P.E.R.C. NO. 2018-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HANOVER,

Respondent,

-and- Docket No. CO-2016-135

PBA LOCAL 128,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the Township's motion for summary judgment in an unfair practice case filed by the PBA. The unfair practice charge alleged that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by unilaterally changing a domestic abuse training program module to indicate that an employee found to be an actor in a domestic violence incident is responsible for any mandated counseling costs. The Commission dismisses the complaint finding that the PBA already received a binding grievance arbitration award that decided the issue underlying the unfair practice charge (specifically, that there was no past practice of the Township paying for counseling mandated on account of a domestic violence complaint or of releasing officers from duty to attend such counseling during work hours) and that the criteria for deferral to arbitration were met.

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 and on the brief; Natalia V. Shishkin, 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 the Township of Hanover (Township) in an unfair practice case filed by PBA Local 128 (PBA). The unfair practice charge alleges that the Township violated subsections 5.4a(1) through (7)[1/] of the New Jersey Employer-Employee Relations Act,

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 employment to encourage or discourage employees in the exercise of rights guaranteed to them by this act. (4) (continued...)

N.J.S.A. 34:13A-1 et seq. (Act), when it unilaterally changed a domestic violence abuse training program to indicate that any employee who was determined to be an actor in a domestic violence incident was responsible for related employer-mandated counseling costs.[2/]

PROCEDURAL HISTORY

On January 28, 2016, the PBA filed the underlying unfair practice charge. On February 24, 2017, the Director of Unfair Practices issued a complaint and notice of hearing with respect

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1/ (...continued)
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/ Specifically, the PBA's charge alleges that "[t]he Township's actions in unilaterally changing the parties' past practice and otherwise declaring that an officer ordered to undergo counseling must now also satisfy the cost of same is violative of N.J.S.A. 34:13A-5.4(a)(1) to (7) . . . [and] the PBA demands that the Township be required to restore the parties' past practice of requiring the Township to satisfy the cost of Township-ordered counseling; reimburse any officer wrongfully required to satisfy the cost of said counseling; negotiate with the PBA re the party responsible to satisfy the cost of said counseling; and comply with any other relief the Commission deems equitable and just."

to the PBA's 5.4a(1) and (5) allegations. On February 27, the Township filed an answer. A hearing was scheduled for May 31.

On May 3, 2017, the Township filed a motion for summary judgment and request for a stay of the hearing supported by a brief, exhibits, and the certification of its attorney. On June 21, the PBA filed an opposition brief and exhibits. On July 6, the Township'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

The PBA represents all patrol officers, detectives, and sergeants employed by the Township. The Township and the PBA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2014 through December 31, 2017. The grievance procedure ends in binding arbitration.

The instant unfair practice charge centers on the PBA's allegation that the Township unilaterally changed terms and conditions of employment. Specifically, the PBA maintains that unlike prior years, the Township's 2015 domestic violence abuse training program indicated that any employee who was determined to be an actor in a domestic violence incident was responsible for related employer-mandated counseling costs. The PBA has asserted that "[t]his change in the training module was apparently done in response to a pending grievance filed by PBA President Glenn Yanovak . . . ."

By way of background, New Jersey Attorney General Law Enforcement Directive No. 2000-3, entitled "Directive Implementing Procedures for the Seizure of Weapons from Municipal and County Law Enforcement Officers Involved in Domestic Violence Incidents," requires law enforcement officers to surrender all weapons whenever an act of domestic violence as defined in N.J.S.A. 2C:25-19 has been alleged. The County Prosecutor's Office within whose jurisdiction the incident occurred, not the victim or the law enforcement agency where the officer is employed, has the authority to determine whether the weapons should be returned.

On June 19, 2014, Detective Glenn Yanovak (Yanovak) was required to surrender his department-issued and personal weapons due to a domestic violence complaint. The Morris County Prosecutor's Office advised the Township that, among other things, Yanovak was required to undergo a fitness for duty psychological evaluation before a determination was made regarding whether his weapons would be returned. On August 5, Dr. Daniel Schievella issued a psychological evaluation opining that Yanovak "should be mandated to attend individual psychological counseling, most preferably with Dr. Jakob Steinberg, who specializes in the treatment of law enforcement officers."

On October 1, 2014, the domestic violence complaint was dismissed. On November 18, the Prosecutor's Office advised the Township that Yanovak was required to comply with "all [of] the counseling recommendations in [Dr.] Schievella's evaluation" before a final determination was made regarding whether his weapons would be returned. After the Township denied Yanovak's request to schedule counseling sessions while he was on-duty, he attended off-duty sessions with Dr. Steinberg from December 3, 2014 through May 19, 2015.

On March 18, 2015, Yanovak sent the Township a bill showing that employer-provided health insurance had paid $932 of Dr. Steinberg's total charges of $1,650, leaving an unpaid balance of $543. On March 31 and June 2, the Township advised Yanovak that it would not pay the outstanding $543 given that the Prosecutor's Office had required the counseling. The Township highlighted that employer-provided health insurance was paying Dr. Steinberg – an out-of-network provider – in accordance with plan terms.

On June 25, 2015, the PBA filed a grievance on Yanovak's behalf seeking reimbursement for out-of-pocket costs and compensation related to his off-duty counseling sessions with Dr. Steinberg. The grievance was denied at every step of the process. On March 8, 2016 an arbitration hearing was held. On May 13, an arbitration award was issued denying the grievance. In pertinent part, the arbitrator found:

-The Township was not the principal actor in the chain of events that unfolded after issuance of the June 19, 2014 warrant. Instead, the procedures followed, and decisions made, were governed by longstanding law enforcement protocols - protocols which required Yanovak to surrender his service and personal weapons and placed responsibility for the decision concerning re-arming on the County Prosecutor.

-The Township did not direct that Yanovak undergo counseling with Dr. Steinberg. Instead, that mandate came from the County Prosecutor, who stated in her November 18, 2014 letter that Yanovak "shall abide by all counseling recommendations in Schievella's evaluations" prior to any re-arming decision.

-The PBA has not pointed to any contract provision, or proven the existence of a binding and enforceable past practice, that would require the Township either to satisfy the balance of Dr. Steinberg's bill or pay Yanovak overtime compensation for attending the mandated counseling sessions.

-The grievant's participation in mandated counseling arose as a result of an off-duty domestic violence allegation and is not remotely similar to [other] types of Township-directed law enforcement duties.

-There is no equivalance between treatment sought during work hours because of a work-related injury, and treatment mandated by the County Prosecutor as a result of an officer's involvement in an off-duty incident of alleged domestic violence.

-The counseling was not ordered by the Township. [W]hile . . . the Township does pay for Township-ordered training and fitness for duty examinations, the PBA has made no showing that there was an established past practice whereby the Township paid for the full costs of any treatment recommended by an examining psychologist or physician.

> -[T]he Department's revision of its Domestic Violence Abuse Training Module [does not] weigh[] in favor of sustaining the grievance. [I]n 2015, the Department included language stating that an officer who is ordered by the Chief to attend domestic violence counseling shall pay the costs thereof. However, the addition of this language, where the module had not previously addressed the issue, does not in and of itself establish that the Township had a prior practice of paying such counseling.
>
> -[T]he Township itself had no role in recommending a particular counselor and, in any case, it in no way impeded the grievant from seeking to secure approval for an in-network psychologist.

LEGAL ARGUMENTS

The Township argues that summary judgment should be granted because the Commission has deferred to binding arbitration awards when a subsequent unfair practice charge alleges a violation of subsection 5.4a(5) that is contingent on the interpretation of a contractual provision or past practice. The Township maintains that the parties have already litigated the issue of whether there was a binding past practice requiring the Township to pay for counseling fees not otherwise covered by health insurance. Moreover, the Township asserts that there is no basis to entertain a post-arbitration challenge.

The PBA argues that the instant unfair practice charge (i.e., "address[ing] [the cost of] any counseling including those ordered or otherwise compelled by the [Township]") is different from the issue litigated in grievance arbitration (i.e.,

reimbursement and compensation for "domestic violence counseling ordered by the County Prosecutor"). The PBA also maintains that the issue of whether the Township was required to negotiate before changing the training module was not litigated in grievance arbitration.

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).[3/] 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. "Although summary judgment serves the valid purpose in our judicial system of

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3/ 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.

protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be 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).

The Commission has established the following criteria for determining when deferral to an arbitration award is appropriate:

> (1) the arbitrator must have had the authority to consider the issues of contractual interpretation underlying the unfair practice charge;
>
> (2) the proceedings were fair and regular; and
>
> (3) the award is not repugnant to the Act.
>
> [Town of Harrison, P.E.R.C. No. 82-73, 8 NJPER 118 (¶13051 1982).]

"When these criteria have been satisfied, recognition of an arbitrator's award furthers the desirable objective of encouraging the voluntary settlement of labor disputes." Id.; see also, State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977) (finding that "[j]ust because one party or the other is dissatisfied with an [arbitration] [a]ward does not mean that deferral is inappropriate"); City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982) (holding that a party "cannot. . . complain solely because the result is displeasing").

ANALYSIS

The Township's motion for summary judgment seeks a determination that deferral to the arbitration award denying the PBA's grievance is appropriate in this matter. Initially, we note that the PBA has not asserted that the grievance arbitration proceedings were unfair or irregular in any way or that the arbitration award is repugnant to the Act. Accordingly, we find that these aspects of the deferral criteria have been met. See Town of Harrison; accord Hudson Cty., P.E.R.C. No. 86-127, 12 NJPER 439 (¶17162 1986).

We also find that the arbitrator had the authority to, and did, consider the issue underlying the PBA's unfair practice charge (i.e., whether the Township violated the Act when it unilaterally changed a domestic violence abuse training program to indicate that any employee who was determined to be an actor in a domestic violence incident was responsible for out-of-pocket costs related to counseling mandated by the Township). When the parties submitted to binding arbitration, they stipulated that the arbitrator had the authority to determine the following issues:

> Whether the Township violated the parties' 2014-2017 agreement when it refused:
>
> > (a) to satisfy the outstanding amount of $1,167.00 for Dr. Steinberg's services?

> (b) to compensate Det. Yanovak for attending the counseling sessions with Dr. Steinberg while he was off duty?
>
> If so, what shall be the remedy?

The gravamen of both the grievance and the complaint is whether the Township altered a past practice of paying for an employee's out-of-pocket costs related to counseling mandated by the Township after a determination that the employee was an actor in a domestic violence incident. Despite having the opportunity to examine witnesses, present evidence, and submit briefs, the the PBA was unable to prove the existence of a past practice that would require the Township to satisfy an employee's out-of-pockets costs or pay overtime compensation for attending mandated counseling sessions. Further, the arbitrator specifically held that:

> -this type of mandated counseling/treatment arose as a result of off-duty domestic violence allegations and was not remotely similar to other types of Township-directed law enforcement duties;
>
> -although the Township does pay for Township-ordered training and fitness for duty examinations, the PBA was unable to demonstrate that there was an established past practice whereby the Township paid for the full costs of any treatment recommended by an examining psychologist or physician; and
>
> -changes to the Township's domestic violence training abuse program that require employees to pay the costs for Department-ordered domestic violence counseling, particularly

> when the training did not previously address the issue, do not in and of themselves establish that the Township had a past practice of paying for such counseling.

See also, Town of Harrison; accord Hudson Cty.

Moreover, the PBA has failed to provide a certification or any other evidence other than training slides in its opposition to the Township's motion for summary judgment that would create a genuine issue of material fact regarding the existence of an alleged past practice or a change in any term and condition of employment. Accordingly, we find that all of criteria set forth above have been met and hold that deferral to the arbitration award is appropriate given that the complaint alleges violations of subsections 5.4a(1) and (5).

ORDER

The Township of Hanover's motion for summary judgment is granted. The complaint is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: September 28, 2017

Trenton, New Jersey