

P.E.R.C. NO. 2017-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and-

Docket No. CO-2015-077

IFPTE LOCAL 196 CHAPTER 1,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants summary judgment in favor of the IFPTE on its claim that the Authority violated §5.4a(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when an Authority supervisor secretly recorded a meeting with IFPTE representatives and an employee having performance issues. The Commission finds that the supervisor's interest in having a recording of the meeting as a memory aid did not overcome the employee's reliance on the supervisor's promise that the meeting would be off the record. The Commission also finds that the supervisor's failure to disclose her intention to record the meeting was contrary to the purpose underlying the Act of promoting labor peace.

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, McElroy, Deutsch, Mulvaney & Carpenter, LLP (James E. Patterson, of counsel and on the brief; David M. Alberts, on the brief)

For the Charging Party, Mets Schiro McGovern & Paris, LLP (Leonard C. Schiro, of counsel and on the brief)

DECISION

This matter comes to us by way of a motion for summary judgment filed by IFPTE Local 196 Chapter 1 (IFPTE) in an unfair practice case against the New Jersey Turnpike Authority (Authority). The unfair practice charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1) and (5),^{1/} by secretly recording an "off-the-record" discussion,

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...)

turning the recording over to management in order to initiate disciplinary proceedings, and refusing to produce a copy of the recording.

PROCEDURAL HISTORY

On October 1, 2014, IFPTE filed the underlying unfair practice charge. On June 28, 2016, the Director of Unfair Practices issued a complaint with a notice of hearing.^{2/} On August 8, the Authority filed an answer.

On August 10, 2016, the Hearing Examiner sent a letter to the parties confirming that the Authority had provided a copy of the recording to IFPTE and that IFPTE had withdrawn the allegations in its charge related to the Authority's failure to produce a copy of the recording.

On November 2, 2016, IFPTE filed a motion for summary judgment supported by a brief, notice of motion, and an exhibit. Although it did not file with the motion any certifications, IFPTE had filed with its charge certifications of its President James Robertello (Robertello), Vice President Franco Gencarelli (Gencarelli), and Treasurer Sean McBride (McBride). On January

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."

2/ Between the filing of the charge and the issuance of the complaint, the exploratory conference was adjourned several times at the parties' request.

10, 2017, the Authority filed an opposition brief and the certification of Maintenance Crew Manager Lillian Grauman (Grauman).

On January 26, 2017, IFPTE's motion for summary judgment was referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a).

FACTS

IFPTE is the majority representative for all toll collectors, maintenance staff, mechanic staff, sign fabricators, landscape staff, painters, toll violator officers, and specialists employed by the Authority, excluding all temporary and part-time employees and supervisors. The Authority and IFPTE were parties to a collective negotiations agreement (CNA) in effect from July 1, 2007 through June 30, 2011.

On July 16, 2014, Vice President Gencarelli met with Crew Manager Grauman, Authority District Manager Diane Gilberti (Gilberti), and the northern area shift supervisor for the Authority regarding a maintenance employee assigned to the northern area day crew (Employee). Grauman had just come off working nights and was new to the northern area day crew. Gencarelli certifies that these Authority employees told him that the Employee was "a bad employee," that she did not listen or follow orders, and that she acted the way she did because of who her spouse is. (The Employee's spouse is an elected politician.)

Gencarelli further certifies that Gilberti gave "examples" of the Employee's conduct as "being on the phone" and "coming to work late." According to Gencarelli, he was told that the Employee would be disciplined if her behavior continued, and he told the Authority supervisors that he would speak to her although he did not know her.

President Robertello certifies that he knew the Employee and called her on or about July 16, 2014 and told her that Grauman and Gilberti had requested an "off-the-record meeting with her to clear the air."^{3/} The employee agreed to attend.

On or about July 22, 2014, Robertello, Grauman, Gilberti, and Treasurer McBride met in Grauman's office, and before the Employee was called into the meeting, Robertello and Grauman agreed that the meeting with the Employee would be "off the record." Robertello left the room and returned with the Employee. When he rejoined the meeting, there were additional northern area managers and supervisors present. Robertello certifies that he confirmed with each person in the room that the meeting was "off the record."

Grauman admits recording the meeting. She does not dispute that she did so without telling IFPTE's officials in attendance or the Employee.

^{3/} As later discussed, the Authority denies it requested the meeting.

The exhibit to IFPTE's motion is a transcript of the "off-the-record" meeting. Neither party identifies who prepared the transcript. According to Robertello, parts of the meeting were not recorded, and therefore, the transcript is not complete.

The transcript appears to begin as Robertello rejoins the meeting with the Employee. He asks if the meeting is on or off the record. Grauman answers, "Off the record." As Grauman attempts to introduce herself to the Employee, the latter interrupts, and the following exchange ensues:

Employee: about time.
Grauman: Excuse me?
Employee: It was about time. I saw you sizing me up yesterday. You should have did that yesterday.
Grauman: I don't understand what you mean I don't know what ...
Employee: Alright. We'll leave it at that. I know what it means.
Grauman: When, when was I sizing you up yesterday?
Employee: I think it was in the hallway.
Grauman: In Paramus?
Employee: You don't remember?
Grauman: I walked into the building. I looked into the lunchroom, and then I walked into ...
Employee: This is what happened. Alright. This is my version. You walked in. You looked me up and down. I watched you look me up and down. Okay. If ... alright, let's leave it at that.
Grauman: And if that's how you took it, that's not ...
Employee: That's how I took it. That's exactly how I took it.
Grauman: Okay.
Employee: I watched you. Okay. Alright. So I don't know who you are.

Grauman: Oh. I just introduced myself.
Anything you want to start off
with?

The transcript continues at this point with Robertello interjecting something he said Gencarelli had told him. Grauman replies that she did not request the meeting but agrees with McBride, who entered the conversation, that it is intended to alleviate "the tensions." McBride then asks, in regard to the "problem with [the Employee's] job performance, 'What she's doing?'" He then volunteers, "I know she gets stressed out sometimes, if it's really hot and you're working outside in the sun all day."

Later, after an unrelated discussion, the Employee addresses Gilberti, stating her "bullying needs to stop." Grauman encourages an unidentified person, presumably Gilberti, to let the Employee finish. While it appears the recording may have been stopped around this point, it continues with the Employee challenging Grauman, asking her, "Is your name [Gilberti]. Is your name [Gilberti]." Grauman replies, "Here we go." Even after Robertello intervenes, the Employee repeats, "Is your name [Gilberti]."

After like exchanges, the Employee returns to the subject of Gilberti, accuses her of bullying, refers to an apparently earlier altercation between the two, and referring to apparently

both Gilberti and Grauman, states, "You got your little spy up there" in Paramus. At that point, the transcript continues:

Grauman: I'm leaving now.
 Employee: Good bye. Good bye. You should be gone.
 Robertello: This is, this is off the record.
 Grauman: You know what? When you threaten me, it's not off the record anymore.
 Employee: It wasn't no threat.
 Grauman: It was absolutely a threat. We are not off the record anymore.
 Robertello: Let's go. It's off the record.
 Employee: Let me tell her something. Let me tell her something.
 Robertello: No. No. You don't want to.... No [name of Employee]. Go. Go. Have the attorneys deal with this now. You know where to go. [Name of Employee], go.
 Employee: Let me...

Robertello again tells the Employee to leave. He and Grauman argue about the meeting being off or on the record. Robertello ends the meeting saying that the Employee will "go her route," and "we'll see who gets f-----."

Grauman certifies that the meeting with the Employee was requested by the IFPTE to allow the Employee to "air some grievances regarding alleged workplace mistreatment."^{4/} She further certifies that she recorded the meeting, rather than taking notes of it, "for the purpose of refreshing ... [her] own personal recollection of what occurred during the meeting."

^{4/} We find the dispute between Grauman and Gencarelli as to which of them requested the meeting immaterial to the disposition of IFPTE's motion.

Grauman maintains that when she agreed that the meeting would be "off the record," she meant that it would not be used by the Authority to impose discipline.

No discipline was imposed as a result of the meeting.

LEGAL ARGUMENTS

IFPTE argues that its motion for summary judgment should be granted because there are no genuine issues of material fact in dispute and that secretly recording a meeting, after agreeing that it will be off the record, amounts to a refusal to bargain in violation of the Act. It cites Borough of Flemington., H.E. No. 88-32, 14 NJPER 93 (¶19034 1988) for the proposition that the Commission has adopted the standards utilized by the National Labor Relations Board (NLRB) "concerning surveillance of ... employees through the use of secret recording devices."

IFPTE maintains that the purpose of the meeting with the Employee was "to facilitate a meaningful dialogue" between the parties and "to address the issues concerning the Union member and supervisor." It argues that the Authority has shown by its actions, apparently referring to secretly recording the meeting, that it was not engaged in any good faith dialogue.^{5/}

The Authority argues that the motion for summary judgment must be denied because IFPTE has failed to present any competent

^{5/} IFPTE does not address in its brief the allegation that the recording was turned over to management in order to initiate disciplinary proceedings.

evidence establishing the underlying facts.^{6/} It also maintains that the facts alleged “do not definitively indicate whether or not the Authority committed an unfair practice.” The Authority cites Local Joint Exec. Bd. v. NLRB, 515 F.3d 942, 945-946 (9th Cir. 2008) and City of Paterson, H.E. No. 2007-3, 33 NJPER 9 (¶7 2007) for the proposition that the test utilized by the NLRB “for determining whether employee surveillance . . . [is a violation]” is multi-factored and depends in large part upon whether the surveillance, “given the totality of the circumstances, would likely restrain or coerce employees in the exercise of their protected rights.” The Authority contends that “no reasonable bargaining unit member could feel coerced by the recording in this case” given that the employee and her union representatives were repeatedly assured that the meeting was “off the record” and no discipline was imposed as a result of the meeting. Further, the Authority claims that “the surveillance at issue in this case is not the type ordinarily forming the basis of [an] unfair practice charge[]” because it did not occur in an area where IFPTE meets privately with employees or in a general workspace. Rather, the surveillance occurred “during a grievance-style meeting” at which a reasonable employee has “a limited expectation of privacy.”

^{6/} The Authority appears to have overlooked that certifications were filed in support of the charge.

STANDARD OF REVIEW

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. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{7/} In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523.

We have denied summary judgment when the facts in the record do not definitively answer whether a public employer has or has not committed the unfair practices alleged. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. 2006-97, 32 NJPER 232 (¶197 2006). We have also denied summary judgment when credibility

^{7/} N.J.A.C. 19:14-4.8(e) provides:

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.

determinations need to be made. See, e.g., New Jersey State (Corrections), H.E. No. 2014-9, 40 NJPER 534 (¶173 2014).

Public employers are prohibited from “[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4a(1). “It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.” State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). “[P]roof of actual interference, restraint or coercion is not necessary to make out a violation of N.J.S.A. 34:13A-5.4a(1). . . .” 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., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). An employer violates this provision independently of any other violation if its action tends to interfere with an employee’s protected 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, Cumberland County College, P.E.R.C. No. 2011-65, 37 NJPER 74 (¶28 2011).^{8/}

ANALYSIS

Based upon the certifications submitted by the parties, we find that there are no genuine issues of material fact.^{9/} Despite an agreement between the parties' representatives that there would be an "off-the-record" meeting "to clear the air," Grauman recorded the meeting without advising the participants that she would do so.

While Grauman and the Authority kept the implicit promise that no discipline would be imposed against the Employee, we find that Grauman's failure to disclose her intention to record the meeting to be a sufficient basis, and the critical factor, in concluding, as we do, that the Authority violated §5.4a(1).^{10/}

Initially, we do not find the facts in Borough of Flemington, P.E.R.C. No. 88-82, 14 NJPER 240 (¶19087 1988), to be

^{8/} Parenthetically, we also note that under federal and state law, it is not unlawful for "[a] person not acting under color of law to intercept a wire, electronic or oral communication, where such person is a party to the communication" unless "such communication is intercepted or used for the purpose of committing any criminal or tortious act" N.J.S.A. 2A:156A-4(d); accord 18 U.S.C. §2511(2)(d).

^{9/} There appears to be a conflict as to the date of the "off-the-record" meeting, but we find it irrelevant given that there is no dispute a meeting did occur in July 2014.

^{10/} We dismiss the refusal to negotiate claim for insufficient evidence.

similar to those here. The only commonality between the cases is that secret recording took place in both. Flemington involved egregious conduct,^{11/} while here, Grauman recorded the meeting only to serve as a memory aide, not for the purpose of disciplining a problematic employee, and IFPTE has not shown otherwise.

We likewise see little similarity between the facts of this case and those of the NLRB cases we mentioned in Flemington. Therefore, we need not discuss the appropriateness of the standard utilized in the private sector in cases of employer spying or surveillance. We do not equate what Grauman did here with either of those things.

In Township of Union, P.E.R.C. No. 2008-20, 33 NJPER 255 (¶95 2007), we found that the surveillance of off-duty police in direct response to certain protected activity was a violation of the Act because it tended to interfere with protected rights and the township did not have a legitimate business justification for it. See also Mt. Olive Twp. Bd. of Ed., P.E.R.C. No. 90-66, 16

^{11/} In Flemington, the police union made several surreptitious recordings during negotiations for a successor agreement, two of the borough's chief negotiator, and attempted to use the recordings to suggest that the borough should be concerned about criminal charges of bribery and extortion and provided a related story to the newspaper. The Commission found that these actions were an attempt to "sandbag" collective negotiations given that the union had previously provided the local prosecutor with a copy of the recordings and was aware of his assessment that the borough had not violated the law.

NJPER 128 (¶21050 1990) (finding that a statement suggesting that the superintendent had placed the association's president under surveillance to build up information to support his controversial transfer was a violation of the Act because it tended to interfere with the exercise of protected rights).

Here, it is debatable whether protected activity prompted the secret recording. Giving the Authority the benefit of the doubt, as we must in the context of a motion for summary judgment, we infer that Grauman thought the recording would serve as some form of protection against a difficult employee with a powerful spouse. If that was her interest in making the recording, we do not find that interest sufficient to overcome IFPTE's and the employee's good faith reliance on the ground rules for the meeting established by the parties (i.e., that the meeting would be "off the record" so that the employee could "air some grievances").^{12/} If Grauman had openly indicated that she wished to record the meeting as a memory aid rather than take notes, IFPTE and/or the Employee might have refused to participate or conducted themselves in a different manner.

We also find that secretly recording an "off the record meeting" is contrary to the Act's stated purpose of "promot[ing]

^{12/} "On the record" means "an interview, meeting or courtroom session of which a written, audio or video record is kept as permanent evidence." Black's Law Dictionary, Free Online Legal Dictionary 2nd Ed. (February 2017).

permanent, public and private employer-employee peace”

N.J.S.A. 34:13A-2. Such conduct seems prone to generating labor relations distrust. Moreover, even if Grauman only understood “off the record” to mean that the meeting would not be used as a basis for imposing discipline, IFPTE and the Employee also had a basis for believing that “off the record” meant that the meeting was considered confidential. Accordingly, we grant summary judgment in favor of IFPTE on its claim that the Authority violated §5.4a(1) of the Act.

ORDER

IFPTE Local 196 Chapter 1’s motion for summary judgment is granted with respect to the claim that the New Jersey Turnpike Authority violated §5.4a(1) of the Act. The Authority 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 by secretly recording any meeting that the parties agree will be “off the record.”

B. Take the following affirmative action:

1. 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.

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

BY ORDER OF THE COMMISSION

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

ISSUED: March 30, 2017

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 by secretly recording any meeting that the parties agree will be "off the record."

Docket No. CO-2015-077

New Jersey Turnpike Authority
(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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372