

P.E.R.C. NO. 2017-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSBOROUGH TOWNSHIP,

Respondent,

-and-

Docket No. CO-2016-215

PBA LOCAL 205,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the PBA in an unfair practice case alleging that the Township 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 refused to provide the PBA with candidate scores/ratings from the sergeant's promotion process that took place in the spring of 2016. The Commission finds that there are genuine issues of material fact precluding summary judgment with respect to the relevance of the information requested by the PBA.

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, Eric M. Bernstein & Associates, LLC, attorneys (Eric M. Bernstein, of counsel and on the brief; Stephanie M. Platt, on the brief)

For the Charging Party, Detzky, Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel and on the brief)

DECISION

This case comes to us by way of a motion for summary judgment filed by PBA Local 205 (PBA) in an unfair practice case against Hillsborough Township (Township). The unfair practice charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1), (2), (3), (4), (5), (6), and (7),^{1/} when it

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of (continued...)"

refused to provide the PBA with candidate scores/ratings from the sergeant's promotion process that took place in the spring of 2016.

PROCEDURAL HISTORY

On April 12, 2016, the PBA filed the underlying unfair practice charge. On May 10, the Township filed an answer. On July 13, the Director of Unfair Practices (Director) issued a complaint and notice of pre-hearing conference with respect to the PBA's 5.4a(1) and (5) allegations.^{2/} On December 2, the Hearing Examiner scheduled a hearing for March 21, 2017.

On February 22, 2017, the PBA filed a motion for summary judgment supported by a brief, exhibits, and the certification of Sergeant Mark Syzmanski (Syzmanski). On March 6, the Township filed an opposition brief and exhibits. On March 20, the PBA's

1/ (...continued)
employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ The Director dismissed the alleged violations of 5.4a(2), (3), (4), (6) and (7), finding that they did not meet the Commission's complaint issuance standard.

motion for summary judgment was referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a).

FACTS

The PBA is the majority representative for all police officers below the rank of Lieutenant employed by the Township. The Township and the PBA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2015 through December 31, 2019.

In the spring of 2016, the Township conducted a promotion process in accordance with Ordinance No. 2015-12. The process consisted of a written examination, a promotional evaluation by sergeants and lieutenants, another promotional evaluation by the Police Chief and captains, and an oral interview with the Police Chief and members of the Township Police Committee. Seniority was also assigned a point value of up to five points.

Szymanski certifies that he was "the top-rated candidate" after the first three phases of the promotion process but that his overall score "plummeted" after the oral interview. He further certifies that he serves as the Local's State Delegate and has served on past PBA negotiating committees and has represented the Local in various grievances over the years.

On March 9, 2016, the Township selected four officers for promotion to sergeant. On March 23, 2016, the PBA President sent

a memorandum to the Police Chief requesting the following information:

- (1) the overall scores/ratings of each candidate;
- (2) the written examination scores;
- (3) the scores/ratings of each candidate at each stage of the promotion process; and
- (4) the scores/ratings of each candidate prepared by each evaluator at each stage of the promotion process including, but not limited to, the Police Committee members and yourself during the final stage of the promotion process.

In his memorandum, the PBA President indicated that he was requesting this information in order "to ensure that the promotion process was conducted in a fair and impartial manner."

On April 5, 2016, the Police Chief responded to the PBA President in a memorandum that provides in pertinent part:

I have reviewed your request dated March 23, 2016 for various documents pertaining to the recent Sergeant's Promotion Process. Each candidate that requested a review of the process was verbally given limited information specific to their results. The information released was consistent with past practices at the conclusion of earlier promotion processes and consistent with Standard Operating Procedure 2009-19.^{3/}

3/ Standard Operating Procedure 2009-19, entitled "Promotion and Corporal Assignment Procedures," provides in pertinent part:

- IX. Candidate Review and Appeal
 - A. Except for the position of Chief of Police, any candidate may request to review their own promotional process scores through the Chief of Police within (7) days of completion of the

(continued...)

After careful consideration and deliberations, I am denying your request for the specified documents. There will be no further dissemination of documents relative to the process to any person, entity, or organization.

As noted above, the unfair practice charge was filed on April 12, 2016. On January 24, 2017, Szymanski was promoted to sergeant.

3/ (...continued)

promotional process.

1. The Chief of Police shall have full discretion on what information is released.

B. If the candidate is not satisfied with the Chief of Police review, an official appeal may be filed within (7) days of the review.

1. The candidate shall submit an appeal in writing directly to the Chief of Police stating the circumstances of the appeal.

2. The Chief of Police shall review the appeal with the Township Labor Attorney to determine its merit.

a. If there is merit to the appeal, it shall be remedied through a legal process determined by the Township Labor Attorney.

b. If there is no merit to the appeal, the candidate shall be immediately informed of the decision and if desired to seek personal legal advice on the matter at their own cost.

C. The County Superior Court is the final authority in all promotional matters including that for Chief of Police, unless elevated to a higher Court.

LEGAL ARGUMENTS

The PBA argues that the Township must supply information requested by a majority representative if there is a probability that it is potentially relevant and will be of use in carrying out representational duties and contract administration. With respect to this case, the PBA maintains that candidate scores/ratings are not confidential and that they are necessary to ensure that Szymanski "was not subject to discrimination, retaliation or anti-union animus . . . during the final phase of the promotion process." In balancing the parties' interests, the PBA contends that disclosure will enhance labor relations and help to ensure that future promotion process panelists evaluate candidates based upon their merit rather than extraneous materials or anti-union animus.

The Township cites Hanover Tp., H.E. No. 2005-13, 31 NJPER 151 (¶67 2005) in support of its position that there are genuine issues of material fact that preclude summary judgment. Specifically, the Township maintains that the PBA has failed to demonstrate that the requested information is "relevant and necessary" or that it "cannot be obtained through other means." The Township also asserts that the requested information is confidential and its disclosure could potentially injure or compromise the Hillsborough Police Department, individual members, test security, and/or the ability to use testing

materials in future promotion processes. Moreover, the Township contends that the underlying unfair practice charge is moot given that Szymanski was ultimately promoted to sergeant.

STANDARD OF REVIEW

We note that 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).^{4/} 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be

^{4/} 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.

denied unless the right thereto appears so clearly as to leave no room for controversy.” Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006). 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 (¶97 2006). We have also denied summary judgment when credibility 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). The charging party need not prove an illegal motive. Id. This provision will also be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[r]efusing 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. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). A refusal to supply potentially relevant information may constitute a refusal

to negotiate in good faith in violation of N.J.S.A. 34:13A-5.4a(5) and derivatively a(1). State Operated School District, City of Newark, P.E.R.C. No. 2017-14, 43 NJPER 106 (¶32 2016).

The Commission has jurisdiction to decide whether information requested under the Act is relevant and is the appropriate forum to resolve such questions. Id.; see also, N.J.S.A. 34:13A-5.3.

In In re Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511, 530-531 (1996), the New Jersey Supreme Court noted the following regarding union requests for information:

[A]n employer must supply information if [there is] a probability that the information is potentially relevant and that it will be of use to the union in carrying out its statutory duties. Thus, unions are entitled to a broad range of potentially useful information. PERC requires every public employer to provide its employees' union with the information that the union needs to evaluate the merits of an employee's complaint about employer conduct unless such information is clearly irrelevant or confidential.

[citations omitted.]

However, "[a] majority representative does not have an absolute right to obtain all requested information; rather, the duty to disclosure turns upon the circumstances of the particular case." State of New Jersey (Office of Employee Relations), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987) (citations omitted).

ANALYSIS

We find that there are genuine issues of material fact with respect to the relevance^{5/} of the information requested by the PBA, particularly when granting all inferences in favor of the Township as we must in the context of a motion for summary judgment. See Brill, 142 N.J. at 523, 540; Judson, 17 N.J. at 73-75. Given that Szymanski's certification was the only non-documentary evidence proffered and that no other unit members have questioned the fairness or impartiality of the Township's promotion process, the Commission is left with no explanation as to why Szymanski's promotion in January 2017 does not render its

5/ New Jersey Court Rule 4:10-2(a) specifies the scope of discovery in civil matters:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

request for information moot or why it cannot obtain any necessary information through other means.^{6/}

Moreover, the PBA has provided no information relative to the promoted candidates and their union membership or activities. However, even assuming Szymanski scored last on the oral component of the promotional process, that in and of itself has no probative value on whether his activities on behalf of the PBA were taken into consideration in assessing his performance. Nor has the PBA adequately addressed the Township's concerns regarding disclosure (i.e., that the requested information is confidential and its disclosure could potentially injure or compromise the Hillsborough Police Department, individual members, test security, and/or the ability to use testing materials in future promotion processes). Under these circumstances, we find that the PBA has failed to demonstrate that, as a matter of law, the Township breached its duty to disclose relevant information. See In re Univ. of Medicine and

^{6/} In its motion for summary judgment, the PBA did not indicate whether it sought consents from any of the candidates for promotion with respect to the disclosure of their scores/ratings. We note that the U.S. Supreme Court has found that a company's willingness to disclose confidential test scores only upon receipt of consents from individual examinees satisfied its statutory obligation to bargain in good faith. See Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 318 (1979) (noting that "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice").

Dentistry of New Jersey, 144 N.J. at 530-531; State of New Jersey (Office of Employee Relations).

Turning to the specific information requested by the PBA, the Township claims that it properly maintained the confidentiality of the scores/ratings of each candidate as well as the names of evaluators who participated in the promotion process and that the PBA may not waive this right on behalf of unit members, non-unit members, or managerial executives. We note that under the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA),

[T]he personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access, except that:

. . . personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest. . . .

[N.J.S.A. 47:1A-10.]^{7/}

Although the Commission has found that OPRA does not always act as a bar to a public employer's disclosure of information contained within a personnel record, we have required public

^{7/} Similarly, the parties' CNA contains a provision stating in part that the contents of personnel files shall not be made public unless required for disciplinary or judicial proceedings.

employee representatives to demonstrate that such information has been requested for a proper purpose pursuant to a specific statute in order to obtain disclosure. As set forth above, we find that the PBA has failed to demonstrate that, as a matter of law, the requested information is being sought for a proper purpose pursuant to a specific statute. Compare State Operated School District, City of Newark, P.E.R.C. No. 2017-14, 43 NJPER 106 (¶32 2016) (citing Morris Cty. and Morris Coun. No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), aff'd 371 N.J. Super. 246 (App. Div. 2004), certif. den. 182 N.J. 427 (2005)), with Montclair Tp., P.E.R.C. No. 93-28, 18 NJPER 492 (¶23225 1992).

Accordingly, we cannot conclude that, as a matter of law, the Township breached its duty to disclose relevant information to the PBA. A hearing will provide an opportunity for the PBA to demonstrate relevance and for the Township to substantiate its concerns regarding disclosure. Accord Hanover Tp.

ORDER

PBA Local 205's motion for summary judgment is denied. This matter is remanded to the Hearing Examiner for a hearing.

BY ORDER OF THE COMMISSION

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

ISSUED: April 27, 2017

Trenton, New Jersey