

D.U.P. NO. 2023-23

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

In the Matter of

CITY OF PLAINFIELD,

Respondent,

-and-

Docket No. CO-2021-049

PLAINFIELD FIRE OFFICERS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Plainfield Fire Officers Association (Association) against the City of Plainfield (City). The charge alleges the City violated sections 5.4a(5) and (1) of the Act by charging Association members who retired from employment with the City health insurance contributions pursuant to the P.L. 2011, C. 78 (Chapter 78). The same claim was already arbitrated and confirmed by the Superior Court. The Director dismissed the charge on the grounds that (1) the charge was untimely and filed beyond the Act's six month statute of limitations; (2) the Commission lacks jurisdiction over refusal to negotiate claims concerning retiree health benefits; (3) Chapter 78 did mandate retirees make health insurance contributions; and (4) the Commission cannot substitute its unfair practice procedures with the parties collectively negotiated grievance procedures when resolving a contractual dispute.

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Appearances:

For the Respondent,
Hatfield Schwartz Law Group LLC, attorneys
(Kathryn Hatfield, of counsel)

For the Charging Party,
Law Offices of Craig S. Gumpel, LLC, attorneys
(Craig S. Gumpel, of counsel)

REFUSAL TO ISSUE COMPLAINT

On September 9, 2020, the Plainfield Fire Officers Association (Association) filed an unfair practice charge against the City of Plainfield (City). The charge alleges the City violated section 5.4a(5) and, derivatively, (a)(1)^{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. (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."

Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by repudiating the parties' collective negotiations agreement (Agreement) and refusing to negotiate in good faith over retiree health insurance benefits. Specifically, the Association alleges the City violated the Act when on May 1, 2019, the City advised Association unit employees that it would, effective July 1, 2019, begin deducting health insurance contributions from retirees in accordance with the insurance contribution rates under P.L. 2011, c. 78 ("Chapter 78"). These deductions, according to the Association, allegedly repudiated a provision in the parties' collective negotiations agreement that provided retired members of the Association with health benefits "at the City's sole expense." The Association also alleges the City "acted in bad faith in negotiations" when it represented that Association retirees would receive the same health benefits as rank-and-file and superior police officers employed by the City.

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.^{2/}

The Association is the exclusive majority representative of uniformed fire officers employed by the City. The Association and City are parties to a collective negotiations agreement extending from January 1, 2018 through December 31, 2021 (Agreement).

On September 7, 2017, the City and Association commenced collective negotiations for the 2018-2021 Agreement. At their second negotiations session on October 4, 2017, the Association submitted negotiations proposals to the City that included a proposal which would provide health benefits to retired Association unit members at no cost to the retiree. At the October 4 meeting, the City's representatives advised the Association that no other City negotiations units, including the rank-and-file and superior police officer units represented by the Policemen's Benevolent Association (PBA) and PBA Superior Officers Association (PBA-SOA), sought changes to Chapter 78 retiree contributions. The City's chief negotiator also informed the Association that it was presenting the "same deal" to the

^{2/} The facts are gleaned from the charge and attachments to the charge.

Association as was provided to the PBA and PBA-SOA and the PBA units already accepted this deal.

On or about March 29, 2018, Association and City representatives executed a Memorandum of Agreement prepared by the City covering the period from January 1, 2018 through December 31, 2021. The 2018-2021 collective negotiations agreement between the Association and City was fully executed and ratified by the parties on or about February 19, 2019. Both the Association's Agreement and the PBA/PBA-SOA collective agreements provide health insurance benefits to retirees at the City's "sole expense."

On or about May 1, 2019, the City advised Association, PBA and PBA-SOA unit employees that, effective July 1, 2019, retirees would pay health insurance contributions pursuant to Chapter 78. Prior to July 1, 2019, retiree health benefits were paid solely by the City. The Association, PBA and PBA-SOA each filed grievances challenging the City's decision to charge retirees health insurance contributions and all three grievances went to arbitration.

On April 21, 2020 Arbitrator Arnold Zudick issued an opinion and award^{3/} denying the Association's grievance "in substantial part", but also sustained the grievance "in part." (Exhibit A to

^{3/} Zudick's arbitration award is attached as "Exhibit A" to the Association's charge.

Charge, p. 24). Specifically, Arbitrator Zudick found that the City did not violate the Agreement^{4/} by charging retirees "Smith, Carnegie and O'Neal a contribution towards their health benefit costs" consistent with Chapter 78. However, Arbitrator Zudick also found that the City violated the Agreement "by giving those retirees inadequate notice of when such contributions would commence." (Exhibit A to Charge, p. 24). Arbitrator Zudick's award was confirmed by the Superior Court of New Jersey on July 15, 2020.

In reaching his decision, Arbitrator Zudick noted, in pertinent part, that the Association in October 2017 proposed language in the 2018-2021 Agreement that would provide retiree health benefits at no cost to retirees. (Exhibit A to Charge, pp. 6-7). Specifically, the Association proposed to add the following language to the 2018-2021 Agreement: "Effective January

^{4/} The specific provision in question -- Article 12.8B of the parties' Agreement--provides:

B. The City agrees at its sole expense to continue the health insurance coverage for employee, spouse and eligible dependents for those employees who retire, as such retirement is defined by P.F.R.S. Said health insurance coverage shall be the same coverage as provided to City employees.

Article 12.1 of the Agreement further provides that the "City agrees to comply with Chapter 78 P.L. of 2011." The arbitrator interpreted these provisions to mean that the City can charge health insurance contributions to retirees consistent with Chapter 78 and that the language in Article 12.8B did not prohibit the same.

1, 2018, [the City shall provide] retiree health benefits at no cost to retirees for any member subject to contribution pursuant to c. 78." (Exhibit A to Charge, p. 7). The arbitrator also found that this proposed language was not added to or referenced in the April 4, 2018 Memorandum of Agreement and 2018-2021 Agreement that was ultimately approved and ratified by the Association and City. (Exhibit A to Charge, pp. 7 and 19). Based on these factual determinations, the arbitrator found the City and Association never agreed to reduce or modify Chapter 78 health insurance contributions. (Exhibit A to Charge, p. 19).

On April 29, 2020, Arbitrator Gerard Restaino issued his Opinion and Award on the PBA and PBA-SOA's joint grievance challenging the City's decision to charge health insurance contributions to retirees.^{5/} Relying on the same health insurance provision/language concerning retiree benefits for Association members, Arbitrator Restaino found that the City had violated the PBA and PBA-SOA agreements by charging PBA and PBA-SOA retirees health benefit contributions.^{6/}

The Association alleges that as a result of Restaino's and Zudick's Awards, PBA and PBA-SOA retirees receive health benefits

5/ Restaino's arbitration award is attached as "Exhibit B" to the charge.

6/ It is unclear from the charge whether either party filed an Order to Show Cause to confirm, modify or vacate this Award.

at the City's sole expense, while Association retirees do not receive health benefits at the City's sole expense. The Association maintains that it "relied to its detriment on the representations made by the City" concerning health benefits for Association retirees and "acted in bad faith in negotiations with [the Association] in that [Association] members do not receive the same [health] benefits as PBA/SOA members regarding health benefits in retirement at the City's sole expense." (Paragraphs 15 and 16 of Charge).

ANALYSIS

I am dismissing the Association's charge for the following, principal reasons:

(1) The charge is untimely since it was filed outside the Act's statute of limitations for unfair practice charges under N.J.S.A. 34:13A-5.4c;

(2) The Public Employment Relations Commission (Commission) lacks jurisdiction over retirees under the Act and cannot exercise unfair practice jurisdiction over claims that an employer unilaterally changed or refused to negotiate over changes to retiree health benefits;

(3) Based on Commission and New Jersey Supreme Court precedent interpreting Chapter 78, the retirees must pay Chapter 78 contributions until the parties agree to modify or change those contributions; and

(4) Under State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984); and other Commission precedent, the Association cannot substitute unfair practice jurisdiction with the parties' collectively negotiated grievance procedure.

Statute of Limitations

N.J.S.A. 34:13A-5.4c provides that:

[no] complaint shall issue based on any unfair practice charge occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

N.J.S.A. 34:13A-5.4c; see also Newark School District and Newark Teachers Union (Gillespie), D.U.P. No. 2014-3, 40 NJPER 205 (¶79 2013), aff'd at P.E.R.C. No. 2014-61, 40 NJPER 440 (¶151 2014).

In determining whether a party was "prevented" from filing an earlier charge, the Commission conscientiously considers the circumstances of each case and assesses the Legislature's objectives in prescribing the time limits as to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978) (case transferred to Commission where employee filed court action

within six months of alleged unfair practice). Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. Sussex Cty. Com. Col., P.E.R.C. No. 2009-55, 35 NJPER 131 (¶46 2009); State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

Here, the Association's charge is untimely since it was filed beyond the six (6) month statute of limitations under the Act. The Association alleges the City advised the Association on or about May 1, 2019 that retiree health benefit contributions would be charged to Association retirees effective July 1, 2019. The charge here challenging this health benefits change was not filed until September 9, 2020 -- sixteen (16) months after the Association was notified of the health benefits change and fourteen (14) months after the health insurance contributions/changes went into effect. While the Association decided to pursue a grievance in lieu of an unfair practice charge challenging the health insurance change, there are no alleged facts indicating the Association was prevented from filing its charge during or prior to filing a grievance.

Based on the foregoing, the Association's charge is untimely and is dismissed.

Retirees and Unfair Practice Jurisdiction

A retiree is not an "employee" within the meaning of the Act. N.J.S.A. 34:13A-3(d); IAFF Local 2081 (Sarapuchiello), P.E.R.C. No. 2009-47, 35 NJPER 66, (¶25 2009); Fairfield Tp., D.U.P. No. 2011-6, 37 NJPER 129 (¶38 2011). It is well-settled that the "Commission does not have jurisdiction over individuals who are no longer public employees, such as individuals who have resigned or retired." Plainfield Bd. of Ed., D.U.P. No. 2016-6, 43 NJPER 9, 10 (¶3 2016); City of Asbury Park, D.U.P. No. 2002-9, 28 NJPER 160, 161 (¶33057 2002), aff'd P.E.R.C. No. 2002-73, 28 NJPER 253 (¶33096 2002).

Based on well-settled Commission precedent, I dismiss the Association's charge for lack of jurisdiction. In the context of changes to health insurance benefits, an employer is not obligated to negotiate over benefit changes for employees who are already retired. New Jersey Turnpike Authority, P.E.R.C. No. 2006-13, 31 NJPER 284 (¶111 2005); Cumberland Cty. Bd. of Social Services, D.U.P. No. 2018-10, 44 NJPER 433 (¶121 2018). A union may, however, enforce a contract on behalf of a retired employee since it has a cognizable interest in ensuring the terms of a collective negotiations agreement are followed. 31 NJPER at 285. The mechanism for enforcing a collective agreement is a

grievance, not an unfair practice charge. Voorhees Tp.; P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011), aff'd 39 NJPER 69 (¶27 App. Div. 2012) (Unions file joint grievance on behalf of retirees who were not reimbursed for increased prescription co-payments under State Health Benefits program); City of Jersey City, P.E.R.C. No. 2013-38, 39 NJPER 223 (¶75 2012), aff'd 41 NJPER 31 (¶7 App. Div. 2014) (Unions file grievances challenging unilateral changes by employer to retiree health care coverage). And the Association did just that: pursued grievance arbitration to enforce the level of benefits provided to retirees under the Agreement. Fairfield Tp.

In sum, the Commission lacks jurisdiction over retirees and cannot exercise unfair practice jurisdiction over claims that an employer unilaterally changed or refused to negotiate over changes to retiree health benefits. Here, the gravamen of the Association's charge is that retirees' level of health benefits were changed when the City began to charge retirees for health insurance contributions pursuant to Chapter 78. While the Association can (and did) pursue a grievance challenging this change in benefits, the claim is not a cognizable unfair practice because retirees are not "employees" within the meaning of the Act.

For this additional reason, the charge should be dismissed.

Chapter 78 and Health Insurance Contributions

Our Supreme Court and Commission have construed Chapter 78 as requiring employees subject to Chapter 78 to make health insurance contributions at Tier 4 levels until the employees' majority representative and public employer agree in a collective negotiations agreement to change or modify Chapter 78 contributions. In re Ridgefield Park Bd. of Ed., 244 N.J. 1 (2020); Lacey Tp., P.E.R.C. No. 2020-47, 46 NJPER 447 (¶101 2020); Ridgefield Park Bd. of Ed., D.U.P. No. 2021-2, 47 NJPER 207 (¶46 2020), aff'd P.E.R.C. No. 2021-27, 47 NJPER 328, 330 (¶78 2021) (Commission notes, in agreement with the Director of Unfair Practices, that ". . . after full implementation of Chapter 78, Tier Four became part of the parties' CNA [collective negotiations agreement] and the *status quo* for future negotiations until the parties agree in a CNA [collective negotiations agreement] to change the Tier Four rate").

Here, Arbitrator Zudick found (and I am not in position to second guess)^{7/} that Association retirees were not paying Chapter 78 health insurance contributions prior to July 1, 2019 and the Association and City never agreed to change, reduce or modify

^{7/} The procedure for challenging or appealing a factual or legal determination in a grievance arbitration award is to file an Order to Show Cause with the Superior Court of New Jersey. N.J.S.A. 2A:24-7 and 8; Somerset Cty., P.E.R.C. No. 2002-14, 27 NJPER 375 (¶32137 2001) (Commission notes that if any party disagrees with a arbitration award it may seek review in the courts pursuant to N.J.S.A. 2A:24-8).

Chapter 78 contributions. Consistent with Supreme Court and Commission precedent, the Arbitrator found the language in the Agreement providing for health benefits at the City's "sole expense" did not supersede the statutory requirement of retirees to make Chapter 78 contributions.^{8/} Given these determinations, the City's charging of retirees Chapter 78 contributions was not an unfair practice under the Act. Ridgefield Park Bd. of Ed., D.U.P. No. 2021-2, 47 NJPER 207 (¶46 2020), aff'd P.E.R.C. No. 2021-27, 47 NJPER 328, 330 (¶78 2021).

Grievances and Unfair Practice Jurisdiction

Under Section 5.3 of the Act, a public employer and majority representative are required to use their collectively negotiated grievance procedures for any disputes covered by the terms of their collective agreement. N.J.S.A. 34:13A-5.3. The Commission ". . . will not permit litigation of mere breach of contract claims in the guise of unfair practice charges." State of New Jersey (Dept. of Human Svcs.), P.E.R.C. No. 84-148, 10 NJPER 419,422 (¶15191 1984); Woodland Park Bd. of Ed., D.U.P. No. 2014-12, 40 NJPER 429, 430 (¶147 2014). Moreover, a Charging Party cannot re-litigate a claim before the Commission that has already been fully adjudicated by an arbitrator or other tribunal. State of New Jersey (Human Services), 10 NJPER 419; Woodland Park, 40

^{8/} The arbitrator also noted that the Agreement on health benefits also included a provision that memorialized the City's statutory obligation to comply with Chapter 78.

NJPER at 431 ("The parties should not be entitled to substitute the Commission for a grievance procedure agreed upon as the method for resolving a contractual dispute."); Jersey City Bd. of Ed., D.U.P. No. 80-5, 5 NJPER 405 (¶10211 1979); Passaic Cty., D.U.P. No. 84-9, 9 NJPER 610 (¶14260 1983); Hudson Cty., D.U.P. No. 2001-12, 27 NJPER 64, 66 (¶32028 2000) (Director notes that the Commission could not afford a charging party a "second bite at the apple" by permitting the charging party to re-litigate her claim challenging her termination when that claim was already adjudicated by the Merit System Board); Mercer Cty., D.U.P. No. 2003-4, 29 NJPER 83 (¶23 2002).

Here, the Association is seeking to re-litigate its claim that the City breached the Agreement under the guise of an unfair practice charge. The breach of contract claim was fully adjudicated, however, by Arbitrator Zudick and the arbitrator's decision was confirmed by the Superior Court of New Jersey. As such, I decline to exercise our unfair practice jurisdiction over a contractual claim that was fully adjudicated in accordance with the parties' collectively negotiated grievance procedures.

N.J.S.A. 34:13A-5.3; State of New Jersey (Human Services).

ORDER

The unfair practice charge is dismissed.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: April 28, 2023
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3. See N.J.A.C. 19:14-2.3(b).

Any appeal is due by May 8, 2023.