P.E.R.C. NO. 99-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY,

Respondent,

-and- Docket No. CO-H-98-210

UNION COUNTY PBA LOCALS 199
and 199A (SUPERIOR OFFICERS),

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission denies the County of Union's motion for summary judgment of an unfair practice charge filed by Union County PBA Locals 199 and 199A (Superior Officers). The charge alleges that the County violated the New Jersey Employer-Employee Relations Act when it allegedly refused to pay the fees of attorneys selected by corrections officers to represent them in civil or criminal cases that stemmed from the performance of their duties. The County alleges that the charge was untimely and the change in the selection of attorneys involves a non-negotiable managerial prerogative. The Commission concludes that since disputed factual issues remain which bear on the timeliness of the charge, summary judgment is not appropriate. The timeliness issue may be litigated before the Hearing Examiner. The Commission has held that both county and municipal employers may negotiate agreements that allow outside counsel to be selected by the officers where the employers can lawfully agree to provide for the officers' defense. The Commission, therefore, concludes that the alleged unilateral change involves an issue which is mandatorily negotiable and the County is not entitled to summary judgment. The matter is remanded to the Hearing Examiner for further proceedings.

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, DeMaria, Ellis & Bausch, attorneys (Kathryn V. Hatfield, of counsel, Ms. Hatfield and Davin Paul Cellura, on the brief)

For the Charging Parties, Klausner, Hunter and Rosenberg, attorneys (Stephen B. Hunter, of counsel)

DECISION

On December 11, 1997, Union County PBA Locals 199 and 199A filed an unfair practice charge against Union County. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] when it allegedly refused to pay the fees of attorneys selected by correction officers to represent them in civil or

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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...."

criminal cases that stemmed from the performance of their duties. The charge asserts that prior to the change, correction officers could choose from a list of attorneys at hourly rates set by the County, or secure another attorney who was willing to accept the same fees.

On March 10, 1999, a Complaint and Notice of Hearing issued.

On April 16, 1999, the County filed a motion for summary judgment supported by an affidavit, exhibits and a brief. It asserts that the charge was untimely and that the alleged change involves a non-negotiable managerial prerogative.

On May 19, 1999, the unions filed an affidavit, exhibits and a brief opposing the motion.2/ The unions assert that the charge is timely and, in any event, the County's alleged violation is "continuous." It further asserts that providing employees with the means of defending themselves against lawsuits stemming from the performance of their duties is mandatorily negotiable. It adds that no statute or regulation prohibits an agreement to allow employees to select attorneys who accept the established fee structure.

The Chair has referred the County's motion to the full Commission. N.J.A.C. 19:14-4.8(a). Summary judgment will be granted if there exists no genuine issue as to any material fact and the movant is entitled to relief as a matter of law. N.J.A.C.

2/ The County filed a reply. As no cross-motion was made, we do not accept this extra submission. N.J.A.C. 19:14-4.8(c). We also deny the County's request for oral argument.

19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

We first consider whether the charge is timely. N.J.S.A. 34:13A-5.4(c) provides that no Complaint shall issue based upon any unfair practice occurring more than six months before the filing of the charge unless the charging party was prevented from filing a charge earlier. The County asserts that a paragraph in an August 20, 1997 letter from the unions' counsel to the County counsel establishes that the charge, filed December 11, 1997, was not brought within six months of the alleged unfair practice. The passage reads:

> On or about May 1, 1997, the PBA was informed that Correction officers were now being specifically advised that they could no longer obtain outside counsel and would be forced to agree to be represented by attorneys designated by the County of Union.

The County asserts that the letter is an admission by the unions that they were aware of the County's practice on May 1, 1997, thus making their December 11, 1997 filing untimely. The County implies that the unions may have known of its position on legal representation even earlier. It points to correspondence it sent during 1996 to individual officers and their designated or proposed attorneys in which it maintained that it had the right to designate counsel in civil suits brought against those officers.

The unions assert that the date mentioned in its attorneys' letter was incorrect and the document is not dispositive of the

timeliness issue. They counter that the correspondence cited by the County was not sent to any union official and cannot be deemed notice to the majority representative of any change in practice. They assert that memoranda sent by the PBA president to County officials during the summer of 1997 show that the PBA was not yet aware that the County had changed the practice. Alternatively, the unions argue that the County's action can be redressed as a continuing violation.

Notice of a change in working conditions given to individual employees usually should not be deemed to constitute notice to the majority representative. See Denville Tp., P.E.R.C. No. 81-146, 7 NJPER 359 (¶12162 1981). The 1996 letters appended to the County's affidavit relate to one civil proceeding and were not copied to any union official. And in Department of Personnel jurisdictions, a majority representative may not always know of the details concerning the legal defense of permanent employees involved in job-related litigation.[3/] Thus we decline to hold that the

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3/ Where an officer facing discipline seeks counsel, the majority representative's role may be minimal. Each correction officer has the right, pursuant to N.J.S.A. 11A:2-14 through 11A:2-16, to contest major discipline independent of any other related benefits that might be secured through collective negotiations. See Monmouth Cty. and CWA, 300 N.J. Super. 272 (App. Div. 1997). During disciplinary appeals, correction officers have a right to be represented by counsel and may, pursuant to N.J.S.A. 11A:2-22, seek reimbursement of the cost of their defense, including the payment of attorney fees. See Oches v. Middletown Police Dept., 155 N.J. 1 (1998).

letters sent to employees prove that the unions knew in 1996 that the County had changed its practices regarding representation of correction officers.

The August 20, 1997 letter could be viewed as an admission by the unions, but we do not so hold at this time.[4/] The unions have advanced an explanation as to why the date in the letter is not dispositive of the timeliness issue. They are entitled to an opportunity to support that assertion with additional evidence. Johnson v. Malnati, 110 N.J. Super. 277, 281 (App. Div. 1970). As there remain disputed factual issues which bear on the timeliness of the charge, summary judgment is not appropriate. The parties may litigate the timeliness issue before the Hearing Examiner.

The County also asserts that it is entitled to summary judgment because the alleged change involves a non-negotiable managerial prerogative, and the Act only requires negotiations over mandatorily negotiable terms and conditions of employment. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in

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4/ A statement by a party's attorney that establishes a material fact may not always constitute an admission by that party. See Czuj v. Toresco Enterprises, 239 N.J. Super. 123, 128-129 (Law Div. 1989).

> their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

The County's obligation to defend correction officers from lawsuits starts with N.J.S.A. 40A:14-117. That statute provides:

> Whenever a member or officer of a county police, or county park police, department or force is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the county, or county park commission, as the case may be, shall provide said member or officer with necessary means for the defense of such action or proceeding, other than for his defense in a disciplinary proceeding instituted against him by the county or park commission, or in a criminal proceeding instituted as a result of a complaint on behalf of the county or park commission. If any such disciplinary or criminal proceeding instituted by or on complaint of the county or park commission shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense. [Emphasis added]

Two broad categories of lawsuits entitling correction officers to legal representation emerge from this statute. The first is civil and criminal charges initiated by an outside entity or individual, often jail inmates. The second is disciplinary charges brought by the County or a County agency.

The focus of this dispute is the first category of cases: the defense of non-disciplinary cases in which the County must provide correction officers with the "necessary means" for the defense of civil or criminal charges arising out of or incidental to the performance of their duties. The County asserts that it has a managerial right to determine in each case who will represent an officer. It states that the selection must be based upon an attorney's qualifications and abilities, because the County might face significant monetary exposure. The County cites Edison Tp. v. Mezzacca 147 N.J. Super. 9 (App. Div. 1977), construing N.J.S.A. 40A:14-155 which applies to municipalities.5/ The concerns raised by the County concerning the cost of civil judgments are legitimate but appear to apply more to whom it will designate to defend suits when it is named as a defendant, than to whether individual officers will have to pay out of pocket for attorneys who represent them in

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5/ Prior to 1986, N.J.S.A. 40A:14-155 was essentially identical to its County counterpart, N.J.S.A. 40A:14-117. The municipal statute was then amended to narrow the instances in which municipalities were required to defend their police officers. See Oches, 155 N.J. at 6-8. But the statute governing county police has been unchanged since Mezzacca. See Oches at 27; Bower v. East Orange Bd. of Ed., 287 N.J. Super. 15, 29-33 (App. Div. 1996).

non-disciplinary cases. Both federal and state courts have held that an agreement to provide officers with a defense, to reimburse them for the cost of attorneys who successfully defend them, and to indemnify them against judgments covers mandatorily negotiable terms and conditions of employment. See Skevofilax v. Quigley, 810 F.2d 378, 124 LRRM 2431, 2438-2439 (3d Cir. 1987), cert. den. 481 U.S. 1029 (1987); Oches, 155 N.J. at 8-9; City Council of Elizabeth v. Fumero, 143 N.J. Super. 275 (Law Div. 1976).

The unions assert that the existing practice in "necessary means" cases has been to have the correction officer choose from the list of attorneys who have agreed to charge fees approved by the County or to select another attorney who also agrees to bill at County-approved rates. Nothing in N.J.S.A. 40A:14-117 preempts this practice.

Where a statute affords a public employer discretion over an otherwise negotiable term and condition of employment, the Act requires that the employer negotiate over how its discretion will be exercised. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-81 (1978). Mezzacca recognizes that no single method of providing officers with the "necessary means" to defend lawsuits is mandated:

> The municipality's obligation under this enactment can be met in several ways, as long as the means chosen fulfills the statutory purpose of providing officers with a defense at municipal expense. It can proffer the services of the municipal attorney when that attorney can function in that capacity free from potential conflicts of interest. When he

> cannot, or in any event, the municipality can proffer the services of an outside attorney who, when selected, would owe exclusive allegiance to the officer free from municipal control. Or, it can come to an agreement with counsel of the officer's choosing as to services to be rendered and the costs thereof. In any of these methods of complying with the statutory mandate, the officer will be provided with an attorney, admitted in this State, of reasonable competence, at municipal expense and the statutory goal will have been achieved. [147 N.J. Super. at 15; emphasis added]

We have held that both county and municipal employers may negotiate agreements that allow outside counsel to be selected by the officers named in civil lawsuits in situations where the employers can lawfully agree to provide for the officers' defense. See Hudson Cty., P.E.R.C. No. 85-84, 11 NJPER 100, 102 (¶16043 1982); Hudson Cty., P.E.R.C. No. 83-59, 9 NJPER 10, 11 (¶14003 1982); Saddle Brook Tp. P.E.R.C. No. 78-72, 4 NJPER 192, 194 (¶4097 1978). We conclude that the alleged unilateral change concerns an issue which is mandatorily negotiable. The County is therefore not entitled to summary judgment on that basis. We remand this matter to the Hearing Examiner for further proceedings.

ORDER

Summary judgment is denied. This matter is remanded to the Hearing Examiner for proceedings in accordance with this decision.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose was not present.

DATED: June 22, 1999
Trenton, New Jersey
ISSUED: June 23, 1999