P.E.R.C. NO. 2012-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and- Docket No. CO-2009-443

NUHHCE DISTRICT 1199J, AFSCME,
AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the decision of a Hearing Examiner recommending the dismissal of the complaint in an unfair practice case filed by NUHHCE District 1199J, AFSCME, AFL-CIO against the County of Hudson. The charge alleges that the County violated the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally implemented a new progressive discipline and lateness policy for unit members employed by the Department of Corrections. The Hearing Examiner concluded that the parties engaged in negotiations over the new policy and reached agreement rejecting 1199J's assertion that the agreement was subject to ratification and approval of the membership and the 1199J president. The Commission dismisses the complaint holding that the Hearing Examiner discredited the testimony of 1199J's only witness and did not establish that her determinations were arbitrary, capricious, unreasonable or not supported by the evidence.

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, Scarinci Hollenbeck, attorneys (Sean D. Dias, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys (Arnold Shep Cohen, of counsel; William P. Hannan, on the brief)

DECISION

On November 16, 2011, NUHHCE District 1199J AFSCME (Charging Party or 1199J) filed exceptions to a Hearing Examiner's report and recommended decision. H.E. No. 2012-3, __ NJPER __ (¶__ 2011). In that decision, the Hearing Examiner recommended dismissal of the unfair practice charge filed by 1199J against Hudson County. The charge alleges the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally implemented a new progressive discipline and lateness policy for unit members employed by the Department of Corrections without negotiations. The charge

further alleges a repudiation of the parties' collective negotiations agreement.

On September 22, 2010, a Complaint and Notice of Hearing issued on the charging party's allegations that the County violated sections 5.4a(1) and (5) of the Act. The other alleged violation of 5.4a(3)[1/] did not meet the Commission's complaint issuance standard and was dismissed by the Director of Unfair Practices.

Hearing Examiner Wendy L. Young conducted a hearing on June 22, 2011. The parties examined witnesses and presented documentary evidence. The parties filed post-hearing briefs by August 17. On November 4, the Hearing Examiner issued her report and recommended decision. She concluded that the parties engaged in negotiations over the new policy and reached agreement. She further found 1199J's negotiator was authorized to act on behalf of the union without any pre-conditions. Specifically, the Hearing Examiner rejected 1199J's contention that the agreement

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

was subject to membership ratification and approval of the 1199J president and that no evidence was produced to support the charging party's repudiation claim.

1199J filed exceptions to the Hearing Examiner's decision arguing that she did not give adequate weight to multiple pieces of evidence that show the union did not agree to the implementation of the new progressive discipline and lateness policy. Specifically, 1199J asserts that: both County witnesses acknowledged the policy was not finalized prior to 2008 and therefore there was no evidence that explicitly acknowledges formal approval by the union; the Hearing Examiner relied on vague testimony from County witnesses regarding the union's acceptance of the policy rather than the union witness' testimony on what is required for union approval; the Hearing Examiner ignored correspondence admitted into evidence that indicates the union had to meet with its members prior to implementation of the policy; the Hearing Examiner did not consider a statement in a March 6, 2009 letter to 1199J asking it to let the County know if there were any issues with the policy; the Hearing Examiner did not find 1199J's written response to a County letter that it would not approve the policy unless it goes into effect for the entire County as evidence 1199J did not agree to the policy; and the Hearing Examiner did not credit the testimony of 1199J's only witness that she told the County the policy had to be ratified by

a membership vote and approved by the president of 1199J which was also memorialized in a document.

The County responds that the Hearing Examiner correctly found that the factual record established the County negotiated in good faith and reached agreement with 1199J on the policy. It points to evidence in the record that states 1199J advised the County it wanted to inform its members of the policy, but does not suggest the policy was subject to a ratification vote.

The Hearing Examiner made comprehensive findings of fact. We adopt them. The Hearing Examiner reviewed the chronological history of the mutual development of the policy between representatives of 1199J, including Grisel Lopez, a vice-president with 1199J, and County Personnel Officer Anthony Staltari and County Director of Personnel and Labor Relations Patrick Sheil. The facts were introduced both through testimony of Lopez, Shiel and Staltari as well as documents exchanged between them. The Hearing Examiner found the parties met two times in 2007 and approximately five times in 2008 to discuss the new policy. She credited Shiel and Staltari's testimony that Lopez did not communicate to them any preconditions circumscribing her authority to act on behalf of 1199J at a May 9, 2008 meeting or at any time prior to August 2008. Shiel and Staltari testified that Lopez had agreed in the past to the implementation of policies without membership ratification and

approval of the 1199J president. Lopez did not rebut that she had agreed to such policies in the past.

The Hearing Examiner did not credit Lopez's version of what she communicated regarding her authority to Shiel and Staltari at the May 9, 2008 meeting. The Hearing Examiner drew a negative inference that despite other 1199J representatives attending this meeting, 1199J did not call a witness to corroborate Lopez's version of events.

The Hearing Examiner concluded that the final policy revisions were completed by the end of August 2008. Having received written notification that the County intended to implement the policy as of September 2008, Lopez in an August 27 letter did not object to the policy, but rather requested the County hold off on implementation in order to hold a membership chapter meeting for the purpose of bringing the policy to 1199J members' attention before implementation. The Hearing Examiner specifically found that if there was any question as to whether the parties had reached agreement on the policy, Lopez would have raised it at that time. Based on these findings, the Hearing Examiner recommended we dismiss the Complaint.

We have carefully reviewed the record to see if it supports the Hearing Examiner's findings. Each of 1199J's exceptions request us to perform a de novo re-evaluation of the evidence and reach an alternate legal conclusion. When reviewing a Hearing

Examiner's findings of fact, we do not perform a de novo review. Our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due fact-finder's "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006); Trenton Bd. of Ed., P.E.R.C. No. 79-70, 5 NJPER 185 (¶10101 1979); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980); Hudson Cty., P.E.R.C. No. 79-48, 4 NJPER 87 (¶4041 1978).

Our independent and through review leads to the conclusion that the Hearing Examiner's findings that the parties had

negotiated and reached agreement is supported by substantial credible evidence in the record. The Hearing Examiner did not credit the testimony of Lopez who was 1199J's only witness. We will not disturb this finding as 1199J has not established it is arbitrary, capricious or unreasonable. There is abundant evidence in the record to support the Hearing Examiner's conclusions. Lopez's testimony was contradicted by Shiel and Staltari as well as the documents in the record.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Krengel, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: March 29, 2012

Trenton, New Jersey