

D.U.P. NO. 2023-24

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

In the Matter of

SALEM COUNTY SHERIFF'S DEPARTMENT,

Respondent,

-and-

Docket No. CO-2022-167

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL 400,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Policemen's Benevolent Association, Local No. 400 ("PBA") against the Salem County Sheriff's Department ("County"). The Charge alleges that the County violated sections 5.4a(1), (2), (3), (4), and (7) of the New Jersey Employer-Employee Relations Act ("Act") by issuing a January 14, 2022 letter to two PBA delegates requiring that the delegates use approved FMLA leave for the full duration of their twelve hour shifts, rather than for partial shifts. The Director found that the charge is moot, as the order from the January 14, 2022 letters has been rescinded, and both impacted members/delegates have been made whole. Further, the Director determined that the PBA failed to present or allege facts sufficient to show that the County's conduct was in retaliation for protected activity under the Act in violation of section 5.4a(3). The Director similarly determined that the charge failed to present facts supporting the 5.4a(1), (2), (4) and (7) violations and therefore dismissed those counts.

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Appearances:

For the Respondent,
(Karin M. Wood, of counsel)

For the Charging Party,
Sciarra & Catrambone, LLC, attorneys
(Christopher A. Gray, of counsel)

REFUSAL TO ISSUE COMPLAINT

On February 9, 2022, the Policemen's Benevolent Association, Local No. 400 ("PBA" or "Union") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") against the Salem County Sheriff's Department ("County"). The PBA filed an amended unfair practice charge on December 13, 2022. The charge, as amended, alleges that the County violated sections 5.4a (1), (2), (3), (4), and (7) of the New Jersey Employer-Employee Relations Act ("Act")^{1/} when it

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

issued a January 14, 2022 letter to two PBA delegates unilaterally requiring that the delegates use approved FMLA leave for the full duration of their twelve hour shifts, rather than permitting use for partial shifts. The PBA contends the County's actions are in retaliation for activity protected under the Act.

The PBA's original charge included an application for interim relief, supported by certifications from Doug Merckx ("Merckx") and Brian Pio ("Pio"). On February 11, 2022, a Commission Designee issued an Order to Show Cause. On February 22, 2022, the County filed a brief in opposition to the PBA's unfair practice charge and application for interim relief supported by a certification of Warden John Cuzzupe ("Cuzzupe"). On March 14, 2022, oral argument was held on the IR application. On April 20, 2022, the Commission Designee issued a revised Order to Show cause with Temporary Restraints, ordering that the County allow the two Correctional Officers at issue to use intermittent FMLA leave for partial shifts. Following the issuance of the

1/ (...continued)
restraining or coercing employees on 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 the 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; and, (7) Violating any of the rules and regulations established by the commission."

Order to Show Cause, the County rescinded the change to the FMLA policy.

On July 27, 2022, the PBA sent a letter to the Commission advising that the impacted employees “. . . have received all of their FMLA time back . . .” and that the interim relief aspect of the charge had been resolved. The matter was transferred to the Director of Unfair Practices for additional processing.

On December 13, 2022, the PBA amended its unfair practice charge to include additional allegations concerning retaliation against the Union and its officers.

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.

I find the following facts:

The PBA is the exclusive majority representative of a group of rank and file correctional officers employed by the County. The PBA and County are parties to a collective negotiations agreement (“CNA”) covering the period of January 1, 2021 through December 31, 2024.

Merckx and Pio are County employees and PBA members who serve as President and State Delegate for the PBA, respectively. (Merckx Cert., at ¶24; Pio Cert. At ¶16).

On or about March 12, 2021, Pio sent a request to the County to use FMLA leave for a serious health condition. Pio's request was approved by the County. Pio certifies that, in the past, he would use FMLA leave for partial shifts when his health condition prevented him from working for an entire shift. (Pio Cert., at ¶¶1, 5; Ex. A).

In or about December of 2021, Merckx sent a request to the County to use FMLA leave for a serious health condition. Merckx's request was approved by the County. Merckx certifies that, like Pio, he was previously permitted to use FMLA leave for partial shifts when his condition prevented him from working the entire shift. Merckx certifies that this practice existed since he began utilizing approved FMLA leave in 2019. (Merckx Cert., at ¶¶2, 3, 9, 13).

On January 14, 2022, Merckx and Pio received nearly identical letters from County Personnel Director Stacy Pennington. The letters state, in pertinent part:

As you are aware, you are currently approved for intermittent FMLA for insomnia. The County of Salem has allowed to you (sic) to take this time based on self-evaluation of your sleeping needs. However, after further assessment the County believes that due to the nature of your job and for the safety and security of yourself, your fellow

correctional officers, and the inmates, the County can no longer continue this practice. As such, if at any time you believe that your lack of sleep will prevent you from working any portion of your shift, the County is requiring you to take off the entire shift. This will alleviate any concern that you have not evaluated your body properly, thereby causing safety issues at the facility.

This change in how you can use your FMLA will be effective immediately.
(Merckx Cert., at Ex. 4; Pio Cert., at Ex. 4).

On February 9, 2022, the PBA filed the original unfair practice charge in this matter accompanied by an application for interim relief. The PBA's charge alleges that the January 14, 2022 letters to Merckx and Pio were retaliatory since Correctional Officers who do not serve as Union officials are permitted to use FMLA leave for partial shifts.

On February 22, 2022, the County filed a brief in opposition to the PBA's unfair practice charge and interim relief application. The County argues Merckx and Pio are in a unique situation, since they are the only two correctional officers who are approved for FMLA leave due to insomnia. The County determined, ". . . through both operational and legal analysis that for the safety of Pio, Merckx, fellow correctional officers, and inmates that they would no longer be able to take partial shifts for FMLA leave." According to the County, the administration had been considering such a policy change since October of 2021, following ". . . a few instances in which Pio

and Merckx used FMLA in an unorthodox manner" (Cuzzupe Cert. At ¶3.). The County denies that it violated any provisions of the Act.

Following the issuance of the revised Order to Show Cause on April 20, 2022, the County rescinded the FMLA policy change and allowed Merckx and Pio to continue using approved FMLA leave for partial shifts. On July 27, 2022, the PBA advised the Commission that ". . . Officer Merckx and Officer Pio have received all of their FMLA time back . . ." and that the injunctive relief aspect of the charge had been resolved.

On December 13, 2022, an exploratory conference call was conducted by PERC. During the call, the PBA reiterated that, although the subject policy was revoked and the FMLA time for Merckx and Pio had been restored, a complaint should issue on the County's alleged retaliatory conduct. The County argued that the PBA has failed to show retaliation, and emphasizes that, upon further review, it rescinded the subject policy and restored Merckx's and Pio's FMLA time.

On December 13, 2022, the PBA amended its unfair practice charge to include four additional allegations: (1) in October of 2021, the PBA "complained and fought" a proof of illness policy, and as a result, "the PBA illuminated what they perceived as theft and contractual violations of jail administration."; (2) the Union prevailed in a December 21, 2021 Scope of Negotiations

decision issued by PERC, and the County has failed to implement that decision; (3) on December 28, 2021, the County proposed changes to FMLA and Military Leave policies, which the PBA opposed, leading to the filing of an interim relief application with PERC; and (4) on January 12, 2022, Pio and Merckx were interviewed for a promotion, but both were bypassed, and Merckx was informed that "he did not possess leadership for being a supervisor."

On December 28, 2022, the County filed a response to the Union's amended charge. The County disputes that the four additional allegations in the amended charge establish that the County retaliated against Merckx and Pio by issuing the January 14, 2022 letters. Specifically, the County: (1) denies that the October 2021 correspondence referred to by the PBA alleges theft or contractual violations, or otherwise creates a basis for finding the County's conduct retaliatory; (2) has complied with PERC's December 21, 2021 decision, and disputes that losing a decision would cause it to retaliate against Merckx and Pio; (3) agreed to rescind the FMLA and Military Leave policies after internal review, and therefore, would have no reason to retaliate against the Union; and (4) asserts that Pio and Merckx were bypassed for a promotion for non-retaliatory reasons, which is supported by the fact that the individual chosen for the

promotion, Officer Christa Urban, is also a PBA executive board member.

ANALYSIS

A case will be found moot where "continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Ramapo Indian Hills Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581, 582 (¶21255 1990). Other considerations are whether there remain open issues which have practical significance; whether there is a continuing chilling effect from the earlier conduct which has not been erased; whether, after a respondent's corrective action, a cease and desist order is necessary to prevent other adverse action against the same or other employees; and, whether the offending conduct is likely to recur. See, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1 (1978) and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978); Neptune Tp. Bd. of Ed. and Neptune Tp. Ed. Ass'n, P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd 21 NJPER 24 (¶26014 App. Div. 1994). See also Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., H.E. No. 87-69, 13 NJPER 517 (¶18195 1987), adopted P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd NJPER Supp. 2d 225 (¶196 App. Div. 1990) (dismissing a complaint based, in part, upon the fact that during the processing of the unfair practice charge, the board rescinded unilateral workload increases for the subsequent school year and

provided no indication that it was contemplating making future changes in unit members' work schedule, and an arbitration award was issued compensating unit members for workload increases during the prior school year; finding that this aspect of the charge was now "a mere academic issue"); Union Cty. Reg. H.S. Bd. of Ed., D.U.P. No. 79-23, 5 NJPER 158 (¶10088 1979) (refusing to issue a complaint based upon the board's "prompt and dispositive actions" which convinced the Director that there was "minimal likelihood of occurrence of the aggrieved conduct . . . in the future and that litigation . . . for the purpose of securing a cease and desist order and a posting for the benefit of the employees is not appropriate.").

In this case, I find that continued processing of the PBA's charge is unwarranted. The charge concerns the County's implementation of a policy on or about January 14, 2022, which precluded Merckx and Pio from using approved FMLA leave for partial shifts. It is undisputed that the County stopped enforcing that policy on April 20, 2022 when the Commission Designee issued the amended order to show cause with temporary restraints, and that the policy has since been completely rescinded. It is further undisputed that by July 27, 2022, Merckx and Pio were given back all the FMLA time that was lost as a result of the County's policy. There is no allegation that other correctional officers besides Merckx and Pio were impacted. No

facts suggest that there is a continuing chilling effect stemming from the County's action, and nothing in the record indicates that the offending conduct is likely to recur. Under these circumstances, litigation over the County's January 14, 2022 letter precluding Merckx and Pio from utilizing FMLA time for partial shifts would not effectuate the purposes of the Act.

Apart from the finding of mootness, the PBA has failed to allege or present sufficient facts establishing that the County acted in retaliation for protected activity in violation of section 5.4a(3). An employer violates subsection 5.4a (3) of the Act when it discriminates with regard to any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. The standard for proving a 5.4a(3) violation is set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). 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.

In this case, I cannot find a nexus between the alleged protected activity and the alleged adverse employment action. None of the assertions in the amended charge are sufficient to show that the January 14, 2022 letters concerning FMLA usage were sent in retaliation for protected activity. For example, even accepting the allegations of the amended charge as true, I cannot find that the PBA's opposition to a "proof of illness" policy in October of 2021 served as a basis for the County to send letters concerning FMLA usage to two specific PBA members approximately three months later. The remaining allegations in the charge similarly lack a nexus to the alleged adverse action. As such, even aside from the determination of mootness, I find that the PBA has failed to sufficiently allege a violation of section 5.4a (3).

Accordingly, I find that the complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.1.^{2/}

^{2/} Regarding the remaining allegations, while the charge alleges that the County violated a "rule[] or regulation[] established by the Commission" in violation of section 5.4a (7), no specific rule or regulation allegedly violated has been cited. The PBA has not set forth any facts necessary to show a violation of sections 5.4a (2) or (4). Finally, given that the County rescinded the offending policy and made all impacted unit members whole over four months prior to the filing of the amended charge, I cannot find that the County's conduct tends to interfere with the exercise of rights guaranteed by the Act in violation of section 5.4a (1).

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: May 10, 2023
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 May 22, 2023.