

P.E.R.C. NO. 2020-55

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and-

Docket No. CO-2019-137

HUDSON COUNTY PBA LOCAL 334,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts, with certain modifications, the Hearing Examiner's report and recommended decision granting Hudson County's motion for summary judgment and dismissing an unfair practice charge (UPC) filed by Hudson County PBA Local 334, which alleged that the County violated N.J.S.A. 34:13A-5.4a(1) and (3) by retaliating against a sheriff's officer for engaging in protected activity when the County transferred him from the Detective Bureau to the Cyber Crimes Unit and removed him from various overtime opportunities. The PBA filed exceptions to the Hearing Examiner's report and recommended decision. The Commission found that the portion of the UPC challenging the alleged retaliatory transfer was properly dismissed as untimely. The Commission found the portion of the UPC challenging the lost overtime opportunities was severable from the transfer, and thus, timely. However, the Commission concluded that the County's removal of the sheriff officer from the overtime opportunities, to accommodate a joint request by the FOP and PBA, was not retaliatory and did not constitute an unfair practice because it was unrelated to protected union activity.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Donato Battista, Hudson County  
Counsel (Nidara Y. Rourk, Assistant County Counsel)

For the Charging Party, Detzky, Hunter, and DeFillippo,  
LLC, attorneys (Stephen B. Hunter, of counsel and on  
the brief)

DECISION

On February 4, 2020, Hudson County PBA Local 334 (PBA) filed exceptions to a Commission Hearing Examiner's recommended Decision and Order, issued on January 9, 2020, H.E. No. 2020-4, 46 NJPER 291 (¶72 2020). The Hearing Examiner granted a motion for summary judgment filed by the County of Hudson (County), and denied the PBA's cross-motion for summary judgment, on a Complaint issued on June 24, 2019 by the Director of Unfair Practices (Director) on an unfair practice charge (UPC) filed by the PBA against the County on November 30, 2018.

The UPC alleged that the County violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (3) by retaliating against

Sheriff's Officer Juan Mendoza (Mendoza) for engaging in protected activity when the County transferred Mendoza from the Detective Bureau to the Cyber Crimes Unit and barred him from various overtime opportunities. The Hearing Examiner granted the County's motion for summary judgment and dismissed the Complaint. First, the Hearing Examiner found that the PBA's UPC was untimely and barred by N.J.S.A. 34:13A-5.4(c). H.E. at 34. The Hearing Examiner proceeded to find that, even if the UPC were timely with respect to Mendoza's removal from the overtime opportunities, the County did not commit an unfair practice because it was obligated to remove him from those overtime lists under 5.4a(1) and (5) of the Act.<sup>1/</sup>

The PBA filed the following exceptions to the Hearing Examiner's report and recommended decision:

1. The Hearing Examiner failed to properly apply the summary judgment standards he cited in his decision in concluding that the charging party's unfair practice charges were untimely and barred by N.J.S.A. 34:13A-5.4(c).

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<sup>1/</sup> The above-cited provisions of the Act 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 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."; and "(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."

2. Although the Hearing Examiner correctly refers to the legal standards applied relating to allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4(a)(3) he did not apply the Bridgewater Township standards in issuing his decision dismissing the charging party PBA's unfair practice charges on timeliness grounds.

3. Although the Hearing Examiner correctly concluded that the allocation of overtime and procedures for selecting employees to work overtime are generally mandatorily negotiable his conclusion that Sheriff's Officer Mendoza was attempting to negotiate a benefit; i.e. his continued inclusion on multiple overtime lists that was not already contractually mandated as a result of negotiations between the PBA and the County of Hudson had no basis in fact or in law.

On February 27, 2020, the County filed a letter brief in opposition to the PBA's exceptions.

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). We have reviewed the record, the Hearing Examiner's Findings of Fact and Conclusions of Law, and the parties' submissions. We find that the Hearing Examiner's findings of fact are supported by the record, are not disputed by the parties, and thus, we adopt them. We further hold that the Hearing Examiner correctly resolved the legal issues presented by this dispute; however, with the following modifications. We address the PBA's exceptions as follows.

PBA's Exception 1

In its Exception 1, the PBA asserts that the Hearing Examiner erred in finding that the PBA's UPC was untimely and barred by N.J.S.A. 34:13A-5.4(c).<sup>2/</sup> The material facts supporting the Hearing Examiner's finding are not in dispute. The Hearing Examiner found that Mendoza was informed in writing that he was being transferred from the Detective Bureau to the Cyber Crimes Unit on May 7, 2018; that the transfer would be effective May 14, 2018; and that he would "no longer be utilized by the Detective Bureau for trips, extraditions, etc." Mendoza's transfer from the Detective Bureau to the Cyber Crimes Unit was effectuated on May 14, 2018, per the County's written notification. The PBA's UPC alleges that Mendoza's transfer was an adverse personnel action in retaliation for his protected union activism. Pursuant to N.J.S.A. 34:13A-5.4(c), Mendoza was required to file an unfair practice charge pertaining to his transfer on or before November 14, 2018, at the latest. The PBA's UPC was not filed until November 30, thereby violating the statute of limitations.

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2/ N.J.S.A. 34:13A-5.4(c) provides, in pertinent part: "...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented."

In its Exceptions Brief, the PBA argues that it was not required to file its UPC challenging Mendoza's May 14, 2018 transfer until he suffered actual economic harm (i.e. when the County unilaterally first barred him from certain overtime opportunities on June 25 and August 21, 2018, resulting in Mendoza losing substantial overtime compensation). As stated above, the UPC as it pertains to the transfer was untimely. However, we agree that the UPC was timely as to Mendoza's claims arising from his lost overtime opportunities.

Accordingly, we adopt the Hearing Examiner's conclusion as to the untimeliness of the PBA's UPC as it relates to Mendoza's transfer, and as such, the portion of the PBA's UPC challenging the alleged retaliatory transfer is properly dismissed. However, we find the portion of the UPC challenging Mendoza's lost overtime opportunities was severable from the transfer, and thus, timely.

#### PBA's Exception 2

The Hearing Examiner established, at a minimum, that the UPC was untimely as to challenging Mendoza's allegedly retaliatory transfer. To the extent that the UPC's other claims- that Mendoza's removal from the overtime opportunities was an unfair practice- are severable from the transfer, the Hearing Examiner properly dismissed those claims on substantive grounds.

In its Exception 2, the PBA argues that the Hearing Examiner ignored the standard set forth in In re Bridgewater Twp., 95 N.J. 235, 240-245 (1984), when he found that Mendoza's removal from the overtime opportunities on June 25 and August 21, 2018 were not retaliation for Mendoza's successful union activism. The PBA argues that it has proven that Mendoza was transferred solely to provide the County with a pretextual basis to subsequently restrict his overtime and substantially reduce his compensation because of Mendoza's protected union activity. The PBA further argues that the County has not provided any independent, non-retaliatory justification for Mendoza's transfer or the removal of his overtime opportunities.

While the Hearing Examiner found facts establishing Mendoza's record of successful union activism, this alone does not establish that a subsequent personnel action, such as removal from overtime opportunities, was retaliatory. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242.

Here, the Hearing Examiner found several undisputed facts that are contrary to the PBA's assertions in its Exception 2 and

establish that Mendoza's removal from the overtime opportunities occurred for reasons unrelated to his protected union activism. First, it should be noted that even after Mendoza was transferred to the Cyber Crimes Unit he was still eligible for overtime opportunities emanating from the Detective Bureau. See H.E. at 16, ¶30. In fact, following the transfer, upon Mendoza's request and the PBA's agreement, the County allowed Mendoza, from May 15 to August 21, 2018, to avail himself of overtime opportunities as if he were still in the Detective Bureau despite being assigned to the Cyber Crimes Unit, a separate unit. See H.E. at 11-13, at ¶20, 22. However, this accommodation was contrary to the parties' past practice and CNA regarding overtime assignments. See H.E. at 11, ¶18.<sup>3/</sup> Based on past practice and the CNA, certain overtime opportunities were first assigned to the Detective Bureau Officers and then, if additional Officers were needed, overtime assignments would be offered to Officers not assigned to the Detective Bureau. Ibid. Thus, even as part of the Cyber Crimes Unit, Mendoza could still be eligible for overtime opportunities, but he would not receive the priority he was previously afforded as part of the Detective Bureau.

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3/ It is a reasonable inference that if the County sought to retaliate for Mendoza's protected union activity it would have not accommodated Mendoza's request to remain eligible for Detective Bureau overtime opportunities, contrary to the established practice for overtime assignment, for three months following his transfer to a separate unit.

The County's deviation from the established practice regarding overtime assignments, which excepted Mendoza as part of the Cyber Crimes Unit, was the impetus for his removal from the overtime opportunities he would have been eligible for had he remained in the Detective Bureau. Union leadership, both FOP and PBA, sought to correct this deviation by requesting, in writing, that Mendoza be limited to certain overtime opportunities in accordance with the established priority given to Detective Bureau Officers. See H.E. at 13-14, ¶24, 26. The Union leadership's motivation for this request was to continue the past practice regarding overtime assignments and to assuage other union members' expressed concerns. Ibid. The County's command acquiesced to the Union leadership's joint request. See H.E. at 15, ¶28.

Thus, based on the preponderance of the evidence on the entire record, the Hearing Examiner properly concluded that Mendoza's removal from the overtime opportunities was not retaliatory and did not constitute an unfair practice because the personnel action was undertaken for reasons unrelated to Mendoza's protected union activity. Accordingly, the Hearing Examiner properly granted the County's motion for summary judgment and dismissed the UPC's claims on substantive grounds as there was no genuine issue of material fact and the County was

entitled to relief as a matter of law. See N.J.A.C. 19:14-4.8(e).  
PBA's Exception 3

In concluding that the County did not commit an unfair practice when it barred Mendoza from certain overtime opportunities, the Hearing Examiner found the County was obligated to remove him from the overtime lists under subsections 5.4a(1) and (5) of the Act. The Hearing Examiner reasoned, "Although the PBA was free to reach an agreement with the County regarding the allocation of overtime that was inconsistent with the parties' CNA and past practice, upon receipt of a demand to negotiate from the PBA [and FOP jointly], the County was obligated to discontinue such an agreement and restore the status quo consistent with the parties' CNA and past practice." H.E. at 41.

In its Exception 3, the PBA argues that the Hearing Examiner erred in concluding that Mendoza attempted to negotiate an individual benefit, undermining the principle of "exclusivity of representation". The PBA argues that Mendoza's removal from overtime opportunities to which he was contractually entitled represented a unilateral change by the County of the CNA's overtime provisions, specifically Article VIII(G) and (H).

It is undisputed that following Mendoza's transfer to the Cyber Crimes Unit, he was allowed to avail himself of the overtime opportunities afforded to Detective Bureau Officers for

three months. This accommodation was made at Mendoza's request and was based on an agreement between the PBA and the County, specifically PBA President Hernandez and Captain DeGennaro, which was later determined by Union leadership to be inconsistent with the parties' CNA and past practice.<sup>4/</sup> Mendoza was only removed from the overtime opportunities after the County received a joint demand from Union leadership to negotiate the discontinuation of Mendoza's individual arrangement and restore the status quo consistent with the parties' CNA and past practice in order to "prevent this from becoming a union issue". See H.E. at 13-14, ¶24, 26.

Given the above, we do not find that Mendoza conducted any direct dealing when he was allowed to remain on the lists following his transfer.<sup>5/</sup> However, the Hearing Examiner correctly concluded to that if the County did not accede to the Union leadership's later request to have Mendoza removed from the overtime opportunities then it could have been charged for

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<sup>4/</sup> In an email dated August 20, 2018, PBA President Hernandez stated, "When I made the agreement with Captain DeGennaro, I didn't think of all the possible issues and concerns that could arise from our agreement. To avoid any problems and to continue past practice, Detectives that are not in the Detective Bureau except for emergency situations, are not allowed to go on extraditions. Therefore for these reasons, Detective Juan Mendoza should be removed from the extradition list to keep everything equally fair for everyone."

<sup>5/</sup> The PBA alleges that numerous other detectives were transferred from the Detective Bureau and remained on the extradition overtime assignment list. H.E. at 15, ¶27.

refusing to negotiate with the majority representative, thereby, conferring a disparate benefit on Mendoza that would lead to complaints from other PBA members. As stated above, the County's acquiescence to the Union leadership's demand, including PBA President Hernandez's request, was the main impetus for Mendoza's removal from the overtime opportunities, rather than retaliation for his union activism.

In sum, we conclude that the Hearing Examiner's Recommended Decision and Order properly granted the County's motion for summary judgment, denied the PBA's cross-motion for summary judgment, and dismissed the Complaint on the PBA's UPC. The Hearing Examiner, based on the undisputed factual record, correctly dismissed the UPC challenging Mendoza's transfer because it was filed past the statute of limitations in N.J.S.A. 34:13A-5.4(c). Additionally, to the extent the UPC's claims that Mendoza was retaliated against when the County removed him from certain overtime opportunities are severable from his transfer, the Hearing Examiner properly dismissed those claims on substantive grounds based on the undisputed factual record and as a matter of law. Accordingly, we adopt the Hearing Examiner's Recommended Decision and Order.

ORDER

The County's motion for summary judgment is granted, the PBA's cross-motion for summary judgment is denied, and the PBA's unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Voos voted in favor of this decision. Commissioners Ford and Jones voted against this decision. Commissioner Papero recused himself.

ISSUED: May 28, 2020

Trenton, New Jersey