P.E.R.C. NO. 2006-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF UNION CITY,

Respondent,

-and- Docket No. CO-2004-231

P.B.A. LOCAL 8,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the City of Union City. The Complaint was based on an unfair practice charge filed by P.B.A. Local 8 alleging that the City violated the New Jersey Employer-Employee Relations Act when it unilaterally imposed a cap of 14 or 15 sick leave days a year and disciplined officers who exceeded that cap in 2003 for excessive absenteeism. The charge alleges that the City imposed this cap in retaliation for the PBA's refusal to accept the City's successor contract proposal that sick leave accrual be capped at 15 days a year. The charge also alleges that the City unilaterally eliminated a practice of conducting an investigation and giving officers an opportunity to be heard before reprimanding officers. Finally, the charge alleges that the City rejected the PBA's demand to negotiate over the alleged changes in employment conditions and impact issues arising from any exercise of a managerial prerogative. A hearing examiner granted the City's motion to dismiss. The Commission concludes that the record does not contain any evidence indicating that the City imposed the sick leave cap; the record does not contain any evidence showing that the City changed any pre-discipline or post-discipline procedures; and the City had no obligation to negotiate mid-contract in response to the PBA's demand.

____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, Martin R. Pachman, P.C., attorneys (Martin R. Pachman, of counsel)

For the Charging Party, Loccke & Correia P.A., attorneys (Michael A. Bukosky, of counsel)

DECISION

On October 5, 2005, Hearing Examiner Wendy L. Young granted a motion to dismiss a Complaint based on an unfair practice charge filed by P.B.A. Local 8 against the City of Union City. The PBA has appealed that ruling. We uphold it.

The PBA represents the City's rank-and-file police officers. Its charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally imposed a cap of 14 or 15 sick leave days a year and disciplined officers who exceeded that cap in 2003 for excessive absenteeism. The PBA alleges that the City imposed this cap in retaliation for the PBA's refusal to accept the City's successor contract proposal that sick leave accrual be

capped at 15 days a year. The charge also alleges that the City unilaterally eliminated a practice of conducting an investigation and giving officers an opportunity to be heard before reprimanding officers. Finally, the charge alleges that the City rejected the PBA's demand to negotiate over the alleged changes in employment conditions and impact issues arising from any exercise of a managerial prerogative.

A Complaint and Notice of Hearing issued on the 5.4a(1), (3) and (5) allegations.[1/] The City's Answer denies the material allegations in the Complaint. The Answer does not assert any defenses.

On June 14 and 16, 2005, the Hearing Examiner conducted a hearing. After the charging party presented its case-in-chief, the City moved to dismiss. The Hearing Examiner asked the parties to file briefs and they did so. The PBA's attorney objected to her not deciding the motion on the record (2T167).

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; 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. . . ." The Director of Unfair Practices refused to issue a Complaint on the PBA's allegations that the City also violated 5.4a(2), (4), (6), and (7).

Three months later, the PBA moved to have a settlement agreement in an earlier unfair practice case added to the record and to have administrative notice of the charge taken. The City opposed the motion. The Hearing Examiner took notice of the charge, but otherwise denied the motion. She concluded that the PBA had not shown extraordinary circumstances for reopening the record given that the PBA knew the document existed before the hearing. She also found that the risk of delay outweighed the probative value of the agreement since on its face it gave management certain rights and the parties disagreed over its meaning.

On October 5, 2005, the Hearing Examiner dismissed the Complaint. H.E. No. 2006-5, 31 NJPER 339 (¶135 2005). Applying the standards set forth in Dolson v. Anastasia, 55 N.J. 2, 5 (1969), she concluded that the PBA had not presented evidence that the reprimands for excessive absenteeism were retaliatory or that the City had unilaterally imposed a sick leave cap or schedule of penalties or otherwise changed sick leave policy or procedures. She also concluded that the City was not required to negotiate because there had been no change in the parties' practice or procedure for reprimands and sick leave abuse.

On November 7, 2005, the PBA filed exceptions. It contests the Hearing Examiner's entertaining and deciding the motion to dismiss instead of continuing with the hearing; the denial of its

motion to have the settlement agreement added to the record; and certain findings of fact. On the merits, it contends that the Hearing Examiner mischaracterized the case as a challenge to sick leave monitoring or a challenge to disciplinary appeal rights and did not address its fundamental claims.

On November 8, 2005, the City filed a response. It argues that the exceptions violate N.J.A.C. 19:14-7.3 and that the PBA has not specified its objections and has improperly attached a copy of the settlement agreement. On the merits, the City contends that the Hearing Examiner properly dismissed the Complaint and the PBA is trying to avoid grieving the reprimands.[2/]

Analysis

Procedural Issues

We will entertain the PBA's exceptions. They identify the factual and legal findings that the PBA objects to and are in substantial compliance with the rules. N.J.A.C. 19:10-3.1 (rules should be liberally construed to effectuate purposes of the Act).

The PBA asserts that the Hearing Examiner did not have power to entertain the City's motion to dismiss or authority to delay the hearing until that motion was briefed and decided. It

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2/ We asked the parties to submit statements concerning the possible applicability of State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), to this case. The parties agreed that this case was not relevant at this stage.

believes that the City's motion should have been treated as a motion for summary judgment and referred to the Chairman and that the hearing should have proceeded unless stayed. We disagree. Motions to dismiss are different from motions for summary judgment and are properly made at the end of the charging party's case and properly considered by the Hearing Examiner. Contrast N.J.A.C. 19:14-4.7 (motions to dismiss decided by Hearing Examiner) and N.J.A.C. 19:14-4.8 (motions for summary judgment filed with Chairman who may refer the motion to the Commission or Hearing Examiner). Motions to dismiss are often resolved orally and immediately, but a Hearing Examiner has a duty to consider such motions under the applicable legal standards and the discretion to ask for briefs if doing so is helpful in applying the standards to the evidence. That discretion was reasonably exercised.

We next consider whether the Hearing Examiner properly exercised her discretion in declining to admit into the record the settlement agreement proffered by the PBA three months after it concluded its case-in-chief. That agreement should have been introduced at the hearing so it could have been the basis of examining and cross-examining witnesses testifying about its contents. Provident Nursing Home, 345 NLRB No. 40, 178 LRRM 1279 (2005). However, we will take administrative notice of the agreement for purposes of this opinion. We note that, contrary

to the PBA's contention, the agreement does not prohibit disciplining officers for excessive absenteeism as opposed to counseling them. It instead provides that quarterly interviews -- held to discuss the trend, pattern, or possible excessive use of sick leave that may be considered to be a potential problem or abuse -- are not to be considered disciplinary actions. Thus, even if introduced, the agreement would at most support a breach of contract claim rather than evidence the repudiation necessary to ground an unfair practice charge. Provident (even if documents had been introduced, they would not require a different result). We reject, however, the inference in finding no. 8 that the City had a history of disciplining officers for excessive absenteeism.

The Motion to Dismiss

In deciding a motion to dismiss after the charging party presents its case, we accept as true all of the evidence supporting the charging party's allegations and afford the charging party the benefit of all inferences that can reasonably be deduced from that evidence. Dolson; New Jersey Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979). Assessment of the credibility of witnesses ordinarily awaits the close of the entire case. Cameco, Inc. v. Gedicke, 157 N.J. 504 (1999). However, dismissal of a claim is appropriate when a rational fact-finder could not conclude from the evidence that each

essential element of that claim is present. Pitts v. Newark Bd. of Ed., 337 N.J. Super. 331, 340 (App. Div. 2001). Applying these standards, we will review the evidence presented in the PBA's case-in-chief to see whether a rational fact-finder could conclude that (1) the City retaliated against the PBA for rejecting its negotiations proposal by reprimanding the officers; (2) the City imposed a cap on the use of sick leave and disciplined officers for exceeding the cap; (3) the City unilaterally changed disciplinary procedures; or (4) the City improperly rejected the PBA's demand to negotiate over the alleged changes in sick leave benefits and procedures.

Alleged Retaliation

The PBA alleges that the collective negotiations agreement in effect from 1999 to 2003 entitled police officers to unlimited sick leave days; during successor contract negotiations, the City proposed capping sick leave at 15 days a year; the PBA rejected that proposal; and the City then retaliated by imposing that cap unilaterally and reprimanding all officers who had taken more than 15 sick leave days during 2003. However, the Hearing Examiner found that several reprimands were issued before the PBA rejected the City's proposal and thus could not have been a retaliatory response to the rejection. The PBA has not excepted to that finding and it is supported by the record. We therefore

dismiss the allegation that the City violated 5.4a(3) and the alleged derivative violation of 5.4a(1).

Alleged Imposition of Sick Leave Cap

The PBA alleges that the City violated the police officers' contractual rights when it imposed a cap of 14 or 15 sick leave days a year and then disciplined police officers who had exceeded that cap in 2003. Here is the background for considering these claims.

Article XXI of the parties' contract is entitled Sick Leave and Terminal Leave. Section A provides: "Sick leave policy . . . shall continue to be administered as in the past." The parties agree that Article XXI entitles officers to up to one year of paid sick leave, but disagree over whether officers can be disciplined for excessive absenteeism.

Article XXII is entitled Disciplinary Action. It provides that when an investigation results in disciplinary action, an officer may seek PBA representation. It does not set forth a schedule of penalties for any infractions.

Article XXXVIII is entitled Miscellaneous Proceedings. It provides that the PBA may appeal allegedly unjust disciplinary actions to a Board of Arbitrators. The City asserts that this right to appeal disciplinary actions encompasses reprimands and we reject the PBA's assertion that the record does not indicate that reprimands may be arbitrated. Reprimands of police officers

are legally arbitrable. See Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶159 2005).

The parties' contract also contains an article entitled Management Rights. That article provides that management may adopt reasonable rules and regulations to maintain order, safety, and effective operations. One department regulation cites chronic or excessive absenteeism as a cause for disciplinary action. The PBA's president acknowledged that regulation (2T159). The PBA's vice-president acknowledged that the City had a sick review policy before 2004 and that there was a potential for discipline under that policy (2T131).

In January 2004, police chief Everett directed that a year-end review of the department's sick leave usage be conducted. He sought to identify officers whose sick leave usage in 2003 significantly exceeded the department's average and, thus, to identify officers whose records needed scrutiny. The year-end average was calculated based on the sick leave used by all officers and pursuant to the same method as in previous years.[3/]

Everett considered annual sick leave usage exceeding 20% of the departmental average to be significant enough to trigger scrutiny of the records of individual officers. In 2003, the

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3/ Chief Everett conducted the year-end review to determine whether to initiate discipline. His predecessors also conducted year-end reviews, but the record does not explain why. We correct finding no. 3 to note the absence of an explanation.

number of days triggering scrutiny was 14, the same number as in 2002 and previous years.

Police officers were not reprimanded or suspended simply because they took more than 14 or 15 sick leave days in 2003. Instead, an internal affairs lieutenant reviewed each officer's sick leave usage in light of several variables. For example, the lieutenant considered whether the officer had significantly exceeded the departmental absence rate for the previous three or four years. He also reviewed any documentation provided by each officer for 2003, including the reports required when an officer called in sick; the forms submitted by officers when they returned from sick leaves of one or two days; and the doctors' slips submitted after longer absences. He also considered any pattern of sick leave usage in 2003 or previous years - e.g., were sick days routinely taken before or after vacations, weekends, holidays, or paydays?

As part of the year-end review, the lieutenant examined an officer's quarterly review forms and documentation. Quarterly reviews began in 1997 when the then police chief issued a memorandum stating that the department "will begin to scrutinize the use or abuse of 'Sick Leave' on a regular basis - Quarterly at least" with a goal of reducing the amount of sick days (R-1). Using a certain number of sick days in a quarter triggered an interview between an officer and the commander. The information

received during the interviews is then recorded in a form (R-1). That information includes whether a suspicious pattern of usage exists and the employee's explanation for any absences. The quarterly interviews are for counseling purposes and are not disciplinary in and of themselves, but the chief's memorandum warns: "Based upon the interview and other factors, further action may result."

After reviewing all these factors, the lieutenant issued reprimands for excessive absenteeism to eight officers and suspended three other officers. We reject the PBA's assertion in response to finding no. 5 that the City has stopped counseling officers about excessive absenteeism and now simply disciplines them. Counseling officers about a perceived problem is not inconsistent with initiating discipline if the perceived problem continues. Counseling through quarterly interviews preceded the initiation of discipline in this case.

The PBA filed this charge rather than appeal or arbitrate these disciplinary actions. Other officers whose records were reviewed were not disciplined (2T88; 2T90).

We finally note that the parties dispute whether the City had disciplined officers for excessive absenteeism before 2004. We add to finding no. 7 that the chief did not specifically recollect when officers were disciplined for excessive absenteeism, but he knew they had been (2T91-2T92); the current

PBA president testified there was no written policy so officers were surprised when reprimands suddenly came down despite the officers' understanding that they were entitled to unlimited sick time (2T150-2T151); the current PBA president did not testify that no officers had ever been disciplined for excessive absenteeism before 2004; and the State PBA vice-president testified that to his knowledge officers had not been disciplined for absenteeism before 2004, but he conceded that he probably would not have known about a disciplinary action if an officer did not appeal and that there was a potential for discipline under the departmental sick leave review policy (2T129-2T131). We correct finding no. 7 to indicate that one of the three disciplinary actions for absenteeism cited by the PBA State delegate was not a reprimand, but a suspension that was overturned by the Merit System Board (2T137).

We conclude that the record does not contain any evidence indicating that the City imposed the sick leave cap asserted by the PBA. Rather, the PBA's witnesses established that a certain number of absences merely triggered a review of an officer's sick leave record; determinations whether or not to discipline an officer were then made case by case in consideration of the specifics of that officer's situation; and some officers exceeding the trigger point for investigation were not disciplined, some were reprimanded, and some were suspended.

Contrast Montville Tp. Ed. Ass'n v. Montville Tp. Bd. of Ed., NJPER Supp.2d 159 (¶140 App. Div. 1985) (invalidating evaluation guidelines that mechanically assigned unsatisfactory attendance ratings based solely on number of absences). These disciplinary actions based on an individualized assessment of each officer's record were subject to an officer's contractual right to seek arbitration of minor disciplinary actions and statutory right to seek Merit System Board review of major disciplinary actions. See City of Jersey City, P.E.R.C. No. 2003-57, 29 NJPER 108 (¶33 2003).

For these reasons, we dismiss the allegation that the City imposed a sick leave cap in violation of 5.4a(5) and any derivative allegation that the City violated 5.4a(1).

Alleged Changes in Disciplinary Procedures

The PBA's unfair practice charge alleges that the City unilaterally changed disciplinary procedures by eliminating an investigation, notice of the charge, and the opportunity to be heard before discipline is imposed.[4/] The record, however, does not contain any evidence showing that the City changed any pre-

4/ We accept the statements in findings no. 5 and 6 that an officer had a right to object to a reprimand, the reprimand was not "final" until the chief signed off on it, and each officer had an opportunity to explain his actions by appearing before the chief or submitting a statement. But we add that officers were not personally told about their right to object and the reprimands as issued appeared to be final.

discipline or post-discipline procedures. The procedures for issuing and appealing the reprimands in this case were the same as in all cases involving reprimands (2T36-2T37). In no instance do officers receive formal notice that they can raise objections to the chief about a reprimand before it is placed in their file. However, PBA officials are aware of the process for appealing reprimands and often speak to the chief about reprimands (2T114). We also note that officers had an opportunity in the quarterly interviews to explain their absences (2T55, 2T68).

For these reasons, we dismiss the allegations that the City unilaterally changed procedural employment conditions in violation of 5.4a(5) and any derivative allegation that the City violated 5.4a(1).

Alleged Refusal to Negotiate

The PBA asserts that the City was obligated to negotiate in response to its demand to negotiate (J-3). We find that J-3 does not suffice to establish an obligation to negotiate.

J-3, a letter from the PBA's attorney to Chief Everett, asserts:

> The PBA has recently been notified that the City of Union City has altered, repudiated and/or modified the terms and conditions of employment as they currently exist[ed] between the parties, specifically, but not limited to changes made in regard to (1) the procedures, method and manner of use or granting of sick leave, (2) changes to the method and manner of disciplinary penalties for alleged abuse of sick leave and (3)

> unilateral establishment of arbitrary "triggers" concerning what the department considers inappropriate use of sick leave and (4) improper initiation of disciplinary charges against approximately twenty PBA unit members as a result of the new modifications to sick leave and penalties commensurate with potential abuse of sick leave.

The PBA demanded negotiations over these four areas of alleged changes as well as "any elimination, alteration, modification, implementation, repudiation or change of the terms and conditions of employment agreed to, or which exist[ed] pursuant to past practice and custom by and between the parties relating to the terms and conditions of employment referenced herein, and other terms and conditions of employment which also may have been changed incident thereto." In addition, it requested impact negotiations with respect to any terms and conditions of employment affected by the City's alleged modification of employment conditions or any change, alteration, or modification resulting from the exercise of a managerial prerogative. Finally, the PBA demanded that the City immediately restore the status quo and asserted that failure to do so would be taken as a refusal to negotiate that could lead to an unfair practice charge. Its demand to restore the status quo specified that the City must rescind all the reprimands.

Chief Everett considered this letter a grievance. He met with the PBA president to try to resolve it. We add to finding no. 10 that the chief told the PBA president that the City had a

right to deal with the issue of excessive sick leave and the PBA president "kind of at the time agreed with that" (2T107). When the chief and the president could not agree on how to resolve the dispute, the chief forwarded J-3 to the City's attorney for review because the parties were already in negotiations for a successor agreement. The City did not otherwise respond to J-3 and the PBA made no new or specific proposals concerning sick leave policies and procedures during the successor contract negotiations or at any other time.

We hold that the City had no obligation to negotiate mid-contract in response to J-3. The PBA insisted that the City rescind all reprimands and warned that it would file an unfair practice charge if the City did not. The City was not required to admit that it had changed employment conditions and to rescind the reprimands as demanded by the PBA. Further, the demand to negotiate was premised on the assertion that the City had changed terms and conditions of employment. However, we have already determined that the PBA did not offer evidence proving that the City made the changes in employment conditions alleged in the PBA's charge. Finally, we note that the PBA's brief discusses at length its desire to negotiate procedures meeting an "industrial due process" standard (Brief pp. 14-20). But its brief differs from its demand to negotiate. J-3 did not specify any pre-disciplinary procedures to be negotiated or any issues severable

from the prerogative to conduct an individualized assessment of officers' records. See, e.g., Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984).

For these reasons, we dismiss the allegation that the City violated 5.4a(5) by not engaging in mid-contract negotiations in response to J-3 and any derivative allegation that the City violated 5.4a(1).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed.

ISSUED: April 27, 2006

Trenton, New Jersey