

H.E. NO. 2004-9

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

RESPONDENT,

-and-

Docket No. CI-2002-16

VICTOR R. KLIMA &
MARINO N. ORTEGA, JR.,

CHARGING PARTY.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants the State's motion to dismiss after the Charging Party rested and recommended the complaint be dismissed. The Charging Party could not simply rely on the submission of documents to prove its case. The Charging Party had to provide sufficient testimony explaining the events and their relationship to the documents to enable the Hearing Examiner to find facts that might support the allegations in the charge. Absent such testimony, the Hearing Examiner found that the Charging Party failed to meet its burden of proof.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the RESPONDENT,
Peter Harvey, Attorney General
(Karen M. Selby, Deputy Attorney General)

For the CHARGING PARTY,
Victor Klima, Marino Ortega, pro se

HEARING EXAMINER'S DECISION
ON MOTION TO DISMISS AND RECOMMENDED ORDER

An unfair Practice charge was filed with the New Jersey Public Employment Relations Commission (Commission) by Victor R. Klima and Marino N. Ortega, Jr. (Charging Party) on September 27, 2001, and amended on April 18, 2002, alleging that the State of New Jersey, Department of Corrections (State or DOC) and PBA Local 105 (PBA), violated the New Jersey Employer-Employee

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1), (2), (3), and 5.4b(1)^{1/}, respectively.

The Charging Party alleged that the State/DOC violated the Act by relying on a confidential PBA legal opinion to deny a grievance; interfered with the Charging Party's right to be represented by counsel; engaged in collusion with the PBA regarding the processing of the grievance; discriminated against the PBA and its members by refusing to negotiate with the PBA; and, has interfered with, restrained or coerced employees for exercising their rights under the Act.

The Charging Party alleged that the PBA breached its duty of fair representation and violated the Act by refusing to provide assistance in processing the grievance; refused to move the grievance to arbitration; and, engaged in collusion with the DOC regarding the processing of the grievance.

^{1/} These provisions prohibit 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in 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; (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; b(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

The Charging Party seeks "to be made whole for any losses sustained" and other remedies including costs and attorneys fees.

The PBA filed a position statement on November 27, 2001, an amended position statement on March 27, 2002, and a response to the amended charge on April 23, 2002. The State filed a position statement on April 5, 2002.

A Complaint and Notice of Hearing issued on October 22, 2002. The PBA filed a motion for summary judgment with the Commission's Chair on January 30, 2003, seeking dismissal of the charges filed against it. That motion was referred to me for consideration by letter of February 3, 2003, N.J.A.C. 19:14-4.8. The PBA submitted a supplemental certification on February 28, 2003, and the Charging Party submitted its response to the motion on April 1, 2003. The PBA filed a reply brief on April 7, 2003.

On June 12, 2003, I issued a decision, State of New Jersey/PBA Local 105, H.E. No. 2003-20, 29 NJPER 263 (¶77 2003) granting the PBA's motion and dismissing the charge against the PBA. A hearing on the case against the State was held on October 9, 2003.^{2/} The State relied upon its April 5, 2002 position statement as its answer. The transcript from that hearing was received on October 28, 2003.

^{2/} The transcript will be referred to as T.

Procedural Background

At the commencement of the hearing the Charging Party was reminded that the case against the PBA had been dismissed and that this hearing was limited to the charges against the State (T10-T27). The Charging Parties were advised of their opportunity to testify and present documents and offer other witnesses.

Charging Party Ortega began his testimony by merely offering for evidence many of the documents the Charging Party had provided in its response to the PBA's motion for summary judgment. I advised the Charging Party that the mere presentation of the documents was not enough to prove its case, that they had to testify what happened to enable me to draw inferences to understand the case (T49-T50). I further reminding the Charging Party that it had the burden of proof in this case (T51-T52).

After reminding the Charging Party of its burden Charging Party Ortega continued to merely offer documents for evidence with little explanation and no testimony on how the events affecting them unfolded. Although there was no objection to the admission of the documents, they were admitted merely as proof of their existence but not as a cohesive explanation of what occurred. Charging Party Klima's "testimony" was more an argument regarding the elements of the Charging Party's case

against the PBA, and argument criticizing the State for using the Intergovernmental Transfer Program to hire former Union County employees at a higher pay.

After both Ortega and Klima "testified" they rested their case. The State promptly moved to dismiss, arguing the Charging Party failed to sustain its burden of proof (T70).

FINDINGS OF FACT

1. Klima and Ortega are State correction officers employed by the Department of Corrections (DOC) and represented by the PBA in the State law enforcement unit. Pursuant to the State Intergovernmental Transfer Pilot Program (IGTP) (R-2), the DOC in April 2001 hired a number of laid off/terminated or about-to-be-laid-off Union County correction officers and paid them the rate on the PBA salary guide closest to their Union County salary. Because the Union County salary guide was different than the DOC salary guide, several former County officers were paid at a higher salary level than certain continuously DOC employed officers with the same years of service such as Klima and Ortega. More specifically, approximately thirteen former County officers with six years of service were placed at step nine of the PBA guide while Klima and Ortega with six years of service were at step 5 of the PBA guide.

In July 2001, the Charging Party filed a grievance (CP-1) seeking to be moved to the same salary guide level as given to the former Union County officers with the same years of service. After an investigation, the PBA declined to participate in or support the Charging Party's request to assist in processing the grievance and denied its eventual request to proceed to arbitration because 1) the transfer did not appear to violate the parties collective agreement; 2) there was no consistent prior practice upon which to challenge the transfers; and 3) the PBA believed that terms and conditions of employment for employees transferred under the IGTP were neither negotiable nor arbitrable. The record shows Charging Parties always received the proper salary provided for them in the DOC/PBA collective agreement.

The DOC denied the grievance, and the grievance was not moved to arbitration.

2. Pursuant to N.J.S.A. 11A:2-11i, the Commissioner of the Department of Personnel created the Intergovernmental Transfer Pilot Program for one year effective from September 1, 1999 through August 31, 2000 (R-1). The program was established to avoid the layoff of experienced employees. It allows for the permanent transfers of employees who hold civil service (Department of Personnel) ranking from one civil service appointing authority (employer) to another (employer) without a

break in service and without the loss of their permanent status. The new appointing authority has the option of offering to credit employees with all their earned seniority, or treat them as a new employee for seniority purposes (R-1, R-2).

N.J.A.C. 4A:4-7.1 sets forth Department of Personnel (DOP) rules regulating the transfer of permanent civil service employees within the same governmental jurisdiction. N.J.A.C. 4A:4-7.1A regulates the movement of permanent civil service employees between different governmental jurisdictions. Although the IGTP originally expired in August 2000, on June 15, 2001, the Commissioner of Personnel issued a final administrative action relaxing N.J.A.C. 4A:4-7.1 et seq., to permit the permanent transfer, in lieu of layoff, of 21 Union County correction officers, eleven of whom were transferring to the New Jersey Department of Corrections (R-3).

ANALYSIS

The Commission's rules and regulations provide that a charging party shall prosecute its case and has the burden of proving the allegations in the complaint. N.J.A.C. 19:14-6.8. The burden is not on the hearing examiner or the Commission to assist the Charging Party in proving its case or to make the case for the Charging Party by sifting through numerous unexplained documents to piece together the events.

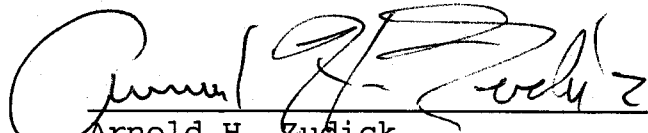
Here the Charging Party was reminded of its burden and advised that the mere presentation of documents would not prove their allegations, yet it offered no testimony to prove its point. There was, for example, no testimony: that specific individuals from the State and PBA colluded to deny the grievance or that the State obtained the PBA legal opinion (CP-16) unlawfully; that officials in DOC took action to interfere with the Charging Party's right to be represented by counsel; and there was no evidence that the Charging Party's were discriminated against, i.e., treated differently than other similarly situated employees and no evidence that the State/DOC was hostile to the Charging Party's exercise of their protected rights. In re Bridgewater Tp., 95 N.J. 235 (1984).

Although many of the documents admitted into evidence here were considered and evaluated in the summary judgment proceeding, the Charging Party cannot rely on the findings in that matter to meet its burden of proving this case by a preponderance of the evidence. Without their testimony explaining the events in relationship to the various documents that were submitted I was unable to make findings to support the Charging Party's allegations.

Accordingly, I **GRANT** the Respondent's Motion To Dismiss and make the following:

RECOMMENDATION

I recommend the Complaint be dismissed.



Arnold H. Zudick
Senior Hearing Examiner

Dated: November 20, 2003
Trenton, New Jersey