

P.E.R.C. NO. 2013-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF GARFIELD,

Respondent,

-and-

Docket No. CO-2011-397

PBA LOCAL 46,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the Hearing Examiner's recommended decision in an unfair practice case filed by PBA Local 46 against the City of Garfield. That decision recommended that the Commission find that the City of Garfield violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1), when the Chief of Police pressured the PBA Vice President to leave a labor-management meeting and threatened him if he did not leave. The Commission rejects the City's exceptions, finding that even accepting the City's version of the facts, the PBA Vice President was still engaged in protected activity during the incident and did not indefensibly threaten workplace discipline, order or respect. The Commission holds that the Hearing Examiner correctly held that intent to threaten is not required by the Act, and that the Chief's remarks had the tendency to interfere with the PBA Vice President's exercise of his rights under the Act.

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, Apruzzese, McDermott, Mastro & Murphy, attorneys (Arthur R. Thibault, of counsel)

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

DECISION

On February 19, 2013, the City of Garfield filed exceptions to a Hearing Examiner's report that recommended we find a violation of section 5.4a(1) of the New Jersey Employer-Employee Relations Act. On February 25, PBA Local 46 filed a brief opposing the exceptions. PBA Local 46 did not file cross-exceptions. For the reasons set forth below, we adopt the Hearing Examiner's recommended decision.

This case arises from an unfair practice charge filed by the PBA against the City alleging the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-4.5a(1) through

7^{1/} when Chief of Police Kevin Amos made threatening remarks to then PBA Vice-President Pedro Gongora at a meeting held in the Chief's office to discuss PBA concerns related to officer safety. The charge further alleges the Chief violated the Act when he had the Vice-President removed from the meeting in retaliation for raising officer safety concerns. A Complaint and Notice of Hearing was issued on April 1, 2012 on the 5.4a(1) allegations. All other allegations were dismissed at that time by the Director of Unfair Practices. A Hearing was held on August 7, 2012 during which the parties had the opportunity to examine witnesses and introduce documentary evidence.

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. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

On February 7, 2012, Hearing Examiner Perry O. Lehrer issued his report and recommended decision. H.E. No. 2013-15, 39 NJPER 434 (¶140 2013). The Hearing Examiner found that the City, and particularly the Chief of Police, violated the Act by pressuring then PBA Vice-President Pedro Gongora to leave a labor-management meeting and threatening Gongora if he did not leave the meeting.

The Hearing Examiner made findings of fact. We adopt and incorporate them here. (H.E. at 3-10). The entire charge centers around the conduct of Gongora and Amos at a meeting held in the Chief's office on March 24, 2011. Present for the meeting were two PBA representatives and two management representatives. The meeting was called after the PBA membership became upset once they learned of a new policy instituted by the Chief to respond to calls when an officer needs assistance.^{2/} The prior practice was to have all available units respond when an officer needed assistance. The new policy required dispatchers to make a more directed response. During the meeting, PBA President Everett Gartno and Chief Amos testified they were talking loudly and excitedly. At some point, Vice President Gongora made a statement to the Chief that., "with all due respect, I don't think it's the right thing to do. We don't know what we have."

^{2/} The new policy was instituted after a dispatcher issued an "all available units call" after determining from the sounds coming from the officer's radio that an officer was involved in a struggle while responding to a domestic violence call.

According to the Chief, Gongora then became excited and kept speaking continuously for a few minutes in an increasingly loud tone. Chief Amos then asked Gongora if he could give his (Amos) views, but Gongora kept speaking. Amos then testified that at that point he asked Gongora to leave his office. When Gongora did not leave, Amos asked him again to leave but Gongora did not depart. Amos then got up from his desk, opened his office door, and told Gongora that if he enjoyed working here or wanted to continue working here, he'd leave. Amos testified that at that point, Gongora left.

The City's exceptions raise three points: that the Hearing Examiner erred in not making credibility determinations of what occurred in the Chief's Office; the Hearing Examiner applied the wrong standard when he determined that Gongora's conduct was protected; and therefore the Hearing Examiner erred in finding that the Chief committed an unfair practice as Gongora's refusal to leave his office was not protected activity. The PBA responds that the Hearing Examiner made proper factual determinations and conclusions of law. The PBA also asserts that the actions of the Chief violated section 5.4a(3) of the Act, however the PBA did not previously file a request for review on the Director's refusal to issue a Complaint on the 5.4a(3) allegations nor did the PBA file cross-exceptions. Thus, this argument will not be considered.

An employer independently violates subsection 5.4a(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exhibition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint or coercion is unnecessary. The tendency to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, a party asserting an independent violation of 5.4a(1) must establish that the employer engaged in some action that would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.

The Hearing Examiner found and the record reflects that even accepting the City's version of the facts, Gongora was still engaged in protected activity during the incident as the meeting was held behind closed doors to discuss a serious workplace concern for the health and safety of officers; he never made a threat; the only employees present were labor and management representatives; and Gongora did not indefensibly threaten workplace discipline, order or respect. See State of New Jersey (Treasury Dept.), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001). We agree with the Hearing Examiner that the City's

version of events accuses Gongora of being rude and disrespectful, but not insubordinate.

The Hearing Examiner further found and the record reflects that even accepting the Chief's version of events, the Chief's remarks violated the Act. First, when he asked only Gongora to leave the room, and second, by threatening Gongora's employment when he did not leave the room. While we understand the City's position that the Chief did not intend to threaten Gongora, the Hearing Examiner correctly held that intent is not required. Advising Gongora that if he enjoyed working [t]here or wanted to continue working [t]here, he would leave, has the tendency to interfere with Gongora's exercise of his rights under the Act.

We adopt the Hearing Examiner's recommendation and find the City of Garfield violated 5.4a(1) of the Act when Chief Kevin Amos asked and then pressured then PBA Vice President Pedro Gongora to leave a labor-management meeting and when Chief Amos threatened Gongora to pressure him to leave the meeting.

ORDER

The City of Garfield is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly when Chief Amos requested PBA Vice President Gongora to leave a labor-management meeting.

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly when Chief Amos threatened PBA Vice President Gongora to pressure him to leave a labor-management meeting.

B. That Respondent take the following affirmative action:

1. Notify Chief Amos that when he meets with the PBA leadership regarding labor-management issues that affect the terms and conditions of employment of employees represented by the PBA, they must meet as equals, the room within which they meet must be considered a neutral location during the meeting, and the Chief cannot determine which union representative(s) may remain at the meeting to represent the PBA.

2. Notify Chief Amos that he shall not threaten Pedro Gongora or any other PBA representative for exercising his/their protected rights.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

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

ISSUED: June 27, 2013

Trenton, New Jersey

NOTICE TO EMPLOYEES
PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly when Chief Amos requested PBA Vice President Gongora to leave a labor-management meeting.

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly when Chief Amos threatened PBA Vice President Gongora to pressure him to leave a labor-management meeting.

WE WILL notify Chief Amos that when he meets with the PBA leadership regarding labor-management issues that affect the terms and conditions of employment of employees represented by the PBA, they must meet as equals, the room within which they meet must be considered a neutral location during the meeting, and the Chief cannot determine which union representative(s) may remain at the meeting to represent the PBA.

WE WILL notify Chief Amos that he shall not threaten Pedro Gongora or any other PBA representative for exercising his/their protected rights.

Docket No. CO-2011-397

CITY OF GARFIELD
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372