D.U.P. NO. 2016-2

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

In the Matter of

TOWNSHIP OF SCOTCH PLAINS,

Respondent,

-and- Docket No. CO-2014-282

SCOTCH PLAINS PUBLIC WORKS RECREATION ASSOCIATION,

Charging Party.

Synopsis

The Director of Unfair Practices dismisses an unfair practice charge filed by the Scotch Plains Public Works Recreation Association alleging that Scotch Plains Township violated subsections 5.4(a)1, 2, and 5 of the Act when it submitted untimely responses to the Association's grievance. The Director finds that defects in the processing of a grievance are, at most, a breach of the contractual grievance procedure, and not an unfair practice. The Director further finds that the Township's actions more than adequately satisfied their obligation under the grievance procedure and no facts were alleged demonstrating that the Township or its representatives said or did anything which might have intimidated, coerced or threatened employees.

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Appearances:

For the Respondent,
DiFrancesco Bateman, attorneys
(Richard P. Flaum, of counsel)

For the Charging Party,
(James Scott, Representative)

REFUSAL TO ISSUE COMPLAINT

On June 18, 2014, the Scotch Plains Public Works Recreation Association (Association) filed an unfair practice charge against Scotch Plains Township (Township). The charge alleges that the Township violated subsections 5.4(a)1, 2, and 5[1/] of the New

1/ These subsections prohibits 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. (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, N.J.S.A. 34:13A-1 et seq. (Act) when it submitted untimely responses to the Association's grievance.

On July 16, 2014 the Township filed a letter denying any violation of the Act, and requesting that the charge be dismissed. It asserts that the grievance proceeded in the normal course outlined by the parties' collective negotiations agreement, concluding in a determination by the Township Manager. It also claims that no allegation in the charge reveals a violation of the Act, and that the Association's dissatisfaction with the outcome of the grievance is not an unfair practice.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent. 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 will decline to issue a complaint. N.J.A.C. 19:14-2.3. We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:1-2.2. An investigatory conference was held on August 22, 2014. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. In correspondence dated September 29, 2015, 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.

On August 28, 2013, Shon Briggs, a Township employee, was formally notified by Raymond Poerio, Director of Parks and Recreation, that he was being disciplined for an incident that occurred on July 30, 2013 and was required to serve a three-day suspension and attend three sessions of counseling through the Scotch Plains Employee Assistance Program (EAP). In response, on September 6, 2013, Association representative James S. Scott filed a grievance with the Township requesting an "appeal" of the discipline.

On September 16, 2013, Township Manager Jerry Giaimis issued a letter to Scott advising that "pursuant to Step 3 of the grievance procedure I am required to issue a decision within 10 working days from receipt of your letter. However, I believe that to best render a decision I would need to hold a hearing to hear all sides of the dispute in question." Giaimis noted, "this date would bring us outside the 10 days required for me to render a decision and acceptance of this day as the hearing would be considered mutual assent to deviate from the bargained time frames for this specific event." The Association accepted the

hearing date and a hearing was held on September 26, 2013 at 1:00 pm.

Article IV 1.c. ("Grievance Procedure") of the parties' most recent collective negotiations agreement (Agreement) provides a three-step procedure, the last of which states:

> If the aggrieved party is not satisfied with the disposition of his (her) grievance at Step 2, he may submit the matter for review by the Township Manager within five (5) working days after receiving the decision in Step 2. The Township Manager shall render a decision from the record before him in writing within ten (10) working days.

Section 2 of Article IV provides in a pertinent part: "The time limits specified in the grievance procedure shall be construed as maximum. However, these may be extended upon mutual agreement."

The Township contends that on November 7, 2013, Giaimis issued a memorandum reducing the suspension from three days to two days. On February 28, 2014, Giaimis issued a memorandum advising Poerio that "[a]fter reviewing all the information and listening to the witnesses and testimony I am reducing the proposed suspension from three days to two . . . Please set the dates as your scheduling permits. I am comfortable with consecutive days or days spread out over a specific time period." Grievant Biggs and Scott were copied on this memorandum. On March 17, 2014, Scott wrote to Giaimis, noting his dissatification with the delay in the process and the "ludicrous" disciplinary decision. On March 21, 2014, Giaimis responded to

Scott and set forth the finality of his determination. Giaimis also wrote:

> My decision was not rendered on February 28, 2014. It was rendered in a memorandum to Mr. Poerio on November 7, 2013. I have a copy of this signed memorandum . . . I do recall the February 28th memorandum that was signed and for some reason unbeknownst to me it was reprinted with a later date. That does not, however, change the decision or merits of the suspension or when the actual decision was rendered.

The Association admits that it agreed to bypass the ten (10) day response deadline set forth in Article IV, Step 3 and deferred to the hearing schedule set forth by the Township Manager. The Township contends that a signed memorandum setting forth Giaimis's decision was sent on November 7, 2013. The Association denies receiving any "memorandum", arguing that the Township did not render a decision on the September 26, 2013 hearing until February 28, 2014, about eighty-nine (89) working days past the time frame set forth in Article IV, Step 3. The Association contends that the Township's failure to comply with the contractual grievance procedure violates the Act.

ANALYSIS

In Bergen Comm. Coll., P.E.R.C. No. 87-153, 13 NJPER 575 (¶18210 1987), the union alleged that the employer committed an unfair practice by violating the parties' grievance procedure when it was three days late in submitting a written response to the union's grievance. The Commission agreed with the Hearing

Examiner that the late response was at most a breach of contract and not an unfair practice. The Commission adopted the Hearing Examiner's findings of fact and conclusions of law, which included this determination:

> Based upon the record in this case and the foregoing, I conclude that the Association's allegations concerning the processing of the docking grievance are not sufficient to support a charge alleging a unilateral change of terms and conditions of employment, but rather amount to a mere breach of contract. Even assuming arguendo that the College 's actions herein would be determined to be a unilateral change of terms and conditions of employment, I decline to find a violation . . . Assuming the Association's contractual interpretation argument is correct, the College's action in delaying its written response to the Association by three days was but a technical violation of the grievance procedure. [Bergen Comm. Coll., H.E. No. 87-67, 13 NJPER 451, 460-461 (¶18171 1987)]

The substance of the claim in this case is that the Township breached its collective negotiations agreement with the Association when it issued the allegedly late response. In State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission held:

> [A] mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

In that case, the Commission set forth some examples of situations where a breach of contract claim bears a sufficient

relationship to an alleged violation of the Act so as to warrant the processing of the charge and the possible issuance of a complaint: (1) the employer repudiates an established term or condition of employment; (2) the employer decides to abrogate a contract clause based on its belief that the clause is outside the scope of negotiations; (3) the contract clause is so clear that an inference of bad faith arises from a refusal to honor it; (4) factual allegations indicate that the employer changed the parties' past and consistent practice in administering the disputed clause; (5) specific allegations of bad faith over and above mere breach of the collective negotiations agreement are present; and (6) breach of the agreement places the policies of the Act at stake.

Based upon the allegations set forth in the charge, I find that the complaint issuance standard has not been met. None of the enumerated exceptions in Human Services warranting case processing appear to be present here. The facts reveal that Giaimis responded to Brigg's grievance, pursuant to Step 3 of the grievance procedure and added a layer of due process (to which the Association concurred) by conducting a hearing (with the grievant and his representative present) to "hear all sides of the dispute in question." Giaimis advised that the hearing and the decision would fall outside of the ten (10) working day deadline; the Association acceded to the Township's request for

an extension of the deadline. I find that the Township's actions do not amount to a colorable repudiation of the grievance procedure. Consequently, I decline to issue a Complaint on the 5.4a(5) allegation.

N.J.S.A. 5.4a(1) makes it an unfair practice for a public employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed to them by the Act. An employer violates this provision independent of any other violation if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Lakehurst Bd. of Ed., PERC No. 2004-74, 30 NJPER 186 (¶69 2004); UMDNJ-Rutgers Medical School, PERC No. 87-87, 13 NJPER 115, (¶18050 1987). The charging party need not prove an illegal motive. I do not find that the Township's delayed decision tended to interfere with Biggs's statutory rights. No facts suggest that the Township's omission (as opposed to a timely decision to the same effect) had an effect on the processing of grievances, generally, or even that the delay resulted in adverse consequences to Biggs. Accordingly, I decline to issue a Complaint on the a(1) allegation.

Subsection 5.4a(2) of the Act prohibits public employers from dominating or interfering with the formation, existence or administration of any organization. Commission cases dealing with 5.4a(2) claims generally involve organizational rights or

the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17 2 NJPER 50 (1976); Middlesex Cty. (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶ 12118 1981); Camden Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). The Commission has held that the type of activity prohibited by 5.4a(2) is "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, 194 (¶ 11095 1980). No facts have been alleged demonstrating that the Township dominated or interfered with the formation, existence or administration of the employee organization. Therefore, I decline to issue a Complaint on the a(2) allegation

For all these reasons, I conclude that the charge does not meet the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.

/s/Gayl R. Mazuco
Director of Unfair Practices

DATED: October 21, 2016
Trenton, New Jersey

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

Any appeal is due by November 5, 2015.