

P.E.R.C. NO. 2016-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2014-205

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the motion for summary judgment filed by the Fraternal Order of Police, Newark Lodge No. 12. The charge alleges that the City of Newark violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5), when it unilaterally changed the pre-interview advisement form utilized by police officers being questioned as part of an official Newark Police Department investigation. The Commission finds that there are material disputed facts concerning when the FOP had knowledge of the change to the pre-interview advisement form.

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, Karen Brown, Corporation Counsel
(Alison Brown-Jones, Assistant Corporation Counsel)

For the Charging Party, Markowitz and Richman,
attorneys (Stephen C. Richman and Matthew D. Areman, of
counsel)

DECISION

This case comes to us by way of a motion for summary judgment filed by the Fraternal Order of Police, Newark Lodge No. 12 (FOP). The FOP filed an unfair practice charge against the City of Newark (City or Newark) on March 4, 2014 and amended the charge on March 13, 2014. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5)^{1/}, when the City

^{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 (continued...)

of Newark's Police Department unilaterally and without negotiations, consultation or notice to the FOP, changed the pre-interview advisement form utilized by City police officers being questioned/ordered to submit an administrative report as part of an official investigation into potential violations of the Newark Police Department's rules and regulations for fitness for duty. The FOP asserts that the change in the form adversely affects the rights of its members to invoke their constitutional rights in accordance with Garrity v. New Jersey, 385 U.S. 493 (1967).

The FOP is the majority representative of police officers employed by the City.

On August 21, 2014, the Director of Unfair Practices issued a Complaint in this matter and assigned Wendy L. Young as the Hearing Examiner. A prehearing conference was initially scheduled for November 6, 2014 and then rescheduled for December 17, 2014 and conducted on that date. After the conference the Hearing Examiner issued a letter indicating that three exhibits would be marked as joint exhibits: the parties' most recent collective negotiations agreement (CNA) from January 1, 2009 to December 31, 2012 as J-1, the old pre-interview advisement form as J-2, and the new pre-interview advisement form as J-3. The

1/ (...continued)
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."

letter further indicated that the City's Answer was due on December 19, 2014, that discovery was to be completed by March 1, 2015 and that the hearing was scheduled for March 12, 2015.

On December 19, 2014, the City filed its Answer in this matter. On February 12, 2015, the FOP filed a motion for summary judgment. The parties have filed briefs, exhibits and certifications.

The FOP argues that summary judgment is appropriate in this matter since the City, in its Answer, did not dispute the fact that it unilaterally changed the pre-interview advisement form, that it is well-settled law in New Jersey that a public employer has a duty to negotiate regarding the procedural aspects of the disciplinary process affecting employees,^{2/} that the New Jersey Attorney General Guidelines merely encourage New Jersey law enforcement agencies to adopt policies and procedures that are consistent with the Guidelines,^{3/} and as a result, material facts are not in dispute and this matter is ripe for summary judgment. The FOP's amended unfair practice charge and its certification

^{2/} The FOP cited Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); Camden Cty. Pros., P.E.R.C. No. 96-32, 21 NJPER 397 (¶26243 1995); and Branchburg Tp., P.E.R.C. No. 89-20, 14 NJPER 571 (¶19240 1988).

^{3/} The FOP cited McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008) and an unpublished New Jersey Appellate Division decision.

from its President indicates that the FOP was made aware of the City's change to the form in December 2013.

The City asserts summary judgment is not appropriate in this matter since material facts are in dispute as to when the FOP was made aware of the change to the pre-interview advisement form, and as a result, the unfair practice charge may be untimely (the City's certification from a police lieutenant from the Newark Police Department's Office of Professional Standards indicates that the pre-interview advisement form was modified in January 2012 to comply with the New Jersey Attorney General Guidelines and that the City has been using the new pre-interview advisement form since August 22, 2012, when a memorandum was issued by the Newark Police Director to "All Commands" to that effect), that the City was required to make the change to the pre-interview advisement form by the New Jersey Attorney General Guidelines, that this matter is not ripe for summary judgment since discovery has not been completed,^{4/} and that since the FOP did not utilize the grievance procedure under the parties' CNA, it lacks standing to file the instant unfair practice charge.

^{4/} The City has cited Velantzas v. Colgate-Palmolive Co., 109 N.J. 189 (1988); J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170 (App. Div. 1996); Rutgers, State University of New Jersey v. Liberty Mut. Ins. Co., 277 N.J. Super. 571 (App. Div. 1994); and Hermann Forwarding Co. v. Pappas Ins. Co., 273 N.J. Super. 54 (App. Div. 1994).

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). N.J.A.C. 19:14-4.8(d) provides that a motion for summary judgment will be granted:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

Summary judgment is to be granted with extreme caution and the moving papers must be considered in the light most favorable to the respondent, with all inferences and doubts resolved against the movant. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988). The Act requires that an unfair practice charge be filed within six months of the date that the unfair practice occurred.^{5/} Charges that are filed later than six months after the date of the unfair

^{5/} N.J.S.A. 34:13A-5.4c provides that:

"no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented."

practice are untimely unless the charging party was prevented from filing within the statutory period. N.J.S.A. 34:13A-5.4c.

The Commission does not have jurisdiction when an unfair practice charge is not filed in a timely manner. See State of N.J. v. Coun. of N.J. State Coll. Locals, NJSFT/AFT, P.E.R.C. No 77-14, 2 NJPER 308 (1976), aff'd 153 N.J. Super. 91 (App. Div. 1977), certif. denied 78 N.J. 326 (1978).

Summary judgment must be denied in this matter since there are material disputed facts concerning when the FOP had knowledge of the change to the pre-interview advisement form. That is a threshold jurisdictional issue that must be determined by the Hearing Examiner. As set forth above, the FOP's certification and the City's certification are in dispute regarding when the FOP received notice of the change. Even though the memorandum from the Police Director was not specifically sent to the FOP, it was sent on August 22, 2012 to "All Commands" in the Newark Police Department. J-2, the old pre-interview advisement form, has a date that appears to be from 2013.^{6/} Since the FOP filed its initial unfair practice charge on March 4, 2014, its charge

^{6/} The form is filled out and at the bottom it states: "I have read and understand the contents on the above statement on this 10 day of 24, 2013." The FOP, in its motion for summary judgment, appears to have filed a redacted version of the same form as Attachment "B" with only the "2013" appearing.

would be untimely if it had notice of the change before September 2013.

ORDER

The Fraternal Order of Police, Newark Lodge No. 12's motion for summary judgment is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Boudreau was not present.

ISSUED: September 24, 2015

Trenton, New Jersey