

P.E.R.C. NO. 2017-2

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. CO-2015-156

FRATERNAL ORDER OF POLICE  
LODGE 140,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, a motion for summary judgment filed by the Sheriff's Office. The FOP's charge alleged that the Sheriff's Office violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by interfering with the FOP by telling rival PBA members that they would get a good contract if they filed a representation petition, by allegedly negotiating with PBA members instead of the majority representative FOP, and by allegedly offering to have the PBA withdraw its representation petition if the local FOP President would resign. The Commission dismissed the refusal to negotiate (5.4a(5)) and domination or interference with the majority representative (5.4a(2)) charges, finding the allegations that the Sheriff's Office negotiated with the PBA and promised it a good contract were unsupported by sufficient admissible evidence to raise a genuine issue of fact as to those claims. The Commission denied the County's motion as to the FOP's tendency to interfere (5.4a(1)) charge, finding that the facts regarding that claim, including the Sheriff's alleged nod of the head when a PBA member allegedly commented about the local FOP president and the PBA petition, were not sufficiently developed.

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, Trimboli & Prusinowski, LLC,  
attorneys (Stephen E. Trimboli, of counsel)

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

DECISION

Before us is a motion for summary judgment made by Mercer County Sheriff's Office (Sheriff). We grant the motion in part and deny it in part.

Mercer County and Fraternal Order of Police, Lodge 140 (FOP) were parties to a collective negotiations agreement (CNA) effective January 1, 2009 through December 31, 2014 pertaining to Sheriff's Officer sergeants and lieutenants. On December 31, 2014, the FOP filed an unfair practice charge against the Sheriff's Office and PBA Local 187A/Superior Officers (PBA). A week earlier, on December 24, the PBA had filed a petition

seeking to be certified as the majority representative of the Sheriff's Officer sergeants and lieutenants, and the FOP's unfair practice charge sought an order blocking an election for that purpose until its charge was adjudicated.<sup>1/</sup>

The alleged unfair practices are that the Sheriff interfered with the FOP by telling PBA members he "would make sure" they got "a good contract" if the PBA filed a representation petition and displaced the FOP as majority representative, that the County had not met with the FOP for negotiations but instead negotiated with "non-certified parties," and that the Sheriff had disproportionately disciplined and retaliated against FOP officials, including "charging the Union President criminally." The FOP asserted that this conduct violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections (1), (2), (4), and (5) of N.J.S.A. 34:13A-5.4a.<sup>2/</sup>

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1/ The petition was docketed as RO-2015-25 and resulted in a decision issued on February 12, 2015 by the Director of Representation, which was not appealed. See Mercer County Sheriff's Office, D.R. No. 2015-4, 41 NJPER 501 (¶156 2015). For purposes of setting forth the relevant background, we take notice of the parties' submissions to the Director in the representation matter.

2/ 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  
(continued...)

As for the PBA, the charge alleged that it violated N.J.S.A. 34:13A-5.4b, prohibiting certain conduct by an employee organization or its representatives or agents. The charge did not clearly set forth allegations ascribing prohibited conduct to the PBA. However, it is apparent from an FOP submission in the representation matter<sup>3/</sup> that the "non-certified parties" with whom the County had allegedly negotiated over the then-FOP members' terms of employment were PBA members.

On January 5, 2015, the FOP requested to intervene in the representation proceeding. On January 21, in response to correspondence on behalf of the Director of Representation, the FOP reiterated its request that any election to certify a majority representative not be conducted until its charge was

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2/ (...continued)  
interfering with the formation, existence or administration of any employee organization . . . (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."

3/ The clarifying submission is the certification of FOP Lodge 140 President Scott Lavin. He claimed that Andrew Mair, the County Administrator, met with unnamed PBA representatives between December 9 and 22, 2014 and "negotiated a resolution" of terms of employment that "impact the contractual provisions involving employees on a ten-hour schedule."

resolved. Following submission of briefs and supporting and opposing certifications from the FOP, the PBA, and the County, the Director of Representation denied the FOP's request and ordered an election by mail, setting April 2 as the date for votes to be tallied.<sup>4/</sup>

The form of ballot gave eligible employees the choice to vote for the FOP, no representative, or the PBA. Ten of thirteen votes were cast for the PBA. Two were cast for the FOP. One ballot was challenged and not counted. No objections to the conduct of the election or to conduct affecting the results of the election were filed. See N.J.A.C. 19:11-10.3(h), permitting such objections. The Director certified the PBA as the unit's majority representative on April 13, 2015.

On May 26, 2015, the FOP filed an amended charge. The amended charge did not name the PBA as a respondent. It added one factual allegation against the Sheriff's Office; namely, that on or about January 6, 2015, Sheriff John Kemler, Chief Warrant Officer Brian Amantia, and Lieutenant Scott Schoellkopf met with State FOP President Robert Fox and during the meeting, "the Employer's representatives" told Fox that if he would force the local FOP President to resign, they would get the PBA to withdraw

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<sup>4/</sup> See n. 1.

its representation petition. The amended charge added asserted violations of N.J.S.A. 34:13A-5.4a(3) and (6).<sup>5/</sup>

On June 3, 2015, the Director of Unfair Practices issued a Complaint with respect to the subsection (1), (2), (3) and (5) allegations but not the subsection (6) allegation. The FOP withdrew the subsection (3) allegations by letter dated July 10, 2015, and the Hearing Examiner dismissed that charge with prejudice on July 13, 2015.<sup>6/7/</sup>

On September 11, 2015, the Sheriff's Office filed its motion for summary judgment. It was accompanied by exhibits attached to

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5/ These provisions prohibit public employers, their representatives or agents from: "(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 (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

6/ The Complaint and accompanying transmittal letter did not address the alleged violation of subsection (4). Since neither party has commented upon that charge, and given the paucity of facts in support of it, we consider that charge dismissed.

7/ This charge included the allegation that the Sheriff criminally charged the FOP Lodge 140 President. Based upon Amantia's certification filed in the representation matter and documents provided with that certification, it appears that the Mercer County Prosecutor's Office brought criminal charges against Lavin; that Lavin was indicted for official misconduct for allegedly filing false police reports and encouraging subordinate officers to do likewise, among other things; and that Lavin was suspended from his police duties in December 2013 pending disposition of the criminal charges.

the certification of its counsel and by the certifications of Sheriff Kemler and Chief Warrant Officer Amantia. On September 17, the Sheriff's Office asked that the Commission take notice of the Director's decision in the representation matter involving the parties and the PBA. On October 2, the FOP filed opposition to the County's motion, accompanied by certifications of State FOP President Fox and Sean Lavin, local FOP President. With leave granted by the Commission, both parties filed sur-replies addressing the sufficiency of Lavin's certification. On October 30, the Chair referred the County's motion to the Commission. See N.J.A.C. 19:14-4.8(a).

The Evidence with Regard to the Alleged Violations

As between Fox and Lavin, only the latter addresses the FOP's allegation that the Sheriff negotiated with the PBA rather than the FOP. On that subject, Lavin certifies:

8. In or about December of 2014, while the FOP was still the majority representative for bargaining unit employees, representatives of the Employer conducted a meeting with a representative of ... the PBA ... to resolve staffing and scheduling issues at the Mercer County Airport, specifically the ten (10) hour schedule .... <sup>8/</sup>

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8/ Lavin made the same claim in a certification filed in the representation proceeding, stating that "the County, through Business Administrator Andrew Mair," met with unnamed PBA representatives between December 9 and 22, 2014 and resolved terms of employment that "impact the contractual provisions (continued...)"

With regard to that allegation, Sheriff Kemler certifies:

8. At no time did I "refuse" to negotiate with the Charging Party, and at no time did I attempt to "negotiate" with any other union representative of the sergeants and lieutenants. There were no negotiations with PBA Local 187A until after the Public Employment Relations Commission certified PBA Local 187A as the majority representative of the sergeants and lieutenants.

Also as between Fox and Lavin, only the latter addresses the FOP's allegation about the promise of the PBA getting a lucrative contract. As to that allegation, Lavin certifies:

9. Furthermore, during the December 2014 meeting, the Employer advised the PBA representative that if the PBA were to file a representation petition for the bargaining unit currently represented by the FOP and successfully replace the FOP, the Employer would agree to a lucrative contract in an expeditious manner that would cost the PBA very little.<sup>9/</sup>

10. This message, i.e., that the PBA, if elected as the majority representative to

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(...continued)

involving employees on a ten-hour schedule." In opposing certifications, Mair, the County Administrator, and Amantia denied attending any such meeting.

9/ Lavin made the same allegation in his certification in the representation matter, except there he referred to "meetings," rather than "a meeting," to the "County," rather than "the Employer," and to "PBA representatives," rather than "a PBA representative." In opposing certifications, Mair and Amantia denied advising the PBA that the County would agree to a lucrative contract if the PBA displaced the FOP as majority representative.

replace the FOP, would receive a lucrative contract in a short amount of time, was relayed to the members of the bargaining unit by representatives of the PBA in or about early January 2015.

In contrast, Kemler certifies:

5. The FOP alleges that I spoke to members of the PBA ... and promised them a favorable contract if they filed a representation petition to replace the FOP as the majority representative of sergeants and lieutenants. I certify that this allegation is untrue. I never had any such conversation with any person and made no such promise or representation. And because the County conducts labor negotiations, I could not have made any promise even if [sic] had wanted to.

6. I did not urge, suggest or encourage any person or labor organization to attempt to replace the FOP as the majority representative of sergeants and lieutenants.

In apparent reply to Kemler's comment that the County conducts labor negotiations, and so he could not have made any promises, Lavin certifies:

6. During my tenure as President of the FOP, I regularly communicated with Sheriff Kemler and his designee(s) regarding the [CNA] and compliance therewith, engaged in negotiations with Sheriff Kemler and his designee(s) regarding terms and conditions of employment for bargaining unit members, and discussed matters of collective negotiations with Sheriff Kemler.

7. I attended bargaining sessions with the Employer for the 2009-2014 [CNA] and while Mercer County officials attended those negotiations, Sheriff Kemler or his designee

similarly attended all bargaining sessions after being appointed Acting Sheriff.

Regarding the allegation attributed to the "Employer's representatives" that "they" would get the PBA to withdraw its representation petition if Lavin resigned, Fox certifies:

4. On January 6, 2015, my office received a telephone call from Sheriff Kemler responding to my request for a meeting to discuss union issues between the Mercer County Sheriff's Office ("Employer") and the [FOP].

5. A meeting was arranged for later that day in my office.

6. Attending the meeting with [Kemler] was [Amantia] and Scott Schoellkopf ("Schoellkopf").

7. Attending the meeting with me was State FOP Legislative Director, Dr. Pete Guzzo.

8. At no time during that meeting did Schoellkopf, or anyone else for that matter, identify himself as a representative of the PBA or attending on behalf of anyone other than the Employer.

9. During the course of the meeting, which lasted approximately thirty (30) minutes, the issue of the PBA's representation petition was discussed.

10. At one point in the conversation, Schoellkopf stated that "the problem" was Sean Lavin, and that if the FOP were to remove Sean Lavin as President of FOP Lodge 140, then they would get the individual who filed the Representation Petition on behalf of the PBA to "pull it."

11. When Schoellkopf indicated that [Lavin] was "the problem," [Kemler] indicated his

agreement with the statement by a contemporaneous nod of his head.

12. I then addressed Sheriff Kemler, Amantia and Schoellkopf asking how sure they were that if Sean Lavin left his union position that the petition would be withdrawn, specifically stating, "what, like 50 or 60 percent sure?"

13. In response to my inquiry, Schoellkopf stated, "Ninety-nine point nine percent sure." I then looked at Sheriff Kemler, who nodded and verbally agreed with Schoellkopf's statement.

In his certification, which predates and was filed before Fox's and Lavin's, Kemler acknowledged attending the January 6, 2015 meeting. Regarding the allegation that during the meeting, "Employer representatives" said that if Fox forced Lavin to resign as the local president, they would force the PBA to withdraw its representation petition, Kemler certifies:

No representative of the "employer" made any such comment. Rather, it was Lt. Schoellkopf, the PBA officer, who stated his opinion that the removal of the then-President of FOP Lodge 140 would cause the PBA to consider withdrawing its petition. Neither Chief Amantia nor I made any comment on that subject.

Amantia also acknowledged attending the meeting. He certifies:

4. At the meeting, the subject of the PBA's representation petition ... was raised. Lt. Schoellkopf, the PBA official, stated his opinion that the removal of the then-President of FOP Lodge 140 would cause the PBA to consider withdrawing its petition. He was the only person at the meeting who made

such a statement. Neither Sheriff Kemler nor I made any comment on that subject.

SUMMARY JUDGMENT STANDARD

N.J.A.C. 19:14-4.8(e) sets forth the standard for granting summary judgment:

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 that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

A genuine issue of material fact exists if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Conversely, when the evidence is so one-sided that one party must prevail as a matter of law, we should not hesitate to grant summary judgment. Id.

ANALYSIS

Allegations related to December 2014 meeting with PBA members

The County objects to the portions of Lavin's certification regarding an alleged December 2014 meeting between the County and PBA representatives. Noting that Lavin did not certify that he attended the meeting, the County argues that the information

Lavin provided about the meeting was not based on personal knowledge but at best, what others supposedly told him about the meeting. The County contends that under Anesthesiology Associates of Manhattan, P.C. v. Grinblat, 2015 N.J. Super. Unpub. LEXIS 777 (App. Div. 2015), the parts of Lavin's certification not based on personal knowledge cannot be considered. In response, the FOP argues that Grinblat, reversing a summary judgment supported only by the certification of the moving party's attorney, does not apply to certifications submitted to oppose a summary judgment motion.

Although Grinblat only discusses submissions in support of a summary judgment motion, the County is correct that certifications for or against summary judgment must be based on personal knowledge. As we said in PBA Local 187, P.E.R.C. No. 2005-61, 31 NJPER 60 (¶29 2005), a charging party opposing summary judgment cannot simply rely on the allegations of its charge or attachments to its charge to create a material factual dispute. It must instead file its own certifications or affidavits made on personal knowledge.

Bald assertions without support in an affidavit or certification based upon the personal knowledge of the affiant cannot support or defeat summary judgment. See e.g., Ridge At Back Brook, LLC, v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div.

2014). Bare conclusions in the pleadings without factual support in tendered affidavits will not defeat a meritorious application for summary judgment; by the same token, conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment. Brae Asset Fund, L.P., v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999).

Lavin's certification does not state that he attended the meeting in December 2014 at which the PBA and Employer representatives allegedly discussed a matter that would be the subject of negotiations for a successor agreement and at which the Employer allegedly promised a lucrative contract to the PBA if it filed a representation petition. Nor does the FOP in its briefs suggest that he did. Therefore, the portions of Lavin's certification (para. 8-11) concerning a December meeting between the County and PBA are insufficient to overcome the County's denial that such a meeting occurred or that the Sheriff negotiated with the PBA or made promises to it at a December 2014 meeting. Stated differently, the FOP's unsupported allegations are not sufficient to raise a genuine issue of fact as to those matters.

Therefore, the County's motion for summary judgment is granted as to the FOP's allegations of a December 2014 meeting between the PBA and County representatives regarding "staffing

and scheduling issues" and at which the County advised that the PBA would receive a lucrative contract if it replaced the FOP. Without those allegations, the FOP cannot establish a refusal to negotiate in violation of subsection 5.4a(5) of the Act or that the County dominated or interfered with the FOP's existence in violation of subsection 5.4a(2). Those claims are dismissed.

Allegations related to the January 6, 2015 meeting

As noted above, Sheriff Kemler and Chief Warrant Officer Amantia acknowledge attending a meeting with FOP President Fox on January 6, 2015. In their certifications, Kemler and Amantia identify Sheriff's Officer Lieutenant Scott Schoellkopf as a PBA, not County, representative. They also deny saying anything after Schoellkopf commented that Lavin's removal as President of FOP Lodge 140 would cause the PBA to consider withdrawing its representation petition. Fox responds in his certification that no one identified the Lieutenant as a PBA member and that Kemler shook his head after Schoellkopf allegedly commented that if Lavin were removed as the local president, "they would get" the unit member who filed the representation petition to "pull it."

Assuming that no one told Fox that Schoellkopf was only speaking as a unit member or was only speaking for the PBA, that in and of itself, even if viewed in the light most favorable to the FOP, would be insufficient to permit a rational factfinder to

find that Schoellkopf was speaking as a County representative when he made his comments. Moreover, we find it unlikely that the County engaged negotiations unit members to act on its and the Sheriff's behalf in labor relations matters. While we find that Schoellkopf was not speaking on the County's or Sheriff's behalf at the meeting, we nevertheless decline to grant summary judgment in favor of the County on the FOP's 5.4a(1) claim.

A public employer violates N.J.S.A. 34:13A-5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification.

UMDNJ-Rutgers Medical, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); see also, Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). The charging party need not prove an illegal motive. UMDNJ-Rutgers. Accord, Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). The tendency to interfere is sufficient. Mine Hill Tp.

The Supreme Court of New Jersey has ruled that "if warranted by the attendant circumstances, a nod of the head can qualify as an affirmative expression of agreement constituting an adoptive admission." McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 530 (2003). In that age discrimination case, the plaintiff

claimed to have been told by another former employee (Haddock) that she had asked the boss's secretary (Cockrell) why the boss (Good) was firing the plaintiff and that the secretary responded by saying it was because the plaintiff was "too old," and that when the secretary said this, the boss nodded his head in agreement. The Court said that if the evidence adduced at a preliminary hearing regarding the circumstances attendant to the head nod "demonstrates that the nodding was intended to convey agreement with that statement," then it could be admitted into evidence and might qualify as direct evidence of discrimination sufficient to shift the burden of persuasion to the defendant/employer. Id. at 531.

Here, Fox certifies that when Schoellkopf allegedly remarked that Lavin was a problem, Kemler indicated his agreement with that statement by "a contemporaneous nod of his head" and that Kemler "nodded and verbally agreed" with Schoellkopf's statement that he was 99.9% sure that the PBA petition would be withdrawn if Lavin were removed as FOP Lodge 140's President. The facts surrounding the alleged head nod have not been sufficiently developed by the parties' certifications to enable us to decide what information Kemler intended to convey by nodding his head, assuming that he did. Likewise, the facts are not clear whether Kemler also nodded his head when Schoellkopf supposedly said that

"they" would get the unit member who filed the representation petition to "pull it" or whether Kemler understood that by "they," Schoellkopf meant anyone other than the sergeants and lieutenants. Therefore, we deny the motion on this claim to enable the facts surrounding the alleged head nodding to be fully fleshed out.

Issue of whether FOP's charges are moot

Finally, the County argues that the FOP's unfair practice charge should be dismissed as moot because the PBA is now the duly elected majority representative. It asserts that the FOP's charge has no present effect on collective negotiations between the County and PBA and that the FOP's continuation of its charge could undermine the PBA's effectiveness. The FOP asserts that without a "cease and desist" order the County will be free to engage in similar behavior against current FOP members (in the PBA unit) and against the FOP if it seeks to represent the unit again in the future.

The Commission will find a case moot where "continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Ramapo Indian Hills Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581, 582 (¶21255 1990). Other considerations are whether there remain open issues

which have practical significance; whether there is a continuing chilling effect from the earlier conduct which has not been erased; whether, after a respondent's corrective action, a cease and desist order is necessary to prevent other adverse action against the same or other employees; and, whether the offending conduct is likely to recur. See, Galloway Township Bd. of Ed. v. Galloway Township Ed. Assn, 78 N.J. 25 (1978); Neptune Tp. Bd. of Ed., P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd 21 NJPER 24 (¶26014 App. Div. 1994); County of Hudson, P.E.R.C. No. 2012-48, 38 NJPER 331 (¶111 2012); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 82-56, 8 NJPER 31 (¶13013 1981); Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1978).

Under these particular facts, and given the very limited hearing we envision by our decision, we decline to dismiss the charge as moot. Unlike the cases cited by the County (Ramapo Indian Hills, supra; Hudson Cty., supra), the present case does not involve an employer and union with a continuing negotiations relationship. Therefore, the ultimate determinations of mootness in those cases based on focusing the parties' attention on a cooperative future are inapposite to these circumstances. Even where the parties to the employer-union relationship remain the same, the Commission does not invariably rule that their entrance

into a successor agreement renders moot a charge of misconduct during negotiations. See, e.g., Paramus Bor., P.E.R.C. No. 99-105, 25 NJPER 298 (¶30125 1999); Galloway, supra; Neptune, supra.

In this case, should the FOP succeed in proving the remaining charge, a cease and desist order would not likely disturb labor stability between the County and the incumbent PBA as much as it would serve as a preventative measure against future misconduct towards the FOP if it seeks to become the majority representative again. Accordingly, analysis of the mootness factors leads us to conclude that the alleged offending conduct may recur and that a cease and desist order may be necessary to prevent recurrence.

ORDER

The County's motion for summary judgment is granted in part but denied with regard to the claim based on 5.4a(1). The

Hearing Examiner will conduct a limited hearing consistent with our decision.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni and Wall recused themselves.

ISSUED: August 18, 2016

Trenton, New Jersey