D.U.P. NO. 2003-7

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

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-2003-31

PBA LOCAL 153,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by PBA Local 153, alleging that the County ordered the PBA to give up its union office at the County Jail. Since the PBA is no longer the majority representative, it is not entitled to the union security benefits of the expired contract. Nor does it have standing to seek contract enforcement.

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Appearances:

For the Respondent
Apruzzese, McDermott, Mastro & Murphy, attorneys
(James L. Plosia, Jr., of counsel)

For the Charging Party
Iacullo & Martino, attorneys
(Steven J. Martino, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 1, 2002, Patrolmen's Benevolent Association Local 153 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that Essex County (County) violated 5.4a(2) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] by ordering the PBA to surrender its union office in the County Jail.

1/ This provision prohibits public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization.

The Commission has authority to issue a complaint where it appears that the 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. In correspondence dated December 27, 2002, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

Until December 2001, PBA Local 153 was the exclusive representative of the County's corrections officers at the County Jail. Following a secret ballot election conducted by the Commission on December 6, 2001, the Fraternal Order of Police replaced the PBA as the negotiations unit's exclusive representative.

The PBA and the County had a collective negotiations agreement in effect until December 31, 2001. A 1984 interest arbitrator's award, which the parties have treated as incorporated into the collective agreement, includes this provision:

> The County of Essex shall provide the Union with a place in the Essex County Jail mutually agreed upon by the parties, in an office large enough to conduct PBA business. This provision to go into effect in 1985.

PBA Local 153 had the use of a large office in the Jail until January 2001. Just after the Commission certified the FOP as the unit's exclusive representative, the County gave the large office formerly used by the PBA to the FOP; the PBA was given a "transitional" office to use in the Jail.

In July 2002, the County notified the PBA Local 153 president that the PBA would be required to surrender its office space, and that the PBA officers would face discipline if they refused to comply with the directive.

The PBA initially filed an Order to Show Cause with temporary restraints in New Jersey Superior Court, Chancery Division. On July 29, 2002, Judge Levy denied restraints and agreed with the County that this Commission had proper jurisdiction over the dispute. The PBA filed the unfair practice charge with the Commission on that date, together with an application for interim relief and temporary restraints pursuant to N.J.A.C. 19:14-9. While the County consented to the temporary restraints, on August 12, 2002, Commission Designee Susan Osborn denied the PBA's request for interim relief. I.R. No. 2003-3, 28 NJPER 363 (¶33131 2002). The matter is now before me to decide if a Complaint should issue. For the following reasons, I decline to issue a Complaint on the allegations of the unfair practice charge.

The PBA asserts that the County violated the Act by repudiating a negotiable provision of the contract which clearly grants PBA the use of the office space. It maintains that the

contract, although expired December 31, 2001, continues "in full force and effect" until the FOP negotiates a new agreement giving it the exclusive use of office space. PBA claims that enforcement of its contractual right would not harm the exclusivity rights of the FOP. It notes that the FOP has neither objected to nor filed charges over the PBA's continued use of office space, nor has the County proffered a legitimate business justification for its action. Therefore, PBA alleges, the County's actions interfered with the existence and administration of its organization in violation of 5.4a(2) of the Act.

The County maintains that the PBA has no employee organization rights to enforce under the expired contract, since it is no longer the majority representative of the unit employees. The County asserts that it risks violating the FOP's exclusivity rights under the Act by giving a minority organization office space. The County cites City of Newark, P.E.R.C. No. 96-53, 22 NJPER 64 (¶27030 1996), aff'g H.E. No. 96-4, 21 NJPER 371 (¶26233 1995), in which the employer was found to have violated the Act by continuing to permit the minority organization release time to conduct union business even after it was no longer the majority representative of the employees.

ANALYSIS

N.J.S.A. 34:13A-5.4(a)(2) prohibits an employer from dominating or interfering with the administration of an employee organization. In Atlantic Community College, P.E.R.C. No. 87-33, 12

NJPER 764, 765 (¶17291 1986), the Commission discussed the standards for a 5.4a(2) violation:

> Domination exists when the organization is directed by the employer, rather than the employees. . . . Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed instead at the employee organization as an entity.

The Commission has held that the type of activity prohibited by 5.4a(2) must be "pervasive employer control or manipulation of the employee organization itself. . . ." North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). The Commission has found 5.4a(2) violations where the employer's deliberate assistance to one organization interfered with the existence of a rival organization. See Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983)(employer assisted incumbent organization by enforcing a broad ban on union solicitation by rival organization but not the incumbent during open period); Cty. of Middlesex (Roosevelt Hosp.), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981)(employer unlawfully assisted incumbent representation by continuing negotiations after a valid representation petition was filed); Cty. of Camden, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983)(employer violated §5.4a(1) and (2) by permitting its personnel assistant, who was also union officer, to represent the county in handling an employee's grievance). Here, however, no facts support the PBA's contention that the County dominated either the FOP or the PBA, nor interfered with the existence of either organization in violation of 5.4a(2).

N.J.S.A. 34:13A-5.3 provides:

> Representatives designated or selected by public employees for the purposes of collective negotiation . . . shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.
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> * * *
>
> 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 interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

Commission caselaw, although not directly ruling on union office space, generally suggests that once the incumbent is replaced as the majority representative, its organizational rights as the employees' representative come to an end. In FOP (Baran), A.B.D. No. 91-2, 16 NJPER 502, 504 (¶21221 1990), the Commission Appeal Board held:

> (An incumbent union's) ouster as the majority representative nullified the agency shop clause of the agreement, which had already expired. See Modine Manufacturing Co., 216 F. 2d. 326, 329 (6th Cir. 1954) and Milk Drivers, etc. Local 680 v. Cream-O-Land Dairy, 39 N.J. Super. 163 (App. Div. 1956). Modine holds that after employees change their majority representative, the union security provisions of the existing agreement become inoperative ["(the ousted union) could not insist on compensation, namely the membership dues, for the service which it could not continue to give."] Cream-O-Land considered an ousted union's demand to arbitrate five claims after contract expiration, three of which alleged

> breaches during the term of the agreement of provisions on wages, pension contributions and holiday compensation and two of which demanded adherence to union security provisions. 39 N.J Super. at 169. The Appellate Division (which cited Modine at 173) barred arbitration over the union security issues. Id. at 177. Thus the courts have distinguished between terms of an agreement which involve recognition of the majority representative and those setting the working conditions of employees. Those contract terms which depend on the right of the contracting union to continue as the majority representative of employees in the unit are nullified when the majority representative is changed, regardless of whether the contract has expired. [emphasis added]

This case was cited by the Commission in Howell Tp. Bd. of Ed., P.E.R.C. No. 94-19, 19 NJPER 452 (¶24213 1993), aff'g H.E. No. 93-29, 21 NJPER 1 (¶26000 1993), finding that the recently ousted incumbent representative was no longer entitled to agency fees under the terms of the expired contract.

The Commission's cases suggest that a former employee representative is not entitled to the union security benefits of the contract once it loses its status as the majority representative. See Newark. While terms and conditions of employment of the employees remain in effect until the new representative negotiates a successor contract (or obtains one through interest arbitration, if applicable), the former representative (here the PBA) retains none of its rights. As the new exclusive representative, the FOP "inherits" the union rights provisions of the contract, such as

union release time, bulletin boards, and so forth.[2/] Moreover, the Commission has previously held that a contract clause giving exclusive rights to the incumbent organization does not constitute unlawful assistance in violation of 5.4a(2) of the Act. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976).

Further, only the exclusive representative has standing to seek enforcement of a collective negotiations agreement. For example, we have previously held that only the majority representative has standing to charge that the employer has unilaterally changed or repudiated the contract. State of New Jersey (Dept. of Environmental Protection), D.U.P. No. 98-18, 23 NJPER 534 (¶28260 1997). Further, in Bayonne Bd. of Ed., 4 NJPER 160 (¶4077 1978), the Commission observed,

> an employee organization does not retain any rights under a collective negotiations agreement, or otherwise, to administer a contract by presenting and/or processing grievances once that organization is decertified. [4 NJPER at 162.]

Based on the foregoing, I find that the PBA, as the minority organization, is not entitled to the office space under the provisions on the expired contract. Therefore, the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.[3/]

2/ Exceptions to this principle are dues deductions and agency fees, which must be negotiated by the newly certified representative. See Howell Tp. Bd. of Ed.

3/ N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: January 15, 2003
Trenton, New Jersey