

P.E.R.C. NO. 2002-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF SOMERS POINT,

Respondent,

-and-

Docket No. CO-H-2001-227

MAINLAND PBA #77 and
APRIL VAN DALEY,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Somers Point for special permission to appeal a Hearing Examiner's refusal to stay the processing of an unfair practice charge pending Superior Court litigation. The Hearing Examiner ruled that the Commission has primary jurisdiction over the unfair practice Complaint. The unfair practice charge was filed by Mainland PBA #77 and April Van Daley alleging that the City violated the New Jersey Employer-Employee Relations Act by disciplining Van Daley in retaliation for her filing a grievance seeking a shift change to accommodate her National Guard training. Van Daley also filed an action in the Superior Court against the City, the mayor, the police chief, a police captain, and a police sergeant. The Commission concludes that there are no extraordinary circumstances warranting special permission to appeal.

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, Roger C. Steedle, P.A. attorneys
(James F. Ferguson, of counsel)

For the Charging Parties, Selikoff & Cohen, P.A.,
attorneys (Steven R. Cohen, of counsel)

DECISION

On February 21, 2001, Mainland PBA Local #77 and April Van Daley filed an unfair practice charge against the City of Somers Point. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),^{1/} by disciplining Van Daley in retaliation for her filing a grievance seeking a shift change

^{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 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."

to accommodate her National Guard training. A Complaint and Notice of Hearing issued and the employer filed an Answer denying that it violated the Act.

Van Daley also filed an action in the Superior Court against the City, the mayor, the police chief, a police captain, and a police sergeant. That action alleges that the department used the disciplinary process to abuse, harass and retaliate against Van Daley in violation of the Conscientious Employee Protection Act ("CEPA") and the New Jersey Law Against Discrimination ("LAD").

On January 3, 2002, the attorney for the City and the mayor in the Superior Court litigation asked Hearing Examiner Jonathon Roth to stay the unfair practice litigation pending resolution of the court case. The attorney asserts that both matters involve the same disciplinary action against Van Daley. On January 7, the police chief joined in the request for a stay.

On January 15, 2002, the Hearing Examiner wrote the parties denying the request for a stay. He stated that the Commission has "primary jurisdiction" over the unfair practice Complaint.

On January 17, 2002, the City's attorney in the unfair practice case joined in the request for a stay. That letter was apparently sent before receipt of the Hearing Examiner's decision denying the request.

On January 30, 2002, the City requested special permission to appeal the Hearing Examiner's decision. The City

argues that although the allegations in the Superior Court are more extensive than the allegations before us, the items charged in the unfair practice proceeding are part of the underlying Superior Court action. It further argues that the City's interests would be prejudiced by having to go forward on the unfair practice matter before discovery and trial or resolution of the pending lawsuit.

On February 1, 2002, the PBA filed a response opposing the request for special permission to appeal. It argues that the unfair practice charge is confined to alleged violations of the Employer-Employee Relations Act and that the court case does not allege violations of that Act. It asserts that the Commission has exclusive jurisdiction over unfair practice allegations and that those allegations cannot be litigated in the Superior Court.

Special permission to appeal will be granted only in extraordinary circumstances. No such circumstances are present.

The City, mayor and police chief asserted to the Hearing Examiner that the CEPA and LAD claims should proceed in Superior Court before the unfair practice claim proceeds here. It relied on Muise v. GPU, Inc., 332 N.J. Super. 140 (App. Div. 2000), for the proposition that original and primary jurisdiction resides in the Superior Court because Van Daley seeks money damages. Id. at 163, 165.

Muise discussed the doctrine of primary jurisdiction under which a court declines original jurisdiction and refers to

an administrative agency those issues which a regulatory scheme has placed within the agency's expertise. Id. at 158. Even when primary jurisdiction applies, the doctrine does not preclude the later exercise of court jurisdiction over remedial issues beyond the agency's authority. Id. at 163. In Muise, the exclusive jurisdiction of the Board of Public Utilities to regulate public utilities did not divest the court of jurisdiction over a damage action for ordinary negligence. Id. at 165.

Nothing in Muise suggests that this agency should stay its proceedings pending resolution of separate claims in the Superior Court arising under the CEPA and LAD statutes. See Scouler v. Camden, 332 N.J. Super. 69 (App. Div. 2000) (CEPA claim in Superior Court does not preclude simultaneous appeal of discipline to Merit System Board). Other legal principles may come into play later to avoid conflicting results, but such concerns are premature.

ORDER

The request for special permission to appeal is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Ricci and Sandman voted in favor of this decision. Commissioner Muscato was not present.

DATED: February 28, 2002
Trenton, New Jersey
ISSUED: March 1, 2002