P.E.R.C. NO. 2014-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY,

Respondent,

-and- Docket No. CO-2012-310

PROBATION ASSOCIATION OF NEW JERSEY
(PROFESSIONAL SUPERVISORS UNION),

Charging Party.

NEW JERSEY STATE JUDICIARY,

Charging Party,

-and- Docket No. CE-2012-012

PROBATION ASSOCIATION OF NEW JERSEY,
(PROFESSIONAL SUPERVISORS UNION),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the New Jersey State Judiciary's motion for summary judgment in an unfair practice case filed by the Probation Association of New Jersey (Professional Supervisors Union), and dismisses the Judiciary's unfair practice charge against PANJ alleging violation of the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4b(3). PANJ alleges that the Judiciary violated the Act, specifically N.J.S.A. 34:13A-5.4a(1), (3), and (5), when it removed certain employees from team leader positions and refused to process most grievances of the removals. In granting summary judgment on the a(5) and derivative a(1) charge, the Commission finds that a Superior Court, Appellate Division decision interpreting the contract clause on the removals as non-grievable, as well as a Superior Court, Chancery Division decision restraining one of the requests for arbitration, do not support PANJ's claim of contract repudiation or of bad faith in failing to process the grievances. The Commission denies summary judgment on the a(3) and derivative a(1) charge, finding that material facts are in dispute regarding PANJ's allegations of retaliation for protected conduct.

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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PROBATION ASSOCIATION OF NEW JERSEY,
(PROFESSIONAL SUPERVISORS UNION),

Respondent.

Appearances:

For the Respondent/Charging Party New Jersey State Judiciary, Meryl G. Nadler, Counsel to the Administrative Director of the Courts (R. Brian McLaughlin, of counsel; Susanna J. Morris, on the brief)

For the Charging Party/Respondent Probation Association of New Jersey (Professional Supervisors Union), Fox and Fox LLP, attorneys (Lynsey A. Stehling, of counsel)

DECISION

On November 21, 2013, the State of New Jersey Judiciary ("Judiciary") moved for summary judgment seeking dismissal of an unfair practice charge filed by the Probation Association of New

Jersey (Professional Supervisors Union)("PANJ"), and also seeking a grant of relief in an unfair practice charge filed by the Judiciary against PANJ. On December 23, PANJ filed a response to the motion. On February 27, 2014, pursuant to N.J.A.C. 19:14-4.8, the Chair referred the motion to the full Commission.

PANJ's unfair practice charge and amended charge were filed on May 8, 2012 and June 14, 2013, respectively, and alleged that the Judiciary violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), and (5),[1/] when it removed five unit members (demoting four and terminating one) from Court Services Supervisor 2 (CSS2) positions (also called "Team Leaders") and refused to process the removed employees' grievances through the grievance procedure.

The Judiciary's charge and amended charge were filed on June 11, 2012 and April 15, 2013, respectively, and alleged that PANJ violated the New Jersey Employer-Employee Relations Act, N.J.S.A.

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. (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."

34:13A-1 et seq., specifically 5.4b(3),[2] by filing grievances on behalf of the five removed Team Leaders. The charge alleges that PANJ's grievances constitute repudiation of the CNA because Article 9.8 establishes the Judiciary's non-reviewable, non-grievable right to remove employees from Team Leader positions.[3]

On February 20, 2013, the Director of Unfair Practices consolidated these cases (CO-2012-310 and CE-2012-012) along with two other unfair practice cases between the parties.[4] Also on February 20, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing for these consolidated cases on PANJ's 5.4a(1), (3), and (5) charges and the Judiciary's 5.4b(3) charge. On April 16 and June 17, the Hearing Examiner issued amended Complaints based on each party's amended charge.

2/ This provision prohibits employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

3/ The Judiciary's original charge also alleged a violation of subsection 5.4b(5) of the Act, but the Director of Unfair Practices dismissed the b(5) charge in her February 20, 2013 Complaint and Notice of Pre-Hearing, and the Judiciary removed the b(5) allegation from its amended charge.

4/ The other consolidated cases are CO-2012-311 and CO-2012-222. A June 5, 2013 pre-hearing letter from the Hearing Examiner confirmed that the parties agreed to bifurcate the hearing so that the instant cases (CO-2012-310 and CE-2012-012) would be heard together first.

The Judiciary's motion is supported by a brief and exhibits. PANJ's response to the motion is supported by a brief, exhibits, and the certification of Bradley Fairchild, President of PANJ.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America , 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

Facts

PANJ represents all professional supervisory employees of the Judiciary in all trial court operations and other legal and administrative offices. The Judiciary and PANJ are parties to a CNA with a term of July 1, 2008 through June 30, 2012. The parties are in negotiations for a successor agreement.

Article 9.8 of the CNA provides the following:

> **9.8 Team Leader and Supervising Probation Officer Positions**
>
> (a) The Judiciary has the non-reviewable right to remove employees in Team Leader and Supervising Probation Officer positions from those positions and said actions shall not be deemed to be discipline and subject to the disciplinary appeal procedure, grievance procedure and/or arbitration procedure. If a Team Leader or Supervising Probation Officer is removed from his/her position, pursuant to this provision, he/she will be permitted to return to his/her previously held career service title. If no prior career service title was held, the Judiciary will make good faith reasonable efforts to place the employee in another position.

> (b) Additionally, the first sentence of Paragraph 8(a) of the Letter of Agreement of December 28, 1994 and paragraph 9.3(a) above are agreed to be inapplicable to Team Leaders and Supervising Probation Officers.
>
> (C) Disciplinary actions, as defined in 9.2 above, are subject to the hearing provisions set forth in 9.6 above.

Paragraph 8(a) of the 1994 Letter of Agreement referenced in 9.8(b) as inapplicable to Team Leader removals states, in pertinent part: "No nonmanagerial judicial employee shall be disciplined or discharged except for just cause." Article 9.3(a), also deemed inapplicable to Team Leader removals by Article 9.8(b), states, in pertinent part: "Discipline shall be imposed for just cause only, of which the Judiciary shall bear the burden of proof." The Article 9.6 hearing provisions referred to by Article 9.8(c) contain the following exception: "Removal from positions of Team Leader and Supervising Probation Officer, pursuant to 9.8 below are not subject to disciplinary hearing procedures."

From February 3, 2012 to January 25, 2013, the Judiciary implemented Article 9.8 removals of five unit members from their CSS2/Team Leader positions. Of the five, Barbara Letts, Trina Reigle, Heather Williams, and Susan Sant'Ana were demoted with salary reductions. Catherine LoFaro was terminated because she had no prior service with the Judiciary prior to becoming a CSS2. PANJ filed separate grievances on behalf of each of the five

removed employees. The grievances alleged that the employees were inappropriately subjected to Article 9.8 removals in violation of Articles 2.1, 2.2, 7.6, 9 generally, 9.3, and 9.8 of the CNA.[5/] The grievances alleged that the removals were actually disciplinary actions, that the Judiciary failed to provide the employees with reasons for the removals, that the reduction in pay violates the CNA, and that the employees were targeted based upon age and other protected characteristics. The grievances seek the following relief: return grievants to CSS2 positions[6/]; provide grievants an Article 9 disciplinary hearing; have the Judiciary and PANJ meet to discuss the appropriate use of Article 9.8; and general compliance with the CNA.

The Judiciary acknowledges refusal to process four of the five grievances, and the record shows that PANJ pursued the fifth grievance to arbitration after the Judiciary declined to process it at earlier steps of the grievance procedure.

In April 2012, PANJ filed additional grievances challenging the Judiciary's failure to process the individual 9.8 removal grievances at issue here. The Judiciary denied the grievances after holding a Step 3 hearing, and that matter has been assigned to an arbitrator.

5/ The Williams grievance did not include Article 9 and 9.3.

6/ The LoFaro grievance sought a return to the CSS2 position, or alternatively that she be placed in another position.

Analysis

N.J.S.A. 34:13A-5.3 requires public employers to negotiate grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions. Such grievance procedures must be used for any dispute covered by the terms of the collective negotiations agreement. Ibid. N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for a public employer to refuse to process grievances presented by the majority representative.

At the outset, we note that the Judiciary met its initial statutory obligation to allow for the presentation of grievances. In Township of West Windsor v. PERC, 78 N.J. 98 (1978), the New Jersey Supreme Court addressed the issue of what rights public employees have when presenting grievances to public employers. In interpreting the Act, the Court stated:

> The statutory language chosen evinces a legislative intent to ensure that all negotiated grievance procedures would provide public employees with a forum for the presentation of their complaints to their public employers on all matters 'affecting them.'
>
> *　　*　　*
>
> Our holding that N.J.S.A. 34:13A-5.3 mandates the scope of matters as to which public employees must be able to present grievances applies only to the presentation stage of the grievance procedure. The procedural details of the grievance mechanism remain negotiable

> and are to be set by the negotiating parties. We agree with PERC that the parties are free to provide for a significantly narrower definition of the matters which are grievable beyond the initial presentation stage.
>
> * * *
>
> We emphasize that N.J.S.A. 34:13A-5.3 requires only that all grievances concerning the matters enumerated therein be presentable. The statute guarantees public employees only a right to grievance presentation. It authorizes, but does not require, the parties' negotiated grievance procedure to provide for processing of grievances beyond the presentation stage or for their resolution by arbitration or other means. [at 106-108; emphasis supplied]

As indicated in PANJ's amended charge, each of the grievances challenging the 9.8 removals was responded to in writing with an explanation of the Judiciary's position that such removals are contractually non-reviewable and not considered discipline. In Rutgers University, P.E.R.C. No. 89-38, 14 NJPER 655 (¶19276 1988), the Commission stated:

> West Windsor requires a public employer to allow the presentation of grievances. Rutgers fulfilled that requirement. Each grievance was investigated and responded to in writing. The fact that Rutgers maintained that the grievances were not Article IX grievances does not make its action an unfair practice. The dispositive fact is that each grievance was presented. [at 656]

In the instant case, the Judiciary has similarly fulfilled its duty of providing a forum allowing for presentation of grievances, and its contractual defense to the grievability of

the issues and failure to further process does not, ipso facto, mean it committed an unfair practice.

Parties can only be compelled to arbitrate those matters which are within the scope of the arbitration clause of their contract. Camden Bd. of Ed. v. Alexander, 181 N.J. 187 (2004). When there is a dispute as to whether a particular grievance falls within the terms of the arbitration clause specifying what the parties have agreed to arbitrate, then it is a matter of substantive arbitrability for the courts to decide. Id. at 205; Pascack Valley Reg. H.S. Bd. of Ed. v. Pascack Valley Reg. Support Staff Ass'n., 192 N.J. 489 (2007) quoting Alpha Bor. Bd. of Ed. v. Alpha Ed. Ass'n., 190 N.J. 34, 43 (2006).

The Judiciary argues that PANJ's unfair practice charge should be dismissed based on a 2006 unpublished Superior Court, Appellate Division decision that restrained arbitration of a 9.8 removal. In State of New Jersey, Judiciary v. Probation Association of New Jersey, Professional Supervisor's Union, 2006 N.J. Super. Unpub. LEXIS 1036, the Court affirmed a Superior Court, Law Division Order granting summary judgment to the Judiciary and restraining arbitration based on the employer's rights under Article 9.8 of the CNA. The parties to that case were the same as here, and the Article 9.8 language at issue from the 2000-2004 and 2004-2008 agreements in effect during that dispute is identical to the Article 9.8 language in the parties'

current 2008-2012 CNA. The grievant in that case challenged the 9.8 removal based on the Judiciary's refusal to schedule an Article 9.6 disciplinary hearing on the removal, whereas the grievants in the instant case challenged the 9.8 removals by alleging violations of Articles 2.1, 2.2, 7.6, 9.3 and 9.8. In both situations, the grievants sought the remedy of reinstatement to their previously held CSS2/Team Leader positions. The Appellate Division found:

> Here, Article 9.8 of the CNA is clear and unambiguous on its face. Its meaning is plain. Plaintiff's right to remove Team Leaders and SPOs is "non-reviewable," not "deemed to be discipline," and not "subject to the disciplinary appeal procedure." We find the contractual right to non-reviewable removal clear and plainly enunciated and, therefore, we do not regard the dispute as arbitrable in these circumstances.

The doctrine of collateral estoppel, or issue preclusion, bars relitigation of any issue that was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action. State v. Gonzalez, 75 N.J. 181, 186 (1977). For the doctrine to apply, the issue to be precluded must be identical to the issue decided in the first proceeding. Hennessey v. Winslow Tp., 368 N.J. Super. 443 (App. Div. 2004), certif. granted 180 N.J. 455 (2004). We find that the doctrine of collateral estoppel is applicable to the disputed issue in the instant case of the contractual arbitrability of Article 9.8 removals. The issue determined by the Appellate

Division in State of New Jersey, Judiciary between the same parties was whether Article 9.8 removals are reviewable under the CNA's review and grievance procedures. That determination compels us to conclude that Article 9.8 removals have been deemed non-arbitrable under the CNA, and therefore the Judiciary cannot be found to have repudiated the CNA based on its Article 9.8 removals, nor can it be found to have violated the Act by refusing to process those portions of the grievances challenging such removals.

However, the court's holding regarding the non-reviewability of 9.8 actions does not necessarily preclude consideration of whether the Judiciary violated the Act by failing to process portions of the grievances asserting violations of Articles 2.1, 2.2, 7.6, 9.3 and a procedural portion of 9.8. For the reasons set forth below, we find that the Appellate Division's ruling on Article 9.8 subsumes any collateral attempts to contractually review the Judiciary's 9.8 removal decision via Articles 2.2 or 9.3 of the CNA, and that the Judiciary's refusal to process the remaining portions of the grievances did not constitute an unfair practice.

Article 2.2 of the CNA is entitled "Non-Discrimination" and provides that employees will not be discriminated against for any of numerous protected characteristics. To the extent that PANJ has asserted a contractual right to non-discrimination, such

allegation in the context of a challenge to an Article 9.8 removal is not reviewable. The court's finding that Article 9.8 entitles the Judiciary to the "contractual right to non-reviewable removal" of Team Leaders subsumes any attempt to review such action under the criteria or standards of any contractual provision within the CNA. Accordingly, the Judiciary did not violate the Act by refusing to process the Article 2.2 Non-Discrimination grievance allegations.[7/]

Article 9.3 of the CNA is entitled "Just Cause" and states, in pertinent part: "Discipline shall be imposed for just cause only, of which the Judiciary shall bear the burden of proof." Article 9.3's Just Cause provision is subsumed by the court's finding that Article 9.8 removals are "non-reviewable" and "not deemed to be discipline." Accordingly, the Judiciary did not violate the Act by refusing to process grievance allegations seeking to review the 9.8 actions via the CNA's Article 9.3 disciplinary Just Cause standards.

The remaining contractual violations asserted in the grievances are the Article 2.1 "Respect and Dignity" clause, the Article 7.6 "Demotions" clause delineating the level of salary reductions allowed when employees are demoted to a lower salary

7/ If PANJ believes that the Judiciary's 9.8 actions violated anti-discrimination laws, then the aggrieved may pursue those claims in the appropriate state and/or federal forum.

band level, and portions of Article 9.8 regarding job placement procedures following a 9.8 removal action.

In determining whether the Judiciary's refusal to process the remaining portions of the grievances violated the Act, we reiterate that N.J.S.A. 34:13A-5.3 requires public employers to negotiate policies setting forth grievance and disciplinary review procedures, and N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice to refuse to process grievances presented by a majority representative pursuant to those procedures. However, the employer may invoke contractual waivers of the majority representative's right to present grievances. A good faith dispute over the interpretation of a contractual waiver is not an unfair practice, but repudiation of a grievance procedure is. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

A self-executing grievance mechanism permitting the union to advance grievances to binding arbitration is a sufficient cure for an employer's occasional lapse in following the grievance procedure's intermediate steps, N.J. Transit Bus Operations, Inc., P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986), but it is not a license to ignore those intermediate steps in all cases where the contract clearly calls for them. State of New Jersey (Dept. Of Treasury), P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988). Here, Article 10 of the CNA explicates the parties'

grievance procedure. The grievance procedure is self-executing because Steps 2, 3, and the Arbitration step each provide PANJ with a right to advance the grievance if, within a specified time-frame, no disposition or decision has been made by the Judiciary at the prior step. The Commission has found repudiation of self-executing grievance procedures when the employer, without support from arbitral or court decisions on the contractual arbitrability dispute at hand, has applied a blanket policy of categorically refusing to process certain types of grievances. See N.J. Transit Bus Operations, Inc., P.E.R.C. No. 89-29, 14 NJPER 638 (¶19267 1988); City of Newark, P.E.R.C. No. 90-83, 16 NJPER 182 (¶21078 1990).

In the instant case, the Judiciary has refused to process grievances which include challenges to Article 9.8 removals, despite other contractual provisions being asserted that might not constitute review of the 9.8 removals in contravention of the 2006 Appellate Division interpretation of that clause. Whether the Judiciary's policy on such grievances amounts to a "blanket" repudiation violative of the Act requires analysis of whether the particular circumstances of the refusal to process support a finding of bad faith or a mere breach of contract. Human Services, 10 NJPER 419. There is no allegation or evidence that the Judiciary has generally repudiated its duty to process any grievances regarding the other asserted clauses. The Judiciary's

failure to process grievances on these issues has been circumscribed to these particular grievances which directly challenge the Article 9.8 removals and seek review and reversal of those removals. In contrast to N.J. Transit, 14 NJPER 638, there have been no arbitral decisions on the contractual arbitrability of these contract provisions in the context of a 9.8 removal that are contrary to the employer's interpretation.

Indeed, the only arbitral or judicial guidance on the contractual arbitrability of these other clauses as part of a 9.8 challenge is an October 11, 2013 Superior Court Order granting the Judiciary's motion for summary judgment permanently restraining arbitration of the Sant'Ana grievance (New Jersey Superior Court, Chancery Division - Mercer, Docket No.: MER-C-74-13). The transcript of the motion hearing includes the following determinations of Judge Paul Innes, J.S.C. regarding his decision to grant restraint of arbitration:

> Here, under the plain terms of the CNA, an Article 9.8 removal is not subject to the grievance process and, therefore, not subject to arbitration. . . . The provisions are, again, unmistakably clear. Article 9.8 removals are non-reviewable and not subject to the disciplinary appeal procedure, grievance procedure and/or arbitration procedure. It is undisputed that what we have is a 9.8 removal. . . . Defendants alleged that the removal involved other violations of the CNA which preclude summary judgment including, among others, Article 2.1, Article 2.2, Article 7.6 and Article 9.3. Whether the claimed violations have merit is irrelevant under the plain meaning

> of the CNA because Sant'Ana was removed from her role as a Team Leader which is explicitly covered by Article 9.8. . . . Article 9.8 is clear. Further discovery will not change the issue. In addition, Article 9.8 overcomes any related violations and Article 9.8 accounts for any action including all reasons for removal of individuals in a Team Leader position. [T30-T33]

Where a court order permanently restrains arbitration, an employer cannot be in violation of its 5.4a(5) obligation to process that grievance. See Rutgers University, P.E.R.C. No. 89-38, 14 NJPER 655 (¶19276 1988)(Commission found no repudiation of grievance procedure or failure to process grievance where parties had good faith contractual arbitrability dispute and employer obtained Superior Court order restraining arbitration consistent with employer's contract interpretation); Woodbridge Tp. Bd. of Ed., D.U.P. No. 82-29, 8 NJPER 238 (¶13102 1982)(in unfair practice case where employer refused to grant a grievance hearing, no violation of the Act where court order restrained arbitration of the issue); UMDNJ, I.R. No. 96-4, 21 NJPER 325 (¶26209 1995)(where employer cancelled arbitrations, Interim Relief order gave employer 30 days to file Superior Court action to restrain arbitrations based on contractual arbitrability).

The Superior Court Order of Judge Innes restraining the entire Sant'Ana grievance bolsters a Judiciary defense to a

repudiation claim.[8/] Judge Innes addressed not just the Article 9.8 claims, but also Articles 2.1, 2.2, 7.6, and 9.3, finding them irrelevant based on his interpretation of the CNA and the Judiciary's Article 9.8 removal rights.[9/] That decision supports the Judiciary's contractual interpretation such that no inference of bad faith arises from its refusal to process the grievances. See Rutgers, 14 NJPER at 656. Furthermore, PANJ failed to allege a repudiation of a past, consistent practice in administering the grievance procedure for Article 9.8 actions. We are not ruling out the possibility that a contractual violation may have occurred; we are only saying that an unfair practice did not. PANJ could have self-executed the grievance procedure to arbitration as it did for the Sant'Ana grievance, at which point an arbitrator (or a court in a restraint of arbitration proceeding) could have determined contractual arbitrability.[10/]

For the foregoing reasons, we dismiss PANJ's 5.4a(5) and derivative 5.4a(1) charges based on allegations of refusal to process grievances and repudiation of the grievance procedure.

8/ On November 19, 2013, PANJ filed a Notice of Appeal of Judge Innes' decision with the Superior Court, Appellate Division.

9/ The Superior Court transcript shows that Judge Innes also found the doctrine of collateral estoppel applicable based on the decision in State of New Jersey, Judiciary.

10/ And, as noted earlier, PANJ's contractual challenge to the Judiciary's refusal to process grievances is the subject of a separate grievance that is before an arbitrator.

As for the 5.4a(3) and derivative 5.4a(1) charges, PANJ's brief alleges that even if the Judiciary had the right to remove the grievants pursuant to Article 9.8, they were subjected to inappropriate reductions in pay in violation of the CNA and the Act. In re Bridgewater Tp., 95 N.J. 235, 244 (1984), sets forth the elements that a charging party must prove to establish a violation of 5.4a(3). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

Although the Judiciary has demonstrated its contractual right to implement Article 9.8 removals without review under the parties' negotiated grievance or disciplinary review procedures, an employer does not have a right to invoke a contractual provision for discriminatory reasons. Whether it has in fact done so will be tested under Bridgewater's standards. See State of New Jersey, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005); Hudson Cty. Police Dept. Layoffs, P.E.R.C. No. 2004-14, 29 NJPER 409 (¶136 2003); See also Jackson Tp. Bd. of Ed., P.E.R.C. No. 2006-12, 31 NJPER 281 (¶110 2005), and cases cited therein

(employer does not have right to exercise managerial prerogative for anti-union reasons).

At this juncture, the facts on record do not show whether the grievants' placements and salaries following the 9.8 removals were adverse actions motivated by the employer's hostility towards protected conduct. There is a dearth of record evidence regarding the timing and processing of demotions and salary reductions in relation to the initial Article 9.8 decisions and the dates the grievances were filed. Summary judgment is not appropriate given that PANJ's 5.4a(3) claim requires an assessment of the employer's state of mind and motivation in the implementation of the 9.8 removals. Therefore, a hearing is required to determine whether the demotions and pay decreases subsequent to the 9.8 removals were substantially motivated by protected conduct. See generally, Pressler and Verniero, Current N.J. Court Rules, comment following R. 4:46-2, p. 1828 (2014) (summary judgment should not ordinarily be granted where an action or defense requires determination of a state of mind or intent such as bad faith).[11/] Accordingly, the Judiciary's motion for summary judgment of PANJ's 5.4a(3) and derivative 5.4a(1) charge is dismissed.

11/ Of course, if a hearing examiner finds that hostility towards protected activity was a substantial factor, he or she will then assess whether the adverse actions would have occurred even absent the conduct. Bridgewater at 242.

Finally, we dismiss the Judiciary's 5.4b(3) charge alleging that PANJ has repeatedly repudiated the CNA by filing grievances challenging Article 9.8 removals. Although the Judiciary's position on such removals as being non-reviewable under the CNA has been confirmed by the Appellate Division, PANJ's grievances alleged several other contractual violations. Further, regardless of whether those grievances solely challenge the 9.8 removals, PANJ was engaged in protected activity under the Act. The Commission has held many times that the filing of a grievance is a fundamental example of protected activity. See, e.g. State of New Jersey, P.E.R.C. No. 87-88, 13 NJPER 117, (¶18051 1987); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978), aff'd NJPER Supp.2d 67 (¶48 App. Div. 1979). We have also held that such protected activity cannot form the basis of an unfair practice charge. Franklin Bor. Bd. of Ed., P.E.R.C. No. 81-126, 7 NJPER 248 (¶12112 1981).

ORDER

The State of New Jersey Judiciary's motion for summary judgment is granted to the extent the Probation Association of New Jersey (Professional Supervisors Union) alleges that the Judiciary violated N.J.S.A. 34:13A-5.4a(5) and (1) derivatively. The Judiciary's motion for summary judgment is denied as to

PANJ's allegations that the Judiciary violated N.J.S.A. 34:13A-5.4a(3) and (1) derivatively. The Judiciary's N.J.S.A. 5.4b(3) complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Voos abstained from consideration.

ISSUED: June 26, 2014

Trenton, New Jersey