

P.E.R.C. NO. 2014-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CWA LOCAL 1040, CWA DISTRICT
ONE AND STATE OF NEW JERSEY
(JUVENILE JUSTICE),

Respondents,

-and-

JUDY THORPE,

Docket Nos. CI-2010-046
CI-2010-047
CI-2010-049

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for reconsideration of P.E.R.C. No. 2013-29 filed by Judy Thorpe. In that decision, the Commission affirmed the Deputy Director of Unfair Practice's refusal to issue a complaint based on allegations in unfair practice charges filed by Thorpe against her employer and majority representative. The Commission finds that Thorpe has not set forth any extraordinary circumstances warranting a grant of reconsideration, and that she has asserted a conflict of interest argument for the first time which nonetheless does not present the appearance of impropriety.

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 - State of New Jersey, Jeffrey S. Chiesa, Attorney General (Brady Connaughton, Deputy Attorney General)

For the Respondent - CWA, Weissman & Mintz, LLC, attorneys (Anmarie Pinarski, of counsel)

For the Charging Party, Judy Thorpe, pro se

DECISION

On November 5, 2012, Judy Thorpe moved for reconsideration of P.E.R.C. No. 2013-29, 39 NJPER 205 (¶66 2012), in which we affirmed the Deputy Director of Unfair Practice's refusal to issue a complaint.^{1/}

N.J.A.C. 19:14-8.4 in material part states:

"After a Commission decision has been issued, a party may move for reconsideration. Any motion pursuant to this section shall be

^{1/} We deny Thorpe's request for oral argument. The issues have been fully briefed.

filed within 15 days of service of the Commission decision, together with a proof of service of a copy on all parties. The movant shall specify the extraordinary circumstances warranting reconsideration and the pages of the record it relies on. Any party opposing reconsideration may file a response within five days of service on it of the motion, together with a proof of service of a copy on all other parties."

The facts and procedural history of this case are fully set forth in the Deputy Director's decision D.U.P. No. 2012-8, 38 NJPER 248 (¶83 2012) and our decision.

Thorpe's brief in support of her motion makes the same arguments that were made below with the exception of these new arguments: that the arbitrator had been the former adjunct professor for the attorney who represented the State at Thorpe's arbitration and that this had not been disclosed to her (Thorpe) and the arbitrator had not recused herself; and that our conclusions resulted from faulty applications of the law and misinformation because we concluded our decision with the statement, "Furthermore, N.J.A.C. 4A:6-1.4, provides authority to an employer to require a fitness-for-duty evaluation 'as a condition of the employee's continuation of sick leave or return to work'" and Thorpe was not on sick leave at the time the State

requested that she undergo a psychological fitness-for-duty examination.^{2/}

A motion for reconsideration will not be granted absent extraordinary circumstances. N.J.A.C. 19:11-9.3; Wall Township Board of Education and Wall Township Information Technology Association, P.E.R.C. No. 2010-63, 36 NJPER 52 (¶24 2010), aff'd 37 NJPER 61 (¶23 2011); City of Newark and Newark Police Superior Officers Association, P.E.R.C. No. 2008-53, 34 NJPER 71 (¶29 2008).

Additionally, we will not consider an argument made for the first time in a motion for reconsideration. Morris Cty. Sheriff's Office and Cty. of Morris and PBA Local 298, P.E.R.C. No. 2010-16, 35 NJPER 348 (¶117 2010), recon. den. P.E.R.C. No.

^{2/} Thorpe also asserts that N.J.A.C. 4A:6-1.4 does not apply to psychological fitness-for-duty exams but presumably, only to physical fitness-for-duty exams. N.J.A.C. 4A:6-1.4 provides in pertinent part:

(g) An appointing authority may require an employee to be examined by a physician designated and compensated by the appointing authority as a condition of the employee's continuation of sick leave or return to work.

1. Such an examination shall establish whether the employee is capable of performing his or her work duties and whether return to employment would jeopardize the health of the employee or that of other employees.

2. The appointing authority shall set the date of the examination to assure that it does not cause undue delay in the employee's return to work.

2010-52, 36 NJPER 24 (¶11 2010), rev'd on other grounds, 418 N.J. Super. 64 (App. Div. 2011).

Thorpe's brief in support of her motion does not set forth any extraordinary circumstances that would justify a grant of reconsideration. Thorpe asserts for the first time that the Deputy Attorney General who represented the State in her case had been a student in a class taught by the arbitrator and that such a relationship required that the arbitrator recuse herself. Unless the arbitrator and the DAG, as teacher and student, closely collaborated on a research project or other academic endeavor, the fact that the DAG was a student in the arbitrator's class does not present either the appearance of impropriety or establish an actual conflict of interest. See Krislov, "Disclosure Problems of the Academic Labor Arbitrator," 52 Dispute Resolution Journal, No. 4, p 54 (Fall 1997). Moreover, Thorpe has not provided any evidence that the arbitrator's decision was influenced by that alleged relationship.

With regard to Thorpe's assertions that the Commission erred when we concluded our decision with the statement concerning the ability of an employer to require a fitness-for-duty evaluation "as a condition of the employee's continuation of sick leave or return to work," that statement was dictum and whether Thorpe was on sick leave or working at the time of the employer's request is irrelevant. See Atlantic Cty. Sheriff, P.E.R.C. No. 2005-28, 30

NJPER 444 (¶147 2004) (employee in working status was interviewed due to recent incidents deemed troubling by her employer and subsequently suspended pending the results of a psychological exam to determine fitness-for-duty); City of Elizabeth, P.E.R.C. No. 2001-33, 27 NJPER 34 (¶32017 2000) (employee in working status was disciplined and suspended for five days and ordered to submit to a psychological fitness-for-duty exam prior to returning to duty).

For all the reasons set forth above the motion for reconsideration is denied.

ORDER

The motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Wall voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: September 26, 2013

Trenton, New Jersey