

P.E.R.C. NO. 2007-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OCEAN,

Respondent,

-and-

Docket No. CO-2006-060

OCEAN TOWNSHIP PBA LOCAL 57,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants an appeal filed by Ocean Township PBA Local 57 of the Director of Unfair Practices' refusal to issue a Complaint on an unfair practice charge it filed against the Township of Ocean. The charge alleges that Township violated the New Jersey Employer-Employee Relations Act when it unilaterally eliminated a steady midnight shift schedule. The Director found that the Township had a managerial prerogative to eliminate the steady midnight shift and he also found an allegation that the change was in retaliation for protected activity to be untimely. The Commission holds that the amendment relates back to the original charge and is therefore timely. The Commission also holds that the amended charge alleges facts that challenge the Township's assertion that it acted pursuant to a managerial prerogative; a factual dispute that must be resolved at hearing. Also, the Commission holds that it cannot be determined at this early stage of the administrative process whether the parties' contract authorized the elimination of the shift. The Commission remands the charge to the Director for issuance of a Complaint.

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, Ruderman & Glickman, PC, attorneys
(Mark S. Ruderman, of counsel)

For the Charging Party, Detzky & Hunter, LLC, attorneys
(Stephen B. Hunter, of counsel)

DECISION

On November 17, 2006, Ocean Township PBA Local 57 appealed the refusal of the Director of Unfair Practices to issue a Complaint based on an amended unfair practice charge filed by the PBA against the Township of Ocean. D.U.P. No. 2007-3, 32 NJPER 349 (¶146 2006). The Director found that the Township had a managerial prerogative and contractual right to eliminate a steady midnight shift. He also found untimely an amendment alleging that the change was in retaliation for protected activity.

The PBA contends that the Director improperly accepted assertions contained in the Township's position statement to a Commission staff agent about why it had eliminated the shift.

The PBA argues that an evidentiary hearing is needed to weigh the parties' competing evidence concerning the work schedule issue.

On November 21, 2006, the Township filed an answering brief. It requests that the Director's decision stand and that the Township be granted costs and fees.

On August 22, 2005, the PBA filed its initial charge alleging that the Township violated N.J.S.A. 34:13A-5.4a(1) and (5),^{1/} when, despite past practices and prior agreements, it unilaterally eliminated the steady midnight shift schedule, affecting five police officers.

On August 29, 2005, the Director of Unfair Practices wrote to the parties and asked, among other things, that the Township submit to a Commission staff agent, a "written statement of position explaining why the allegations in the charge, if true, would or would not constitute unfair practices."

By letter to the staff agent dated October 24, 2005, the Township asserted that it eliminated the experimental shift to effectuate significant governmental policy interests in improving

^{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, or refusing to process grievances presented by the majority representative."

supervision and efficiency. The Township also asserted that the parties' contract does not mention the midnight shift and gives the police chief the final word on scheduling matters.

On August 10, 2006, the Director wrote to the parties that based on the information before him, he was not inclined to issue a Complaint. He found that the Township had a managerial prerogative to eliminate the steady midnight shift to best allocate its staff and have adequate supervision on all shifts. He also found that the contract authorized the chief to eliminate the steady midnight shift.

On August 28, 2006, the PBA amended its charge to allege that the shift change was intended to retaliate against the PBA because its former president had publicly stated that the Township manager rather than the police chief ran the department. The amendment also alleged that the elimination of the shift violated 5.4a(3).^{2/}

N.J.A.C. 19:14-2.1 provides that the Director of Unfair Practices shall issue a Complaint if:

the allegations of the charge, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings

^{2/} This provision prohibits public employers, their representatives or agents from: "(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."

should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues. . . .

The 5.4a(3) allegation is timely because the action challenged -- the elimination of the steady midnight shift -- was challenged in the original timely charge. This ruling comports with our ruling in State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985), aff'd NJPER Supp.2d 162 (¶143 App. Div. 1986), where a union filed a timely charge alleging that the employer unilaterally and illegally reduced the work hours of part-time employees to 15 hours per week. Twenty months later, the successor to the original charging party amended the charge to specify that this reduction in hours was illegally motivated by a desire to retaliate for protected activity. Relying on New Jersey Court rules and case law, we found that the amendment related back to the original charge and should be considered timely. R. 4:9-3 provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading.

In the leading case interpreting this rule, our Supreme Court, in Harr v. Allstate Insurance Co., 54 N.J. 287 (1969), stated:

The rule should be liberally construed. Its thrust is directed not toward technical pleading niceties, but rather to the underlying conduct, transaction or occurrence giving rise to some right of action or defense. When a period of limitation has expired, it is only a distinctly new or different claim or defense that is barred. Where the amendment constitutes the same matter more fully or differently laid, or the gist of the action or the basic subject of the controversy remains the same, it should be readily allowed and the doctrine of relation back applied. [Id. at 299]

Cf. Notte v. Merchants Mutual Ins. Co., 386 N.J. Super. 623 (App. Div. 2006) (otherwise untimely amendment raising common law claims relates back to date of untimely CEPA filing and is thus timely). Given this case law, we conclude that the amendment to add the 5.4a(3) allegations relates back to the original charge and is timely.

As for the alleged violation of 5.4a(5), even if the 5.4a(3) allegation were untimely, the amendment alleges facts that challenge the Township's assertion that it acted pursuant to a managerial prerogative. Such a factual dispute must be resolved at hearing. In addition, we do not believe that it can be determined with assurance at this early stage of the administrative process if the parties' contract authorized elimination of the shift. Passaic Cty. Bd. of Ed., P.E.R.C. NO. 89-98, 15 NJPER 257 (¶20106 1989). The Township may assert its managerial prerogative and contractual defenses at hearing or in a summary judgment motion.

ORDER

The appeal is granted and the charge is remanded to the Director of Unfair Practices to issue a Complaint.

BY ORDER OF THE COMMISSION

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

ISSUED: January 25, 2007

Trenton, New Jersey