenton, New Jersey