

D.U.P. NO. 2024-10

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

In the Matter of

ESSEX COUNTY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and-

Docket Nos. CO-2022-231,
CO-2023-102, CO-2023-135,
CO-2023-142, CO-2023-143,
CO-2023-145, CO-2023-148

ESSEX COUNTY SUPERIOR OFFICERS,
FOP LODGE 106,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices dismisses unfair practice charges filed by FOP Lodge 106 (Essex County Superior Officers) against the County of Essex (Department of Corrections). The charges allege that the County violated sections 5.4a(1), (5), and (7) of the New Jersey Employer-Employee Relations Act ("Act") by requiring unit members to execute a "defense agreement" as a precondition to obtaining legal representation/indemnification in federal civil lawsuits. The Director found that the County did not unilaterally alter a term and condition of employment, as unit members previously signed defense agreements in connection with obtaining County representation. The Director further determined that, with respect to the instances asserted in the charges, the County did not deny representation to members that refused to sign defense agreements. The Director found that the FOP failed to assert a cognizable claim for costs and fees, and that the matter is moot given that the County ceased requesting defense agreements from unit members since March of 2023.

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ESSEX COUNTY SUPERIOR OFFICERS,
FOP LODGE 106,

Charging Parties.

Appearances:

For the Respondent,
(Sylvia Hall, Director of Labor Relations)

For the Charging Party,
C. Elston & Associates, LLC, attorneys
(Catherine M. Elston, of counsel)

REFUSAL TO ISSUE COMPLAINT

On May 16, 2022, the Essex County Superior Officers, FOP Lodge No. 106 ("FOP" or "Union") filed an unfair practice charge with the Public Employment Relations Commission ("PERC" or "Commission") against the Essex County Department of Corrections ("County"). The FOP filed an amended unfair practice charge on May 23, 2022. The charge, as amended, alleges that, on or about January 5, 2022, the County violated sections 5.4a(1), (5), and

(7) of the New Jersey Employer-Employee Relations Act ("Act")^{1/} when it: (1) required a unit member to sign a "defense agreement" as a precondition to providing that member with legal representation in a federal civil matter; (2) incorrectly stated that the County obtained a vacation of a default judgment that had been entered against the unit member; and (3) refused to confirm or deny whether the County would be providing representation notwithstanding the unit member's refusal to sign the "defense agreement." The charge further alleges that, given the County's failure to respond to multiple inquiries about whether it would represent the unit member in the civil litigation, the Union was forced to provide the member with legal representation. The FOP requests an order requiring the County to cease issuing the "defense agreements," and to reimburse the FOP Legal Defense Plan, as well as the Union's Counsel, C. Elston & Associates LLC, for all costs, fees, and expenses that have been

^{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; (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; and, (7) Violating any of the rules and regulations established by the commission." The original charge also contained an alleged violation of section 5.4a(3), but that allegation was withdrawn.

incurred (and will be incurred) through the conclusion of the civil matter, including any appeals.

Between December 14, 2022 and February 27, 2023, the Union filed six (6) additional unfair practice charges, all alleging that the County violated the Act by requiring unit members to execute defense agreements prior to providing those members with legal representation when named as defendants in various civil matters.^{2/} The Commission processed the charges together, and an exploratory conference was conducted on March 28, 2023 at PERC's offices in Trenton.

The County filed position statements on January 9, 2023 and March 24, 2023. The FOP filed position statements on January 26, 2023 and April 5, 2023. All position statements were filed with the Commission and served on the opposing party.

On July 7, 2023, the FOP sent correspondence to the Commission, with a copy to the County, stating, in part, that since on or about March 28, 2023, the County has not required the

^{2/} In addition to CO-2022-231, the Union filed the following unfair practice charges: CO-2023-102 (filed December 14, 2022, regarding Lt. Christina Bell and Sgt. Sandra Grier); CO-2023-135 (filed February 10, 2023, regarding Lt. Dominick Tafuri); CO-2023-142 (filed February 17, 2023, regarding Sgt. Herman Pride); CO-2023-143 (filed February 22, 2023, regarding Sgt. Carlos Matos); CO-2023-145 (filed February 23, 2023, regarding Lt. Rahim Taylor); and CO-2023-148 (filed February 27, 2023, regarding Lt. Gregory Bartelloni and Sgt. John Conway). Each aforementioned charge contains alleged violations of sections 5.4a(1) and (5) of the Act. CO-2022-231, CO-2023-102, and CO-2023-135 also contain alleged violations of section 5.4a(7) of the Act.

execution of a "defense agreement" from any FOP unit member, and that it does not intend to do so in the future.

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. Based on the record, I make the following findings of fact:

The FOP is the exclusive majority representative of a group of correctional Sergeants, Lieutenants, and Captains employed by the County. The FOP and County are parties to a collective negotiations agreement ("CNA") which expired on December 31, 2017.^{3/}

Article 13 of the parties' CNA ("Extent of County Liability") sets forth circumstances under which the County will defer the cost of defending a legal action instituted against a unit member for acts or omissions arising during the course of the member's employment. The CNA provides that the County's obligation is limited to cases in which:

^{3/} While the parties have not produced a CNA covering a period after 2017, both parties represent that any contractual provisions relevant to this matter have remained unchanged.

1. The proceeding is dismissed or results in a final disposition in favor of the employee; and
2. The employee was acting in a matter in which the County had an interest; and
3. The employee was acting in the discharge of a duty imposed or authorized by law; and
4. The employee was acting in good faith; and
5. The employee is a named defendant in a matter pending before a court of competent jurisdiction.

(Amended Charge, Ex. B).

Article 13 of the CNA further provides a procedure by which members may seek reimbursement from the County for costs of defending a proceeding. Specifically, Section C of Article 13 provides:

1. Any employee who is served with a summons and complaint shall, within ten (10) calendar days of the time he/she is served with the summons and complaint, deliver the summons and complaint along with any accident or incident reports relevant to the action, to the County Counsel.
2. The County Counsel will review all documents submitted to determine if the employee is entitled to have representation provided to him/her. If the employee is entitled to representation, such representation shall be provided by the County Counsel, an attorney selected by any insurance carrier insuring the County, or by private counsel to be retained by the County. In no event will private counsel retained by the employee be compensated for his/her services by the County of Essex.
3. The County shall provide representation to the employee at all stages of the litigation, and shall save harmless and protect the employee from any financial loss resulting from any action in which the County provides such representation. (Id.).

On or about April 26, 2021, Dominique Lemons, a former inmate at the Essex County Correctional Facility, filed a lawsuit in the United States District Court for the District of New Jersey against five correctional officers alleging violations of the New Jersey Civil Rights Act, the United States Constitution, the New Jersey Constitution and common law (Civil Action No. 2:21-cv-09912-SDW-CLW, hereinafter "Lemons"). One defendant named in the lawsuit was FOP member Correctional Sergeant Sandra Grier ("Grier"). (Amended Complaint, Ex. A).

On or about September 1, 2021, the Court in the Lemons matter entered a default judgment against the five defendants for a failure to plead or otherwise defend the complaint. On September 21, 2021, Assistant Essex County Counsel Alan Ruddy, Esq. ("Ruddy") wrote a letter to the court asking that the default judgment against the defendants be vacated, as the County had just become aware of the lawsuit. (Id.).

On or about September 22, 2021, Grier signed a "defense agreement" and allowed the County to provide her with a legal defense in another federal lawsuit (Civil Action No. 2:20-cv-02793-ES-CLW). Other unit members, Gerardo Gonzalez and Kerri McCann, also signed defense agreements relating to that action. (County's March 24, 2023 Position Statement, at Ex. F-G).

On or about October 18, 2021, Catherine Elston, Esq. ("Elston"), attorney for the FOP, had a telephone conversation

with Ruddy regarding whether the County would represent Grier in the pending Lemons lawsuit. Ruddy forwarded Elston a copy of a "defense agreement" that the County was requesting Grier to sign, which was identical to the agreement Grier signed a month prior in the other civil suit (Civil Action No. 2:20-cv-02793-ES-CLW).

The defense agreement provides:

1) Covenant. By entering this agreement, the Public Employee affirms that at all times relevant to the Legal Matter she acted within the scope of her county-paid employment and understands that the County of Essex has entered into this agreement based upon its reliance on this representation.

2) Defense or Representation. County Counsel shall have exclusive control of the Public Employee's defense or representation or designation of counsel. Public Employee shall cooperate fully with the County Counsel's defense or representation. Public Employee is advised that the County will not provide for or continue her defense if she fails to comply with this Agreement, if County Counsel or the trier of fact determines that Public Employee did not act within the scope of her employment, or that her conduct involved actual fraud, actual malice, or the defense or representation would create a conflict of interest for the County.

3) Methods of providing defense. County Counsel may provide for Public Employee's defense herself, by designating an attorney from her own staff, by employing a special counsel for this purpose, or by asserting the County's right of the Public Employee under any statute, rule, or applicable insurance policy which requires any other entity to provide the defense and/or indemnification.

4) Indemnification. The County's agreement to provide a defense does not obligate it to provide for indemnification. The County reserves its rights not to indemnify Public Employee for

punitive or exemplary damages and will not pay for any fines for contempt of court resulting from Public Employee's actions or omissions. The County may only indemnify Public Employee for compensatory damages if it is determined that Public Employee acted within the scope of her county-paid employment.

5) Bankruptcy. Public Employee is advised that damages for a willful and malicious injury cannot be discharged by bankruptcy. Public Employee is further required to inform the County's designated attorney for the Legal Matter if she has filed for bankruptcy in the past three years or is contemplating doing so. Public Employee is advised to inform her bankruptcy counsel because claims for negligence, for example, can be discharged.

6) Cooperation. Public Employee will cooperate fully and completely as set forth above and as set forth as stated in this provision. Public Employee will cooperate fully and completely in her defense and the County's defense of the Legal Matter. Public Employee will cooperate fully and completely in all claims advanced by the County Counsel's designated assistance or special counsel on behalf of the Public Employee.

7) Independent Review. Public Employee is advised and encouraged to seek counsel at her own expense to review this agreement or to provide independent counsel at any stage of the litigation.

8) Entire Agreement. Even if the representation has already begun, this agreement constitutes acceptance of the foregoing terms and conditions with regard to the Legal Matter. This agreement constitutes the entire understanding between the County and Public Employee, and that understanding cannot be modified except in a writing signed by an authorized representative of the County and the Public Employee. (Amended Charge, Ex. C.).

On October 22, 2021, Elston emailed Ruddy regarding her concerns with the defense agreement. Elston stated, in part:

As discussed, my issue with the agreement, particularly paragraph 4, is that it conflicts with the parties'

collective agreement by asking my client to waive her rights for indemnification whether or not she was acting within the scope of her duties. This is in direct violation of Article 13, Section C, paragraph 3 of the parties' collective bargaining agreement. (Amended Charge, Ex. A).

On October 27, 2021, Elston asked Ruddy about the status of the motion to vacate the default judgment entered against the defendants. Ruddy replied stating that the motion has not yet been decided. (Id.).

On October 29, 2021, Ruddy emailed Elston, stating, in part, "The jail [] has informed me Lt. [G]rier has indicated you will be representing her in the civil suit. Please confirm by e-mail before we speak." On October 30, 2021, Elston replied, stating "Alan, please advise whether the County is going to undertake representation. My client's legal plan won't undertake representation unless she is denied by the County and a reason given for such denial." (Id.).

On November 17, 2021, Elston emailed Ruddy, stating, "[p]lease confirm that the County is representing Sandra Grier in the above matter so that I may tell her of the representation. I never received an email from you affirming same. You were to talk to your supervisor and get back to me but never did so there's been some confusion caused by the County's failure to respond to my inquiries." (Id.).

Ruddy responded to Elston's email on November 17, 2021, stating "[a]t no time did I ever indicate the County would not

represent her if she desires. However, today for the second time, Sgt. Grier has told an [E]ssex employee she will be represented by you." Ruddy and Elston spoke by phone on November 17, 2021, wherein Ruddy confirmed again that the County would represent Sgt. Grier in the matter if she so desired, notwithstanding her refusal to sign the defense agreement. (Id.).

On December 1, 2021, the default judgment against the defendants was vacated. (Id.).

On January 5, 2022, Elston again emailed Ruddy regarding the representation of Grier. Elston alleged Ruddy had ". . . been emailing Sgt. Grier directly, behind my back, and sending a lieutenant to Sgt. Grier, demanding that she sign the defense agreement if she wished to be represented by the County." Elston further requested "written confirmation of [the County's] representation of Sgt. Grier in this matter no later than tomorrow close of business. If the County is not going to represent Sgt. Grier, we need the County to so state in writing so that Sgt. Grier can avail herself of representation from the FOP Legal Plan; such Plan requires a written declination." (Id.).

Ruddy responded to Elston on January 5, 2022. Ruddy confirmed that ". . . the Court has vacated default as to all defendants, including the other officers who have signed a defense agreement." Ruddy stated that Grier agreed to be represented by the County, and therefore, Ruddy assumed she would

be willing to sign the defense agreement. See Id. ("To summarize, we have not denied representation of Sgt. Grier. She has personally told me twice she would sign the agreement, and she has actually signed the same agreement in another case. We have done nothing to jeopardize Sgt. Grier's position in this case but have obtained a vacation of the default.").

On January 10, 2022, Elston emailed Ruddy, stating, in part, ". . . I am asking one last time on behalf of Sgt. Grier: will the County continue its representation of her in this matter if she does not sign the Defense Agreement presented to her by the County." Elston further requested the County provide her and Grier with a copy of the order vacating the default judgment.

Ruddy replied by email the same day, attaching a copy of the requested order vacating the default judgment. (Id.). Ruddy also stated that he advised Sgt. Grier that an answer was due to be filed by January 21, 2022. Elston asked Ruddy if the County will be filing an answer on behalf of Sgt. Grier.

Two days later, on January 12, 2022, having not received a response from Ruddy, Elston filed a notice of appearance on behalf of Sgt. Grier. On the same date, Elston notified the FOP Legal Plan that she would be seeking its approval to provide coverage for the representation of Sgt. Grier.

On May 3, 2022, Ruddy sent correspondence to Elston's office stating, in part, "Since the County did not deny representation,

and has always been willing to represent Sgt. Grier, until she expressed her desire not to be represented by us, I have been authorized to say that the County of Essex will not pay legal fees on her behalf."

The County contends that it did not deny representation to members that did not sign a defense agreement. The County also contends that ". . . no defendant employee requested representation or delivered their complaints to County Counsel within 10 days, in violation of the [CNA]."

The subsequent charges filed by the FOP contain allegations similar to those raised in CO-2022-231. In each matter, the FOP alleges that the County is seeking the execution of a defense agreement as a condition for providing representation and indemnification in actions brought against unit members. The charges allege that the defense agreements conflict with the terms of the CNA between the parties and were never negotiated. In all cases, the FOP requests an order directing the County to: cease and desist from requiring members to sign defense agreements; reimburse the FOP's legal plan for monies expended during representation of members; and, pay C. Elston & Associates, LLC, all legal expenses and costs for continued representation of the members.

An exploratory conference was held on all seven of the charges on March 28, 2023 at PERC's offices in Trenton.

On July 7, 2023, the County wrote to the Commission Designee, stating, in part:

As previously represented, since on or about March 28, 2023 . . . the County has not requested the execution of a defense agreement from any employee who is a member of FOP Lodge 106. Please be advised, without admission of any wrongdoing or violation of the relevant collective bargaining agreement, rule, or law, and in good faith, the County will not request the execution of a defense and/or retainer agreement going forward; however, this correspondence shall not foreclose any future discussion with the union and/or negotiation on this issue.

This shall not foreclose the County's right to send employees a reservation of rights letter. By way of example, the Attorney General of New Jersey routinely send a "reservation of rights letter" to County employees which provides in part, "a final determination on indemnification will be made at the conclusion of the matter, once the entire record of the matter is completed. My office also reserves the right to withdraw representation of one or more of these defendants if the facts should develop differently." County Counsel may send similar correspondence to employees in the future.

The FOP responded to the County's letter on July 10, 2023. The FOP asserts that the matter is not moot, as the County has failed to address the issues of reimbursement for legal fees already expended, and payment to counsel for fees going forward.

ANALYSIS

A public employer commits an unfair practice if it refuses 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-5.3,

34:13A-5.4(a) (5). Section 5.3 of the Act defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Galloway Tp. Bd. Of Ed. V. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

Under state law, local public entities may agree to indemnify local public employees ". . . for exemplary or punitive damages resulting from the employee's civil violation of State or federal law if, in the opinion of the governing body of the local public entity, the acts committed by the employee upon which the damages are based did not constitute actual fraud, actual malice, willful misconduct or an intentional wrong." Legal defense, indemnification, and representation in civil matters are mandatorily negotiable. See City of Newark, P.E.R.C. No. 98-82, 24 NJPER 56 (¶29035 1997) (finding grievances contesting the City's failure to provide legal representation to eight police officers who were defendants in civil lawsuits were not preempted by N.J.S.A. 40A:14-155 and were arbitrable); City of Newark, P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003), aff'd 31 NJPER 9 (¶6 App. Div. 2005) (New Jersey Superior Court, Appellate Division, affirming PERC's ruling that a grievance challenging an employer's refusal to pay a \$30,000 civil judgment issued against a police officer is not preempted and is legally arbitrable).

The FOP contends that the County failed to negotiate in good faith when it required members to sign a defense agreement as a precondition to obtaining legal representation provided under the CNA. Specifically, the FOP asserts that the defense agreement conflicted with the parties CNA and added provisions including a waiver of the officer's rights to indemnification for punitive or exemplary damages, and limited indemnification of compensatory damages to situations in which the employee acted within the scope of her employment. (Amended Statement of Charge).

Based on the undisputed facts in the record, I cannot find that the County unilaterally altered a term and condition of employment, because it is undisputed that unit members signed defense agreements in the past in connection with obtaining County representation. The County has produced defense agreements signed by unit members prior to the filing of the initial unfair practice charge in this case, including agreements signed by the very members subject to this unfair practice charge. For example, while this matter concerns Grier's refusal to sign a defense agreement in October of 2021, it is undisputed that Grier signed an identical defense agreement in a separate matter (Civil Action No. 2:20-cv-02793-ES-CLW) on September 22, 2021 (i.e., the prior month). Other unit members, Gerardo Gonzalez and Kerri McCann, also signed defense agreements relating to that action. (County's March 24, 2023 Position Statement, at Ex. F-G).

The record does not indicate that the FOP objected to any defense agreements prior to the filing of the instant charge in May of 2022. In light of these circumstances, I cannot conclude that the County unilaterally changed a term and condition of employment with respect to the defense/indemnification procedures in the CNA.

Further, based on the record in this case, I cannot find that the County conditioned representation of unit members on the execution of the defense agreement, and therefore, even assuming the defense agreement altered a term and condition of employment, I cannot find a violation of the Act in connection therewith. On numerous occasions, the County indicated that it was not denying representation to members that did not sign the defense agreement, and in fact, the County obtained a vacation of a default judgment entered against Grier, despite the fact that Grier did not sign the County's defense agreement in that matter.^{4/} See Amended Charge, Ex. A, October 29, 2021

^{4/} I acknowledge the FOP's contention that the County did not obtain a vacation of the default judgment against Grier, despite information to the contrary from County Counsel. However, the Civil Docket included with the amended charge indicates a "Order that the default against the defendants is vacated" on December 1, 2021 (Amended Charge, at Ex. A). Further, even if the FOP is correct that the default judgment against Grier was not vacated on December 1, 2021, the Union does not dispute that, by that time, Grier advised the County that she wished to be represented by Elston. (See Amended Charge, Ex. A, October 29, 2021 and November 17, 2021 correspondence from Ruddy to Elston stating Grier
(continued...)

correspondence (“[t]he jail [] has informed me Lt. [G]rier has indicated you will be representing her in the civil suit. Please confirm by e-mail before we speak.”); November 17, 2021 correspondence (“[a]t no time did I ever indicate the County would not represent her if she desires. However, today for the second time, Sgt. Grier has told an [E]ssex employee she will be represented by you.”); January 5, 2022 correspondence (“To summarize, we have not denied representation of Sgt. Grier. She has personally told me twice she would sign the agreement, and she has actually signed the same agreement in another case. We have done nothing to jeopardize Sgt. Grier’s position in this case but have obtained a vacation of the default.”).

Rather, the record indicates that the FOP, through conversations with County Counsel, anticipated that the County would refuse to represent Grier without her execution of a defense agreement, and that Grier advised the County (as early as October of 2021) that she wished to be represented by Elston. As noted above, the County stated that it was not denying representation to Grier prior to Elston’s January 12, 2022 entry of appearance in the pending lawsuit.

4/ (...continued)
wished to be represented by Elston, not the County, in the civil lawsuit). Further, there is no allegation in CO-2022-231 or subsequent charges that unit members were prejudiced in federal court in connection with the County’s alleged failure to obtain a vacation of the default judgment on December 1, 2021.

Even if the County required members to sign a defense agreement in order to obtain representation, the Union has not set forth facts sufficient to find that the County's conduct rises to the level of a unilateral change in terms and conditions of employment. In conversations with Ruddy, Elston noted that her ". . . issue with the [defense] agreement, particularly paragraph 4, is that it conflicts with the [CNA] by asking my client to waive her rights for indemnification whether or not she was acting within the scope of her duties. This is in direct violation of Article 13, Section C, paragraph 3 of the parties' collective bargaining agreement." (Amended Charge, Ex. A). However, Article 13, Section C, paragraph 3 of the CNA does not provide an absolute right to defense/indemnification, but rather states that County Counsel will decide ". . . if the employee is entitled to have representation provided to him or her" and, if the employee is entitled to representation, ". . . such representation shall be provided by the County Counsel, an attorney selected by any insurance carrier insuring the County, or by private counsel to be retained by the County." (Id.). The County is obligated to "provide representation to the employee at all stages of the litigation, and [] save harmless and protect the employee from any financial loss **resulting from any action in which the County provides such representation.** (Id. (emphasis added)). Since the County's obligation to provide representation

is limited by Article 13, Paragraph A^{5/}, I cannot conclude that the defense agreement (which largely mirrors the provisions of the CNA) constitutes a unilateral change or repudiation of the CNA's defense/indemnification procedures.

Further, the FOP has failed to assert a cognizable claim for costs and fees of representation given an explicit negotiated provision which precludes members from retaining unapproved private counsel at the County's expense. Again, Article 13, Section C provides that, where an employee is entitled to representation under the CNA, ". . . such representation shall be provided by the County Counsel, an attorney selected by any insurance carrier insuring the County, or by private counsel to be retained by the County. **In no event will private counsel retained by the employee be compensated for his/her services by the County of Essex.**" (Id.) (emphasis added). In this case, FOP members apparently retained private counsel unapproved by the

^{5/} Article 13, Section A limits the County's obligation of to situations in which:

1. The proceeding is dismissed or results in a final disposition in favor of the employee; and
2. The employee was acting in a matter in which the County had an interest; and
3. The employee was acting in the discharge of a duty imposed or authorized by law; and
4. The employee was acting in good faith; and
5. The employee is a named defendant in a matter pending before a court of competent jurisdiction. (Amended Charge, Ex. B).

County (i.e., Ms. Elston), and now seek to have the County pay for the representation. Given the explicit contractual provision, however, I cannot find that the FOP has set forth a claim for fees and costs, even if an underlying violation of the Act had been sustained. The FOP has not otherwise shown that attorney's fees are warranted under PERC precedent. See Commercial Tp., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983) ("We find no merit in respondents' assertion that they are entitled to an award of attorney's fees and costs. The application does not fall within the provisions of R 2:11-4 (a) through (g) and the absence of statutory authorization of such expenses in [the Act] puts this application beyond the pale of subsection (b) of the rule.").

Additionally, based on the findings above, I find that the dispute concerning the defense agreement is now moot. 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").

In this case, the County has unequivocally stated that since March 28, 2023, it has not requested the execution of a defense agreement from any unit member, nor will it do so moving forward. The FOP does not dispute this factual assertion. Rather, the County indicated it may prepare and send to members a "reservation of rights" letter, which would not require

acquiescence or a signature from the FOP or any unit member. Since the County no longer requests defense agreements, it cannot be said to condition representation of unit members on the execution of a defense agreement. There has been no allegation by the FOP that the County has, in fact, continued to issue defense agreements after March 28, 2023. Indeed, the most recent unfair practice charge alleging that the County issued a defense agreement was filed on February 27, 2023 (CO-2023-148). Under these circumstances, and based on PERC precedent, the dispute is moot.

I find that the FOP has failed to set forth facts sufficient to find a violation of section 5.4a(7), including a citation to the rule or regulation of the Commission allegedly violated by the County. Therefore, I decline to issue a complaint on that allegation.

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

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

DATED: October 10, 2023

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

Any appeal is due by October 20, 2023.