

D.U.P. NO. 2021-10

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

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Respondent,

-and-

Docket No. CO-2018-167

FOP LODGE 22, LIEUTENANTS &
SERGEANTS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging violations of section 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act (Act). FOP Lodge 22 (Lieutenants and Sergeants) (FOP) alleged the employer violated the Act by failing to provide acting captain Donald Fritz all rights, privileges and compensation of a captain.

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Appearances:

For the Respondent,
Cleary, Giacobbe, Alfiero, Jacobs, LLC, attorneys
(Adam S. Abramson-Schneider, of counsel)

For the Charging Party,
Mets Schiro & McGovern, LLP, attorneys
(Leonard C. Schiro, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 23, 2018, Fraternal Order of Police Lodge 22, Lieutenants and Sergeants (FOP) filed an unfair practice charge against the Township of Old Bridge (Township). The charge alleges that on or about August 1, 2017, the Township violated section 5.4a (1), (3) and (5)^{1/} of the New Jersey Employer-

^{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. (3) Discriminating with 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
(continued...)

Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by failing to provide acting captain Donald Fritz (Fritz) with [salary guide] step movement provided to captains, despite Fritz having been promised "all the rights, privileges, compensation and responsibilities of the rank of Captain."

On May 24, 2018, the Township filed its position statement. It avers that underlying the unfair practice charge is a contractual dispute between the parties and, as such, the grievance procedure in the parties' collective negotiations agreement (CNA) should govern the disposition of this matter. Notwithstanding the grievance procedure, the Township contends that the Memorandum of Agreement (MOA) it reached with the Captains Association was not applicable to Fritz in his position of acting captain. The Township also asserts that the Captains Association's MOA specifically excludes step movement for the title, acting captain.

On May 30, 2018, a staff agent conducted an exploratory conference among the parties. At the request of the FOP, the charge was held in abeyance to allow it to file a position statement. On October 9, 2018 the FOP submitted a letter

1/ (...continued)
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.

asserting that the Township violated its "duty of good faith and fair dealing." The FOP did not address its allegations that the Township violated the Act.

The Commission has authority to issue a complaint where it appears that a 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; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The FOP and the Township are parties to a CNA extending from January 1, 2017 through December 31, 2020, that covers employees holding the titles of lieutenant and sergeant.

Article XXX of the CNA, entitled "Grievance Procedure", defines a "grievance" as "an appeal . . . regarding the application or interpretation of this Agreement." It also provides five steps, ending in binding arbitration, except for matters arising from an interpretation or application of a section of the "management rights" provision.

Article VI, Section K of the CNA, entitled, "Working Up in Rank," provides in a pertinent part:

Lieutenants will be allowed to work up as Captains. However, such assignments also remain a management right and are to be assigned by the Chief of Police.

On June 28, 2017, the Chief of Police sent a memorandum to Fritz advising that, effective June 28, 2017, he was being assigned to the position of acting captain. The memorandum also afforded Fritz "all the rights, privileges, compensation and responsibilities of the rank of captain." At the time of his assignment to acting captain, Fritz was included in the unit represented by the FOP.

Captains within the Township's Police Department are represented by Old Bridge Captains Association, FOP Lodge 22 ("Captains Association"). On July 10, 2017, the Township and the Captains Association signed a MOA extending from January 1, 2017 through December 31, 2021. Article V of the MOA provides:

3. Any employee holding the title of Captain as of July 1, 2017 and not at Step 4 shall be moved to Step 4 retroactive to January 1, 2017. Employees holding an acting title of Captain shall not be afforded the step movement.

On July 1, 2017, Fritz held the permanent title, lieutenant and was included in the FOP's unit, not in the Captains Association unit. On August 22, 2017, Fritz was promoted to captain and became included in that unit.

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

The FOP hasn't set forth any circumstances of Fritz's membership in the FOP, nor any facts describing Fritz's activities on behalf of the FOP, that may have unlawfully motivated the Township's conduct. Accordingly, I decline to issue a complaint on the FOP's claim that the Township violated section 5.4a(3) of the Act.

I also decline to issue a complaint on the FOP's claim that the Township violated section 5.4a(1) and (5) of the Act. Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in

activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. No. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[r]efusing 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" N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "ha[s] the authority to remedy that violation under subsection a(5)." State of New Jersey (Dept. of Human Services), P.E.R.C. 84-148, 10 NJPER 419 (¶15191 1984).

The Commission has found a violation of N.J.S.A. 34:13A-5.4a(5) if an employer repudiates a contract clause. Camden Cty. Prosecutor, P.E.R.C. No. 2006-24, 31 NJPER 323 (¶128 2005); Bridgewater Tp., P.E.R.C. No. 95-28, 20 NJPER 399 (¶25202 1994), aff'd 21 NJPER 401 (¶26245 App. Div. 1995). A claim of repudiation may be supported by showing that a contract clause is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. However, the Commission has found that a mere breach of contract does not warrant exercising our unfair practice jurisdiction and will not be found to be a refusal to negotiate in good faith. Id. Instead, a party must use arbitral or judicial avenues to assert such contract claims. State of New Jersey (Dept. of Human Services).

The FOP's charge alleges that the Township violated the Act by repudiating the Chief's June memorandum sent to Fritz affording him ". . . all of the rights, privileges, compensation and responsibilities of the rank of Captain." The Chief issued this memorandum pursuant to Article VI, Section K of the FOP's CNA. It is undisputed that Fritz was compensated at a rate equivalent to the salary of a captain at the time of his assignment to acting captain. The FOP maintains that Fritz should have been moved to Step 4 of the salary guide, pursuant to

Article V section 3 of the MOA between the Township and the Captains Association, upon its ratification of the MOA in July, 2017. However, the express wording of that provision excludes employees holding the designation of acting captain from eligibility for salary guide movement. It is not apparent that the Chief's memorandum was intended to waive any contractual provision. (A contractual waiver must be "clearly and unmistakably established, and the contractual language alleged to constitute a waiver will not be read expansively." Red Bank Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); City of Burlington; South River Board of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶ 17167 1986); Elmwood Park Board of Education, P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985)).

Fritz was not included in the Captains Association unit during the brief time he served as acting captain. He was merely working out-of-title, as contemplated in Article VI, Section K of the FOP's CNA. Consequently, Fritz didn't have any contractual rights under that CNA and under the MOA between the Township and the Captains Association until he was permanently appointed to captain in August, 2017.

Under these circumstances, I find that bad faith cannot be inferred. In the absence of facts demonstrating that the Township repudiated the parties' CNA, I find that the FOP's claim does not indicate a refusal to negotiate in good faith and likely

amounts to a mere breach of contract claim. A breach of contract claim, standing alone, should be resolved through the parties' grievance procedure, not the Commission's unfair practice process.

Accordingly, I decline to issue a complaint on the FOP's claimed violations of section 5.4a(1) and (5) of the Act regarding the Township's failure to provide Fritz, as acting captain, with a salary increase, pursuant to the July 2017 MOA between the Captains Association and the Township. The complaint issuance standard has not been met and I dismiss the charge.
N.J.A.C. 19:14-2.1.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: June 9, 2021
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 June 21, 2021.