

D.U.P. No. 2006-1

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

In the Matter of

STATE OF NEW JERSEY (CORRECTIONS),

Respondent,

-and-

Docket No. CO-2004-358

FOP LODGE 183,

Charging Party.

SYNOPSIS

The Director of Unfair Practices denies a motion to reopen an unfair practice charge that was dismissed by a hearing examiner because of the charging party's failure to appear at a pre-hearing conference. The Director found that the charging party had been given ample notice of the conference, and appropriate notice to provide a written explanation for its failure to appear at the conference, but the charging party failed to respond.

The Director held that the charging party did not present extraordinary circumstances to justify reopening, and that a dismissal would not create an injustice as provided in N.J.A.C. 19:14-1.5(e).

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Appearances:

For the Respondent,
Peter C. Harvey, Attorney General of New Jersey
(George N. Cohen, Deputy Attorney General)

For the Charging Party,
Jeffrey Smith, President

DECISION ON MOTION TO REOPEN

On May 14, 2004, FOP Lodge 183, New Jersey Superior Officers Association (FOP) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the State of New Jersey, Department of Corrections (State). The FOP alleged that on or about January 28, 2004, the State seized FOP electronic files and restricted its President, Jeffrey Smith, from access to all departmental e-mail and computer systems in retaliation for the exercise of protected rights in violation of

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5) and (7).^{1/}

On January 4, 2005, I issued a Complaint and Notice of Hearing in this matter and assigned the case to Hearing Examiner Wendy L. Young for hearing. The State filed an answer on April 29, 2005, denying it violated the Act.

On August 25, 2005, the hearing examiner, pursuant to N.J.A.C. 19:14-1.5(d), dismissed the charge. On August 30, 2005, the FOP, in accordance with N.J.A.C. 19:14-1.5(e), filed with me a timely motion to reopen the charge/complaint. The State filed a timely response in opposition to the motion on September 2, 2005.

The facts related to the motion show that by letter of March 4, 2005, the hearing examiner rescheduled a pre-hearing

^{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. (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. (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. (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. (7) Violating any of the rules and regulations established by the commission."

conference in this case for April 29, 2005. The hearing examiner confirmed the April 29th date by letter of April 20, 2005.

On April 29, 2005, the hearing examiner faxed a letter to the parties acknowledging the FOP's request to adjourn the April 29th conference because it apparently voiced interest in retaining legal counsel. In granting the adjournment request, the hearing examiner explained that she would reschedule the conference after the FOP's attorney made an appearance in the case. By June 15, 2005, however, no attorney had made an appearance on behalf of the FOP, thus, by letter of that date to FOP President Jeffrey Smith and Deputy Attorney General George Cohen, the hearing examiner rescheduled the pre-hearing conference for August 16, 2005, and asked the parties to advise her of any conflicts with that date. Neither party advised the hearing examiner of any scheduling conflicts with that conference date.

The pre-hearing conference was convened as scheduled on August 16, 2005. Representatives of the State appeared. Neither the FOP's President, Jeffrey Smith, nor any other representative appeared on behalf of the Charging Party. Consequently, by letter of the same date (August 16) sent by fax and regular mail, the hearing examiner notified Smith that the FOP's failure to appear at the pre-hearing conference indicated it had no further interest in processing this matter, and told him that unless the

FOP indicated otherwise in writing by 5 p.m. on August 23, 2005, she would dismiss the charge pursuant to N.J.A.C. 19:14-1.5(d). A copy of the fax verification sheet dated August 16, 2005 to Jeffrey Smith is contained in the case file showing a fax was successfully sent to the FOP's fax number.

By letter of August 25, 2005, also sent by fax at 5:06 p.m., the hearing examiner reminded Smith that in her August 16th letter she had advised him that if the FOP did not respond in writing by the close of business on August 23, she would dismiss the case. The hearing examiner in her August 25th letter therefore held, "To date, you have not responded as instructed in my letter. Therefore, this matter is dismissed" A copy of the fax verification sheet dated August 25, 2005 is contained in the file showing a successful transmission to the FOP's fax number.

On August 30, 2005, pursuant to N.J.A.C. 19:14-1.5(e), I received a motion to reopen the charge on behalf of the FOP. The motion did not include sworn affidavits or certifications.

The FOP first argued that the hearing examiner's August 16th letter was actually postmarked August 18, and that Smith did not receive it until August 25. The FOP, in its motion, argues Smith telephoned the hearing examiner that date to advise her of the FOP's continued interest in the matter, and stated that the hearing examiner said she would not discuss the issue with him

over the telephone and that he had to respond in writing. The FOP alleges Smith wrote the hearing examiner a letter indicating the FOP's continued interest in the case and mailed it on August 25, 2005. Such a letter was not received by the Commission as of the date of this decision, September 21, 2005. The FOP also stated in its motion that at 5:03 p.m. on August 25, 2005, Smith received the hearing examiner's fax of the same date dismissing the case because the FOP had not responded in writing.

The FOP's motion also criticizes the handling of this and other cases and asks that this matter be reopened and sent to hearing before a different hearing examiner.

On September 2, 2005, the State submitted a written response in opposition to the FOP's motion. There were no affidavits or certifications accompanying the State's response. The State generally argued that there are no extraordinary circumstances warranting reopening this case nor would any injustice occur from denying the FOP's motion. The State alleged that after the FOP's failure to appear at the August 16th conference it (the State) ascertained that neither Smith, nor any other union representative, applied for leave to attend the pre-hearing conference. The State also represents that it received faxed copies of the hearing examiner's letters of August 16 and 25 to the FOP on the date of those letters, and did not receive a letter from the FOP allegedly mailed on August 25, 2005.

The State argued that the FOP's motion did not address the fact that the August 16th letter had been faxed to the FOP, and also argued that the FOP's "admission" in its motion that Smith received the hearing examiner's fax of August 25 supports a presumption that he also received the hearing examiner's fax of August 16, 2005. The State also argued that since the underlying merits of the charge regarding Smith's access to e-mail privileges have been resolved, there would be no injustice or harm to the FOP if this case were dismissed. Finally, the State disputes the FOP's assertions regarding the Commission's processing of this case, and opposes a substitution of the hearing examiner if the motion were granted.

ANALYSIS

Having considered the relevant facts and the parties arguments, I deny the FOP's motion.

Even assuming the FOP did not receive the mailed copy of the hearing examiner's August 16th letter until August 25, it appears from the record before me that it did receive the faxed copy of that letter on August 16. The FOP did not comment upon the faxed transmission of the August 16th letter in its motion, but more significantly, it did not deny receipt of that letter by fax. Since the FOP acknowledged receipt of the faxed copy of the hearing examiner's August 25th letter, I can only conclude that the FOP also received the faxed copy of the August 16th letter.

Having received that letter, the FOP had ample time to respond to the hearing examiner's August 16th inquiry and explain its absence on that date.

To the extent Smith verbally attempted to notify the hearing examiner of the FOP's continued interest in this case, since the FOP acknowledged in its motion that the hearing examiner informed Smith that the FOP's response had to be in writing by 5 p.m. that day (August 25), the FOP was on notice that time was of the essence to respond and explain its failure to appear on August 16. The FOP failed to respond. In fact, to date, the FOP has failed to provide any written response. The FOP obviously has fax capability. The Commission accepts faxes to meet filing requirements. N.J.A.C. 19:10-2.3. Having been put on notice by the hearing examiner on August 25 that he had to submit a written response to her August 16th letter by the close of business on August 25, Smith knew time was of the essence. A response should have been faxed. That did not occur. Instead, the FOP alleged Smith mailed a letter to the hearing examiner on August 25, yet no such letter has been received by either the Commission or the Respondent.

The hearing examiner's refusal on August 25 to verbally discuss the matter with Smith and, instead, require a written response was an appropriate directive. Hearing examiners' serve in a neutral capacity and, therefore, must avoid ex parte

communications. An opposing party cannot have confidence in a process whereby hearing examiners make decisions based on telephone conversations with one side of a dispute to which it was not a party. The hearing examiner properly sought to avoid such a breach in the standards of neutrality by directing Smith to provide a written response. The FOP's failure to provide that response was not attributable to any actions of the hearing examiner or the State.

Finally, it is important to refocus on the issue that led to the dismissal, the FOP's failure to appear at the scheduled pre-hearing conference. Nowhere in its motion, nor through any affidavit, has the FOP explained its failure to appear at the August 16th conference. Charging parties have the burden to prosecute their cases. N.J.A.C. 19:14-6.8. That responsibility includes being prepared to proceed at a hearing or pre-hearing conference after having been provided with adequate notice. The FOP was notified of the August 16th conference by letter of June 15, 2005, and was specifically asked to notify the hearing examiner if that date was unacceptable. The FOP did not raise any objection to that date, and did not allege in its motion that it was unavailable for the conference. Consequently, the hearing examiner on August 16 could reasonably conclude that the FOP's absence that day was an indication it had no further interest in processing the case, and due to its failure to provide a timely

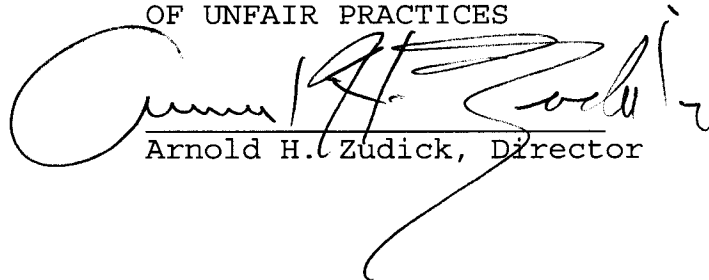
written explanation for its failure to appear on August 16th, the hearing examiner had the discretion, and exercised reasonable authority, to dismiss the case pursuant to N.J.A.C. 19:14-1.5(d). The record in this case contains no evidence that the hearing examiner exercised her discretion inappropriately.

Accordingly, based upon the above facts and analysis, I conclude there are no extraordinary circumstances warranting the reopening of this charge, nor sufficient basis to conclude that denying the FOP's motion would create an injustice.

ORDER

The FOP's motion to reopen is denied.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: September 21, 2005
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-4.7.

Any appeal is due by October 4, 2005.