H.E. NO. 91-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF STONE HARBOR,

Respondent,

-and- Docket No. CO-H-90-246

CAPE MAY PBA LOCAL 59,

Charging Party.

SYNOPSIS

In an unfair practice hearing where the Charging Party PBA alleged that the Respondent Borough discriminated against a member of the Charging Party due to his protected conduct, the Hearing Examiner denies Respondent's Motion to Limit PERC Jurisdiction/ Motion to Dismiss Complaint.

The Respondent argued that pursuant to N.J.S.A. 40:14-150, a police officer in a non-civil service jurisdiction found guilty of disciplinary infractions may have his conviction reviewed only by the Superior Court and that the Commission lacks jurisdiction to modify or reverse the disciplinary finding or the penalty imposed.

In denying the motion, the Hearing Examiner found that the Commission has primary and exclusive jurisdiction over unfair practice charges; that this unfair practice charge is not an appeal in contravention of section 150; rather, it addresses different and broader issues than did the disciplinary hearing. Accordingly, the Hearing Examiner concluded that the Commission has jurisdiction over such unfair practice matters as these, implicating employer actions -- including disciplinary matters and managerial prerogatives -- governed by other statutory schemes.

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Appearances:

For the Respondent
Gruccio, Pepper, Giovinazzi & DeSanto, Attorneys
(Cosmo A. Giovinazzi, III, of counsel)

For the Charging Party
Schneider, Cohen, Solomon, Leder & Montalbano, Attorneys
(David Solomon, of counsel)

DECISION

On March 2, 1990, Cape May PBA Local 59 ("PBA") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Borough of Stone Harbor ("Borough") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. ("Act"); on March 22, 1990, the PBA amended its charge. The amended charge alleges that the Borough violated subsections 5.4(a)(1), (3) and (4)[1/] of the Act when it

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1/ These subsections 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

Footnote Continued on Next Page

discriminated against a Stone Harbor police officer because he engaged in conduct protected under the Act.

A Complaint and Notice of Hearing was issued on June 20, 1990. On July 19, 1990, the Borough filed its Answer, generally denying that it had violated the Act and stating several affirmative defenses. Two pre-hearing conferences were conducted and a pre-hearing order was issued on October 9, 1990.[2/] On October 16, 1990, the Borough submitted a Motion to Limit PERC Jurisdiction; the PBA responded to the Motion on October 25, 1990. In correspondence dated November 1, 1990, I requested that the Borough clarify aspects of its motion. In a letter dated November 13, 1990, the Borough states that its Motion to Limit PERC Jurisdiction is in the nature of a motion to dismiss complaint. See N.J.A.C. 19:14-4.7 and R. 4:6-2(e).

1/ Footnote Continued From Previous Page

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 act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

2/ The pre-hearing order indicates the parties' agreement to submit these joint exhibits into evidence at the hearing: (a) A copy of the parties' most recently executed collective negotiations agreement. (b) The Notice of Discipline prepared by the Borough against Officer E. Beck. (c) The written order prepared by the disciplinary hearing officer concerning the Beck disciplinary matter. (d) The Rules and Regulations governing the Borough of Stone Harbor Police Department. (e) The Stone Harbor Police Chief's calendar, admitted in evidence at the Beck disciplinary hearing. As of this date, the parties have provided items a, b and c.

In Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987), the court stated:

> On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979).
> Reider, at 552.

When considering a motion to dismiss complaint, the allegations of the complaint are deemed true and the benefit of all favorable inferences from the allegations are accorded to the complaintant. Wuethrich v. Delia, 134 N.J. Super 400 (Law Div. 1975), aff'd 155 N.J. Super 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978).

A motion to dismiss raises only issues of law, while admitting all of the opponent's well-pleaded facts; a party seeking a motion for summary judgment claims there is no genuine issue of material fact and it is entitled to judgment on the undisputed facts and applicable law. Heljan Management Corp. v. Dileo, 55 N.J. Super 307 (App. Div. 1959); Baldwin Const. Co. v. Essex Cty. Bd. of Taxation, 24 N.J. Super 253 (Law Div. 1952).

In Hackensack Water Co. v. No. Bergen Tp., 103 F.Supp 133 (D.N.J. 1952), aff'd. 200 F.2nd 313 (3rd Cir. 1952), defendant

submitted a motion to dismiss, based upon lack of jurisdiction and failure to state a claim on which relief could be granted. The court said it would consider matters outside the pleadings only where such matters were undisputed.

When matters outside the pleadings are considered, the motion is treated as one for summary judgment. Enourato v. N.J. Building Auth., 182 N.J. Super 58, 64-65 (App. Div. 1981), aff;d 90 N.J. 396 (1982). R.4:6-2, 4:46-1. In P. & J Auto Body v. Miller, 72 N.J. Super 207 (App. Div. 1962), the court stated:

> While the court has the power to enlarge the scope of said motion and treat the same as "one for summary judgment," this may be done only if on said motion "matters outside the pleading are presented." However, such matters must be presented by depositions, admissions or affidavits. They cannot be raised, without verification, in oral arguments of counsel or in briefs filed with the court.
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> P. & J. Auto Body, at 211. See also Comment, R. 4:6-2.

In this matter, the Borough submitted its Motion to Limit PERC Jurisdiction to me and represents that it is in the nature of a motion to dismiss. Although the Borough submitted a statement of facts and attachments to its brief, it provided no affidavits, depositions or cognizable admissions of facts. Accordingly, for purposes of deciding this motion, I am constrained to rely upon the factual statements contained in the complaint and upon the legal arguments of counsel. P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962) and AFSCME, Council 52, P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990).

In its charge, the PBA asserts:

1. In September 1989, Beck, at the request of the PBA, testified at a disciplinary hearing on behalf of another member of Cape May PBA Local 59 who was employed in another jurisdiction.

2. In January 1990, Beck, on behalf of the PBA, approached the Stone Harbor Chief of Police seeking an accounting concerning the funds from a soda machine which belonged to members of the Stone Harbor Police Department.

3. In February 1990, the PBA mailed an unfair practice charge to the Borough alleging that the Borough had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq., through the discriminatory actions it took against Beck due to his exercise of protected rights.

4. In January-February 1990, the Stone Harbor Police Chief reprimanded Beck.

5. In January-February 1990, the Police Chief removed Beck as a Senior Shift Officer and gave him a less desirable work schedule.

6. In March 1990, the Borough filed disciplinary charges against Beck involving incidents dating back to September 1989. A hearing was then held before a Hearing Officer appointed by the Borough. The Hearing Officer concluded that Beck violated two Stone Harbor Police Department Regulations -- (1) failure to secure the Police Chief's approval before testifying in a civil proceeding and (2) testifying in a civil proceeding without service of a subpoena.

This disciplinary proceeding resulted in Beck being suspended without pay for 10 days.

The PBA contends that the Borough discriminated against Beck with regard to terms and conditions of employment because Beck engaged in protected activities and filed an unfair practice charge against the Borough, and that such conduct has interfered with employees in the exercise of rights guaranteed by the Act.

The Borough admits only that the PBA is the majority representative of the unit of police officers employed by the Borough of Stone Harbor and that the parties entered into a collective negotiations agreement which is currently in effect. The Borough denies all other allegations contained in the charge and offers several affirmative defenses: that the charge fails to state a cause of action upon which relief may be granted by the Commission; that Beck was removed as a Cape May County Police Academy instructor due to comments made by Beck during a class which offended certain class members; and that the PBA filed its unfair practice charge for the purpose of intimidating the Borough.

In its Motion to Limit PERC Jurisdiction/Motion to Dismiss, the Borough notes that under the Civil Service Act, N.J.S.A. 11:1-1 et seq., an employee in a civil-service municipality who receives discipline in excess of a 5-day suspension has a right to appeal such action to the Merit System Board. Similarly, the Borough notes that, pursuant to N.J.S.A. 40A:14-150 ("section 150"), a police officer in a non-civil service jurisdiction who has been tried and

convicted of disciplinary changes may have his conviction reviewed by the Superior Court. However, citing Jersey City v. Jersey City Police Assn., 179 N.J. Super. 137 (App. Div. 1981), the Borough argues that the section 150 procedures cannot be modified or supplanted in any way -- such as, by submitting the reasonableness of the disciplinary penalty to arbitration. The Borough argues that, in section 150, the legislature has given exclusive jurisdiction to review disciplinary matters to the courts and therefore, the Commission has no jurisdiction to modify or reverse the disciplinary finding or to alter the penalty imposed. The Borough contends that if an employee's defense to disciplinary charges is that they were brought solely for the purpose of discriminating against a union representative, then that defense must be presented to the reviewing court pursuant to N.J.S.A. 40A:14-150. The Borough further argues that in Hackensack v. Winner, 82 N.J. 1 (1980), where two related cases were tried before two administrative agencies, the court said that the Commission's jurisdiction over unfair practice charges was concurrent with the Civil Service Commission and that the Commission was bound by the principles of collateral estoppel and res adjudicata.

Finally, the Borough contends that the mere allegation that the imposition of discipline may constitute an unfair labor practice cannot deprive an employer of the ability to impose discipline nor does it give the Commission jurisdiction to review a disciplinary matter where review is reserved to the Superior Court by statute.

The Borough requests, based upon the facts and argument presented, a determination that the Commission does not have jurisdiction to consider this complaint, to alter the findings of the hearing officer or the discipline imposed upon Beck because the object of the complaint is to appeal the discipline imposed by the Borough. Alternatively, the Borough argues that if it is determined that the Commission has concurrent jurisdiction with the Superior Court over the present subject matter, then based upon the principles of collateral estoppel and res adjudicata, we should not invoke that jurisdiction.

The PBA argues that the Commission has jurisdiction to consider how the Borough applied its police department rules to Beck and whether or not its actions against Beck, as a whole, were done in retaliation for his protected activities. The PBA contends that the Borough's position that Beck should have sought Superior Court review of the discipline imposed upon him misses the point. The PBA notes that it neither contests the general validity of the two departmental rules Beck was found to have violated nor their violation. Rather, the PBA contends that the issue is whether the Borough's actions against Beck -- all of the Borough's actions, not only the 10-day suspension -- were illegal retaliation for Beck's protected activity.

Section 150 ensures that police officers in non-civil service jurisdictions are afforded protections against arbitrary employment actions which are similar to those given to police

officers in civil service jurisdictions. The PBA contends that section 150 does not preempt the Commission's jurisdiction here. It argues that the Commission's jurisdiction cannot be taken from it when it is asked to consider a matter within its area of expertise, even though other statutory schemes may be implicated. The PBA cites Tp. of Teaneck v. Local 42, FMBA, 158 N.J. Super. 131, 138 (App. Div. 1978), where the court held that the Commission has primary jurisdiction over unfair labor practices and that it is only in extraordinary circumstances that this jurisdiction may be preempted by the courts. The PBA further asserts that the Borough's characterization of the unfair practice charge as an attempt to appeal a disciplinary determination is incorrect. Rather, the PBA suggests that its charge goes to the legality of the discipline under the Act. The PBA notes that despite authority granted by the legislature to municipalities to enact internal rules and regulations, such authority cannot be exercised in an unbridled fashion. The PBA argues that each case must be assessed so as to ensure that the scope of authority exercised was not ultra vires. Accordingly, the PBA urges that the Borough's motion be denied.

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In considering the Borough's Motion to Limit Jurisdiction/ Motion to Dismiss, I deem all facts alleged in the complaint to be admitted and accord the Charging Party the benefit of all favorable inferences which may be drawn from those allegations. Reider; AFSCME, Council 52. The inquiry at this stage is to the legal

sufficiency of the facts alleged by the Charging Party. Reider; AFSCME, Council 52.

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

> The Commission shall have exclusive power... to prevent anyone from engaging in any unfair practice....

The Commission has primary and exclusive jurisdiction over alleged unfair labor practice charges. In Hackensack v. Winner, 81 N.J. 1 (1980), employees petitioned two administrative agencies for relief concerning the same set of events. The Civil Service Commission issued its decision denying most of the relief sought by petitioners. Subsequently, this Commission issued a decision granting petitioners the relief sought. In Hackensack, the Supreme Court addressed issues presented by multiple agency litigation:

> ...the Legislature by its 1974 amendment corrected a defect in administrative coverage which this Court noted in Burlington Cty. Evergreen Park Mental Hosp. v. Cooper, supra, where no statutory power to deal with unfair labor practices was found to reside in PERC.... The 1974 amendment vested in PERC full authority to deal remedially with all aspects of the public employment environment when tainted by unfair labor conduct and to provide broad remedial relief...
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> ...
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> Hence, the Public Employer-Employee Relations Act, as amended, should be understood as granting to PERC the exclusive administrative power to deal fully and completely with complaints of unlawful practices relating to employee rights not directly covered by other laws.
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> ...
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> ...where an unfair practice is not the sole, major or dominant issue in an employer-employee controversy, it would not be improper for the Civil Service Commission

> to consider that issue if it were otherwise relevant in a civil service proceeding addressing the employer-employee controversy. On the other hand, PERC would have exclusive power over claims involving unfair practice allegations when these allegations do constitute the sole or major complaint of the aggrieved employees. Similarly, wrongful conduct equated with unfair practice, though not the primary issue, may in the context of a particular controversy so dominate or color the entire case that its determination, as a practical matter, might substantially influence or render moot the resolution of other issues. In that situation it would be appropriate to consider PERC's jurisdiction to be "exclusive." It is also possible that an unfair practice charge may raise issues of wide public significance affecting important interests extending beyond those of the immediate parties; in such a case, it may be appropriate to invoke PERC's jurisdiction even though the matter is otherwise cognizable before another administrative agency.
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> Hackensack, at 24-26.

In Bd. of Ed. of Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979), the Court held that the Commission has primary jurisdiction over disputes involving asserted conflicts between the New Jersey Employer-Employee Relations Act and other statutory schemes. In Tp. of Teaneck v. Local 41, FMBA, 158 N.J. Super. 131 (App. Div. 1978), the Court stated:

> We observe that defensible reasons for Chancery to preempt the primary jurisdiction of PERC in the case of charges of unfair practice contrary to the statute would need to be exceptionally compelling to pass muster.
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> [Teaneck at 138].

Disciplinary matters are negotiable, as provided in section 5.3 of the Act:

> the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them .... Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws.

See CWA v. P.E.R.C., 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 190 (1984) and Bergen Cty Law Enforcement Group v. Bergen Cty Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983).

Where there is an alternate statutory appeal procedure for disciplined employees, no arbitral or other review of the discipline is permitted, other than that provided by statute. CWA v. P.E.R.C.; Bergen Cty Law Enforcement Group. The Commission has determined that section 150 "... is an alternate statutory appeal procedure for non-civil service police who receive disciplinary sanctions set forth in the statute". Tp. of So. Brunswick, P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986).

However, this case is not an appeal of a disciplinary proceeding in contravention of section 150. It is an unfair labor practice charge which addresses issues that are different from and broader than those addressed in the Beck disciplinary matter. Where an appeal of the disciplinary determination may address just cause

or penalty fairness issues, the charge focuses on whether the several, alleged discriminatory actions taken by the Borough against Beck were motivated by Beck's asserted protected conduct, in violation of subsections 5.4(a)(1), (3) and (4) of the Act.

The Charging Party, PBA, alleges that the employer retaliated against Beck because he engaged in protected activities. The Respondent Borough denies its actions were retaliation against Beck due to his protected activities. The Borough asserts it fairly disciplined Beck for violating departmental rules. The charge allegations present more than an attempt to appeal the discipline. The charge states that (1) in September 1989, Beck testified at a disciplinary hearing on behalf of another member of PBA Local 59, at the request of the PBA; (2) in January 1990, Beck confronted the Stone Harbor Chief of Police seeking an accounting for funds from a soda machine belonging to members of the Stone Harbor Police Department; and (3) on March 2, 1990, the PBA filed an unfair practice charge against the Borough for alleged discriminatory actions taken against Beck. The charge further states that (4) in January-February 1990, Beck was reprimanded by the Police Chief; (5) in January 1990, the Chief removed Beck as an instructor at the Cape May County Police Academy; (6) in January-February 1990, the Chief removed Beck as a Senior Officer and assigned him a less desirable work schedule; and (7) on March 6, 1990, the Borough filed disciplinary charges against Beck for incidents which occurred as early as September 1989. These disciplinary charges resulted in Beck being suspended for ten days without pay.

The Borough asserts that Beck was properly disciplined. It further argues that after the disciplinary hearing was completed and a penalty imposed upon Beck, his only avenue for challenging the ten-day suspension was to appeal the discipline to Superior Court, pursuant to N.J.S.A. 40A:14-150.

The ten-day suspension is one component of the discrimination which the Charging Party alleges the Borough took against Beck for his various protected activities -- a package of events.

The Commission has jurisdiction over allegations of unfair practices which implicate employer actions governed by other statutory schemes. See Bernards; Gloucester Cty Voc Tech School Bd. of Ed., P.E.R.C. No. 89-125, 15 NJPER 333 (¶20148 1989) (where the Commission found the Board suspended a custodian without pay due to his protected activities); Hopatcong Bd. of Ed., P.E.R.C. No. 89-51, 14 NJPER 694 (¶19296 1988) (where the Commission found the Board disciplined a teacher who was president of the local teachers' association due to her protected activities); Logan Tp. Bd. of Ed., P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1981), aff'd App. Div. Dkt. No. A-696-82T2 (10/4/83) (where the Commission found that the Board did not rehire a teacher who was vice-president of the local teachers' association due to her protected activities); and Trenton Bd. of Ed., P.E.R.C. No. 80-130, 6 NJPER 216 (¶11108 1980) (where the Commission found that the employer's critical comments in a teacher's evaluation were motiviated by the teacher's protected

conduct). Each of these cases involved actions by an employer -- including matters of discipline and managerial prerogative -- governed by other statutory schemes. The Commission's jurisdiction over these matters derives from the allegations of unfair labor practice in the charges -- specifically, the assertion that the employers actions against employees were motivated by the employees' protected activities.

Inasmuch as I have concluded that the charge and the disciplinary proceeding each address different issues, the Borough's res adjudicata/collateral estoppel argument is inapposite. City of New Brunswick v. Speights, 157 N.J. Super. 9 (C.C. 1978).

Based upon the foregoing, I conclude that the complaint states a viable unfair practice charge, that it is not an appeal of discipline and that the Commission has jurisdiction over the allegations of the complaint. Accordingly, Respondent Borough's Motion to Limit P.E.R.C Jurisdiction/Motion to Dismiss is denied.

The hearing shall proceed as scheduled.

Charles Tadduni
Hearing Examiner

Dated: November 21, 1990
Trenton, New Jersey