

P.E.R.C. NO. 2003-82

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HILLSBOROUGH,

Respondent,

-and-

Docket No. CO-H-2002-280

HILLSBOROUGH TOWNSHIP  
PBA LOCAL 205,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies motions a motion for summary judgment filed by the Township of Hillsborough and a cross-motion for summary judgment filed by the Hillsborough Township PBA Local 205. The PBA filed an unfair practice charge alleging that the Township violated the New Jersey Employer-Employee Relations Act by denying the request of five duly authorized PBA representatives to attend the State PBA Mini-Convention. The Commission concludes that N.J.S.A. 40A:14-177 provides that leave be granted to duly authorized PBA representatives subject to a maximum of ten percent of the membership. The Commission also concludes that the statute does not grant the employer discretion to determine the number of employees between two and ten, and that the employer did not have a managerial prerogative to deviate from the statutory requirement. With respect to the PBA's cross-motion, the Commission concludes that nothing in the record indicates the size of the PBA's unit and therefore the Commission has no basis for determining whether the Township repudiated the contract.

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, Eric M. Bernstein & Associates, L.L.C., attorneys (Eric M. Bernstein, of counsel and on the brief; Michael C. Kovacs, on the brief)

For the Charging Party, S.M. Bosco & Associates, consultants (Simon M. Bosco, of counsel and on the brief)

DECISION

On April 16, 2002, Hillsborough Township PBA Local 205 filed an unfair practice charge against the Township of Hillsborough. 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), (2), (3) and (5),<sup>1/</sup> by denying the request

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<sup>1/</sup> 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; (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 this act; (5)  
(continued...)

of five duly authorized PBA representatives to attend the State PBA Mini-Convention.

On December 23, 2002, a Complaint was issued. On January 21, 2003, the employer filed its Answer generally denying the allegations in the Complaint.

On March 10, 2003, the parties submitted these stipulations of fact:

1. The Township of Hillsborough (hereinafter "Township") and the Hillsborough Policemen's Benevolent Association, Local #205 (hereinafter "PBA") are Parties to a Collective Bargaining Agreement (hereinafter "CBA"), the terms of which expire on December 31, 2003 and has previously been entered into evidence as J-1.

2. The crux of the case germinates from an application of N.J.S.A. 40A:14-177, as incorporated and applied with Article II, Policemen's Rights, Section D of the CBA.<sup>2/</sup>

3. On or about February 13, 2002, Kenneth Pryor, PBA President forwarded a memo to Robert Gazaway, Chief of Police (hereinafter "Chief") requesting paid convention leave for five (5) representatives to attend the State PBA Mini Convention. (Attachment "1")

4. On or about February 18, 2002, the Chief responded to Pryor, approving paid convention

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1/ (...continued)  
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. . . ."

2/ Article II, Section D provides, in relevant part, that attendance at Conventions and Mini-Conventions shall be without loss of pay as specified in N.J.S.A. 40A:14-177.

leave for three (3) and denying two (2) of the requested five (5) representatives. (Attachment "2")

5. On or about August 30, 2001, the Chief sent a letter to Michael McMahon, PBA Grievance Committee Chairman. Chief Gazaway denied the grievance because he felt that the denial of time off with pay to attend conventions was not a violation of Article II of the CBA. (Attachment "3")

On March 11, 2003, the employer filed a motion for summary judgment and supporting brief. It argues that it is entitled to summary judgment because it did not violate the parties' contract; the decision to deny paid convention leave was within its managerial prerogative; it was not required to schedule negotiations to discuss convention leave; and there is no remedy available to the PBA.

On March 18, 2003, the PBA filed a cross-motion for summary judgment and a brief supporting its motion and opposing the employer's motion. The PBA argues that it is entitled to summary judgment because the employer improperly applied N.J.S.A. 40A:14-177; by relying on a past practice, the employer is attempting to necessitate negotiations over a subject that is preempted by statute; and the Assembly State Government Committee has introduced an amendment that further supports the PBA's argument that N.J.S.A. 40A:14-177 preempts negotiations and guarantees

that ten percent of its membership shall be granted paid convention leave.<sup>3/</sup>

On May 6, 2003, the Commission Chair referred both motions to the full Commission. N.J.A.C. 19:14-4.8.

Summary judgment may be granted:

If it appears from the pleadings, together with the brief, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law. . . . [N.J.A.C. 19:14-4.8(d)]

See also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).

We begin with the Township's motion. The employer argues that N.J.S.A. 40A:14-177 grants it the discretion to determine how many delegates to the PBA's convention are entitled to paid leave, subject to a minimum of two and a maximum of ten. We reject that argument. N.J.S.A. 40A:14-177 provides:

The heads of the county offices of the several counties and the head of every department, bureau and office in the government of the various municipalities shall give a leave of absence with pay to persons in the service of the county or municipality who are duly authorized representatives of an employee organization as defined in subsection e. of section 3 of P.L.1941, c.100 (C.34:13A-3) and affiliated

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<sup>3/</sup> That bill became law on July 12, 2002. P.L. 2002, c. 41. It establishes an exception to the statute's limitation on the number of authorized representatives. That exception is not relevant here.

with the New Jersey State Policemen's Benevolent Association, Inc., Fraternal Order of Police, Firemen's Mutual Benevolent Association, Inc. or Professional Fire Fighters Association of New Jersey to attend any State or national convention of such organization, provided, however, that no more than 10 percent of the employee organization's membership shall be permitted such a leave of absence with pay, except that no less than two and no more than 10 authorized representatives shall be entitled to such leave, unless more than 10 authorized representatives are permitted such a leave of absence pursuant to a collective bargaining agreement negotiated by the employer and the representatives of the employee organization, and for employee organizations with more than 5,000 members, a maximum of 25 authorized representatives shall be entitled to such leave.

A certificate of attendance to the State convention shall, upon request, be submitted by the representative so attending.

Leave of absence shall be for a period inclusive of the duration of the convention with a reasonable time allowed for time to travel to and from the convention, provided that such leave shall be for no more than seven days. [Emphasis supplied]

Under this statute, leave must be granted to duly authorized PBA representatives, subject to a maximum of ten percent of the PBA's membership. The statute also provides for a minimum of two and a maximum of ten representatives unless some greater number is negotiated. Employee organizations with more than 5000 members are entitled to a maximum of 25 representatives.

We reject the employer's argument that the statute grants it discretion to determine the number of employees between two and

ten. We also reject the employer's argument that it had a managerial prerogative to deviate from the statutory requirement. The employer had not cited any legal authority justifying deviation from a statutory command. We agree with the Township that negotiations were not required, but not because it had a prerogative to determine the number of PBA representatives above two entitled to paid leave. Negotiations were not required because it does not appear that the PBA demanded to negotiate over any negotiable aspect of convention leave. Finally, we reject the argument that there can be no remedy for a violation. We will not, however, speculate on what remedy might be appropriate.

As for the PBA's cross-motion, nothing in this record indicates the size of the PBA's membership.<sup>4/</sup> Accordingly, we have no basis to determine whether the Township repudiated the parties' contract and its incorporation of N.J.S.A. 40A:14-177 when it permitted only three PBA representatives paid convention leave.<sup>5/</sup>

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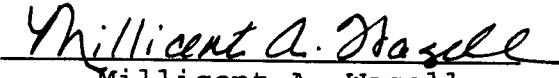
<sup>4/</sup> In a motion for summary judgment, we cannot rely on facts asserted in a party's brief. Thus we cannot consider the PBA's assertion that the PBA's membership is approximately 53.

<sup>5/</sup> We need not address whether the alleged violation rises to the level of a contract repudiation. We note that under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), mere breaches of contract are not unfair practices and must instead be addressed through contractual grievance procedures.

ORDER

The motion and cross-motion for summary judgment are denied.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

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

DATED: May 29, 2003  
Trenton, New Jersey  
ISSUED: May 30, 2003