

D.U.P. NO. 2021-4

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

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and-

Docket No. CO-2018-094

HUDSON COUNTY SUPERIOR OFFICERS
ASSOCIATION, LOCAL 109A,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Hudson County Superior Officers Association Local 109A (the Charging Party or SOA) against Hudson County (Respondent or County), alleging that the County repudiated the parties' negotiated grievance procedure, in violation of section 5.4a(1), (2) and (5) of the Act. The charge alleges that on or around September 18, 2017, the SOA's representatives appeared for a step three hearing that was previously scheduled with one of the County's hearing officers, and were informed that the hearing officer could conduct a fact-finding hearing, but lacked the authority to render a decision on the merits. The Director of Unfair Practices determined that the facts as alleged did not constitute repudiation. There were no facts indicating that the Respondent acted inconsistently with the contractual grievance procedure as written, and there were no facts indicating the County refused to implement a binding determination of one its agents.

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Appearances:

For the Respondent,
Scarinci Hollenbeck, attorneys
(Sarah E. Tornetta, of counsel)

For the Charging Party,
Detzky Hunter and DeFillippo, attorneys
(David J. DeFillippo, of counsel)

REFUSAL TO ISSUE COMPLAINT

On October 6, 2017, Hudson County Superior Officers Association Local 109A (the Charging Party or SOA) filed an unfair practice charge against Hudson County (Respondent or County). The charge alleges that on or around September 18, 2017, the SOA's representatives appeared for a step three hearing previously scheduled with County representative Richard Campisano, and were informed that the Director of Personnel, Elinor M. Gibney, designated Mr. Campisano to conduct a fact-finding hearing, but Mr. Campisano lacked the authority to render a decision. The Charging Party alleges that upon information and

belief, the fact-finding hearing constituted a new protocol unilaterally established by the County. The Charging Party alleges that such action repudiates the parties' negotiated grievance procedure, violating section 5.4a(1), (2) and (5)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

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-5.4c; 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).

I find the following facts.

The SOA is the exclusive majority representative of the County's superior corrections officers below the rank of captain.

1/ These provision prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; 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."

The collective negotiations agreement (CNA or contract) in effect when this dispute arose extended from January 1, 2013 through December 31, 2017. The successor and current agreement expires in 2022.

Article XI of the parties' CNA sets forth the grievance procedure, which culminates at step 4 in arbitration. Step 3 of the grievance procedure provides:

If the grievance is not settled by Step Two, then the Association shall have the right within five (5) working days of the receipt of the answer at Step Two, to submit such grievance to the County Director of Personnel. A written answer to such grievance shall be served upon the individual and the Association with[sic] seven (7) calendar days after submission.

This provision appears in the current agreement without modification. Article XI also provides that the "failure at any step of this procedure to communicate the decision on a grievance shall permit the aggrieved employee to proceed to the next step."

At all relevant times, the following individuals have held the following titles: Kevin Dille - Association Vice President; Elinor M. Gibney - Director of Personnel; and Richard Campisano - County Hearing Officer . On or around August 24, 2017, Vice President Dille submitted by email to Director of Personnel Gibney a grievance that was filed earlier in the month and unresolved at the prior steps. A hearing was scheduled for September 18, 2017. When the Association's representatives

appeared, Hearing Officer Campisano advised that he would conduct a fact-finding hearing and prepare a report of his findings to Director of Personnel Gibney.

In the past, Director of Personnel Gibney had appointed a hearing officer, like Campisano, as a designee. However, the Charging Party claims that when Gibney used a designee in the past, the designee had the authority to render a decision on the merits of the grievance. At the hearing, Vice President Dille objected to what he believed to be a new protocol that violated Article XI of the contract. The Charging Party refused to participate in the step 3 hearing, given the alleged change in procedure.

By letter dated September 22, 2017, Vice President Dille advised Director of Personnel Gibney of the Association's objection in writing, and that the Association "will not participate in this unfair practice of 'fact finding' hearings" However, Dille set forth in the letter what he characterized as a brief synopsis of the Association's position regarding the grievance for Gibney's consideration when issuing her decision. Respondent claims that Director of Personnel Gibney did not issue a written decision regarding that grievance, given the Association's position.

The Charging Party claims that the County essentially added a new fact-finding process by limiting the designee's authority

to rule on the grievance, and therefore, repudiated the parties' grievance procedure. In an April 1, 2020 position statement, the SOA claims that it was not uncommon for Gibney to designate a hearing officer on her behalf, but on those occasions, the officer had the authority to render a decision on the grievance's merits. The SOA contends that the County needed to negotiate before curtailing the authority of its hearing officer to issue decisions. It cites a number of cases where the Commission found violations of the Act when a public employer refuses to implement decisions of one of its step designees in sustaining a grievance.

Respondent avers that the charge should be dismissed because the contract does not require the Director of Personnel to personally conduct a hearing before a decision is rendered. Instead, the contract requires the grievance to be submitted to the Director of Personnel at step 3 and that the written answer is served within seven days. The contract language at issue has existed unmodified for roughly two decades. The County claims that it sought to conduct the Step 3 meeting as scheduled, but that the SOA refused to participate in the established grievance procedure.

ANALYSIS

N.J.S.A. 34:13A-5.4a(5) of the Act makes it an unfair practice for a public employer to refuse to negotiate in good faith with a majority representative or to refuse to process

grievances presented by the majority representative. Although the Commission does not exercise jurisdiction over allegations constituting mere breaches of contract, allegations establishing the repudiation of a clear contract term fall within its unfair practice jurisdiction arising under Section 5.4a(5) of the Act. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 422-23 (¶15191 1984). Such conduct constitutes a failure to negotiate in good faith under Section 5.4a(5). It also constitutes an attempt to restrain and coerce employees in the exercise of their rights, in violation of Section 5.4a(1) of the Act. See State of New Jersey (Dept. Of Military and Veterans Affairs), P.E.R.C. No. 91-40, 16 NJPER 583 (¶21257 1990), recon. granted P.E.R.C. No. 91-54, 17 NJPER 55 (¶22022 1990). I find that the facts, as alleged, do not meet the complaint issuance standard for violations of 5.4a(1) or (5) of the Act.

The agreement specifies only that the Director of Personnel receives Step 3 grievances and that a written answer is provided within a specified time period. The agreement is silent regarding all other procedural aspects of the decision-making process at Step 3, including the holding of any type of hearing, "fact-finding" or otherwise. Therefore, a change limiting the authority of County's hearing officer designee to finding facts does not conflict with the express terms of the parties'

grievance procedure since the contract does not provide specific procedural requirements for Step 3 grievances beyond the title of the designee for receiving step 3 grievances and the time period for a response. At most, the only change at issue in the case is that the Director of Personnel retains all decision-making authority on the merits, whereas in the past, according to the Charging Party, it was not uncommon for the Director of Personnel to delegate her decision-making authority to hearing officers. No facts are alleged indicating that the County is acting inconsistently with Step 3 of the grievance procedure as written, let alone demonstrating a repudiation of it.^{2/}

Case law cited by the Charging Party in which the Commission found repudiation is inapposite. Although the SOA correctly notes that the Commission has previously held that an employer's

^{2/} The charge characterizes the change as a new protocol. However, the only change identified in the charge is the County's decision to restrict the scope of the authority of one of its own designees. I have found no Commission law in support of the proposition that the ability of a public employer's hearing officer to render a decision on the merits at a grievance hearing can become a negotiable term and condition of employment. There are also no facts indicating that the restriction of the hearing officer's authority to render a decision on the merits of a grievance had an identifiable impact on employees' terms and conditions of employment that would arguably give rise to a negotiations obligation. See e.g. Wayne Bd. of Ed., D.U.P. No. 92-9, 18 NJPER 105 (¶23050 1992) (refusing to issue complaint where charge alleged board violated grievance procedure by designating its attorney to serve as step 3 hearing officer); Pennsauken Tp., P.E.R.C. No. 80-51, 5 NJPER 486 (¶10248 1979).

refusal to honor the binding decision of its grievance representative constitutes a refusal to negotiate in good faith, the critical, legally operative facts in those cases were that binding decisions had actually been rendered by authorized grievance representatives that the public employers subsequently refused to honor. See Bor. of Keansburg, P.E.R.C. No. 2004-29, 29 NJPER 506 (¶160 2003) (citing Passaic Cty. (Preakness Hosp.), P.E.R.C. No. 85-87, 11 NJPER 136 (¶16060 1984)). See also City of Newark, P.E.R.C. No. 2008-34, 33 NJPER 316 (¶120 2007), recon. den. P.E.R.C. No. 2008-53, 34 NJPER 71 (¶29 2008); City of Newark, H.E. No. 2013-14, 39 NJPER 410 (¶130 2013); City of Newark, H.E. No. 2015-8, 41 NJPER 454 (¶141 2015)). No facts in this case suggest that the County refused to implement a binding determination of one of its agents. Instead, the SOA refused to participate in the hearing, based on its belief that conducting such a hearing was itself an unfair practice. No determination was rendered as a result.^{3/} No facts are alleged indicating that

^{3/} Under the parties' CNA, the Charging Party could have proceeded to the next step of the grievance procedure when the County did not issue a decision at step 3. Section 11.4 of Article XI provides that the "[f]ailure at any step of this procedure to communicate the decision on a grievance shall permit the aggrieved [e]mployee to proceed to the next step." The Commission generally has not recognized a violation of the Act when the grievance could have proceeded to arbitration under the contract's self-executing grievance procedure. See e.g. State of New Jersey (Treasury), P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988); State of New Jersey (Judiciary), P.E.R.C. No. 2014-84, 41 NJPER 43 (¶11
(continued...))

a binding determination was rendered by a designee and that the County refused to implement it.

Finally, the charge does not allege any facts that support a claim arising under Section 5.4a(2) of the Act. Under all of these circumstances, I dismiss the charge.

ORDER

The Unfair Practice Charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: January 8, 2021
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 19, 2021.