P.E.R.C. NO. 2018-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CAPE MAY,

Respondent,

-and-

Docket Nos. CO-2015-237
CE-2016-004

CAPE MAY COUNTY ASSISTANT PROSECUTOR'S ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the County's motion for summary judgment in an unfair practice case filed by the Association. The unfair practice charge alleged that the County violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by (1) rescinding a contract proposal for a successor collective negotiations agreement on December 18, 2014 as a result of the Association having filed a lawsuit on December 12, 2014 seeking to prevent the County from changing its employee health insurance program; (2) proposing a contract provision in March 2015 that would require Association members to assume the costs associated with the Cadillac tax under the Affordable Care Act; (3) not permitting the County Prosecutor to award promotions until the Association agreed to a contract; and (4) refusing to admit Association representatives to a health benefits focus group meeting held on June 3, 2015 by the County with other majority representatives of the County's employees. The Commission dismisses the complaint finding that the Association has produced insufficient evidence that there was a causal link between its filing of the lawsuit and the consequences that followed and that the County had a legitimate, non-retaliatory reason for withdrawing the contract proposal; that there is no evidence that the County was hostile to the Association because it would not agree to the elimination of the core plan or to the County's Cadillac tax proposal; and that it is not an unfair practice to invite some but not all employee representatives to a meeting to discuss health care options given that (1) the Association was not singled out for exclusion and (2) the County informed the Association that it would be invited to another meeting regarding the options at a later date.

The Commission also grants the Association's motion for summary judgment in an unfair practice case filed by the County. The unfair practice charge alleged that the Association violated the Act by obtaining the arrest records of a member of the County's negotiations committee and sharing them with other County employees for the purpose of harassing and intimidating the County's negotiations committee member and the committee and to gain an advantage in negotiations. The Commission dismisses the complaint finding that the County has failed to show that any Association member used or attempted to use the underlying arrest or related records to intimidate or harass anyone on the County's negotiations committee or to gain advantage in contract negotiations.

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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Charging Party.

Appearances:

For the Respondent, Gruccio, Pepper, DeSanto & Ruth, PA, attorneys (Stephen Barse, of counsel)

For the Charging Party, Cape May County Assistant Prosecutor's Association (Saverio M. Carroccia, of counsel)

DECISION

This case comes to us by way of a motion for summary judgment filed by the Cape May County Assistant Prosecutor's Association (Association) seeking the dismissal of an unfair practice charge filed against it by the County of Cape May (County). The County opposes the Association's motion and has filed a cross-motion for summary judgment seeking the dismissal of unfair practice charges filed against the County by the Association.

PROCEDURAL HISTORY

On April 9, 2015, the Association filed its initial unfair practice charge alleging that the County violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (3), and (5),[1/] by engaging in the following conduct:

> Rescinding a contract proposal for a successor collective negotiations agreement (CNA) on December 18, 2014 as a result of the Association having filed a lawsuit on December 12, 2014 seeking to prevent the County from changing its employee health insurance program;
>
> Proposing a contract provision in March 2015 that would require Association unit members to assume the costs associated with the Cadillac Tax under the Affordable Care Act; and
>
> Not permitting the County Prosecutor to award promotions until the Association agrees to a contract.

On June 4, 2015, the Association filed an amended charge alleging that the County violated subsections 5.4a(1), (4), and

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1/ These provisions prohibit public employers, their representatives and agents from "(1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by this Act. . . . (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. . . . (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."

(7),[2/] by refusing to admit Association representatives to a health benefits focus group meeting held on June 3, 2015 by the County with other majority representatives of the County's employees.

On July 31, 2015, the County filed its unfair practice charge alleging that the Association violated subsection 5.4b(3)[3/] of the Act by obtaining the arrest records of a member of the County's negotiations committee and sharing them with other County employees for the purpose of harassing and intimidating the County's negotiations committee member and the committee and to gain an advantage in negotiations.

On October 5, 2016, the Director of Unfair Practices issued a complaint and notice of pre-hearing with respect to both parties' allegations and an order consolidating the cases. On May 16, 2017, the Association filed its motion for summary judgment, along with a brief, exhibits, and certifications of Assistant Prosecutor Christine Smith, who is one of the Association's negotiators, and of thirteen other Association

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2/ These provisions, excluding subsection 5.4a(1), prohibit public employers, their representatives and agents from "(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. . . . (7) Violating any of the rules and regulations established by the commission."

3/ This subsection prohibits employee organizations, their representatives and agents from refusing to negotiate in good faith with the public employer of the organization's unit members.

members. On June 13, the County filed its cross-motion for summary judgment, along with a brief in opposition to the Association's motion and in support of the County's cross-motion, exhibits, and certifications of the following County employees and official:

> Jeffrey Lindsay, Director of Human Resources and Training and a member of the County's negotiations team;
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> Elizabeth Bozzelli, Clerk of the Board of Chosen Freeholders and a member of the County's negotiations team;
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> Mike Laffey, Director of Operations and a member of the County's negotiations team;
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> Frank Germanio, a Captain in the County's Sheriff's Office;
>
> Dawn Simonsen, Keyboarding Clerk;
>
> County employees Kathy Bakley, Catherine Neider, and Michele Morrissey;[4/] and
>
> Gerald Thornton, Freeholder Director.

On June 26, 2017, the Association filed a brief in opposition to the County's cross-motion and the certification of Robert Taylor, County Prosecutor. On July 6, the motions were referred to the full Commission for consideration pursuant to N.J.A.C. 19:14-4.8(a).

FACTS

The Association's Charge

4/ The positions of Bakley, Neider, and Morrissey are not identified in the certifications or other submissions.

The Association represents the assistant prosecutors employed full time by the County in its Prosecutor's Office. The Association and the County are parties to a collective negotiations agreement (CNA) in effect from January 1, 2009 through December 31, 2012. The CNA automatically renewed at its expiration,[5/] and the parties negotiated a wage increase for 2013.

Under the 2009-2012 CNA, the County reserved the right to change employee health insurance coverage or to implement a self-funded plan as long as the level of benefits provided "is on balance appreciably comparable to the current coverages." During the contract term, the County changed coverage from a private plan to a self-insured plan administered by AmeriHealth. By 2013, the annual cost for family coverage under the then-current insurance plan had increased to $29,100.00.[6/]

5/ This information is set forth in the parties' jointly filed request for mediation to resolve an impasse in negotiations over the wage increase for 2013. Docket No. I-2014-004, filed July 2, 2013. The salary issue was resolved through that process in December 2013. We note that while the Association alleges that the County refused to negotiate in 2013 over any issue except salary, this assertion is not supported by a certification, nor is it a basis of the charges before us. Moreover, any claim based upon the parties' interactions in 2013 would have been time-barred under N.J.S.A. 34:13A-4.5(c) by the time the Association's initial charge was filed in 2015.

6/ These facts are alleged in the complaint filed by the Association seeking to prevent the County from changing the health insurance plan and are not disputed by the County.

On October 4, 2013, Steve Barse, counsel for the County, sent Assistant Prosecutor Smith a proposed successor agreement having a term from January 1, 2014 through December 31, 2016. The proposal would have changed various provisions of the expired CNA as well as the health benefits program, with the County offering "at least three major medical plans with varying premiums and deductibles." However, like the 2009-2012 CNA, the proposed agreement reserved to the County the right to make changes to plans as long as the "level of coverage provided is on balance appreciably comparable to the current coverages." Under the proposed agreement, the assistant prosecutors would receive a 1% wage increase on January 1 of each year of the agreement.[7/]

On or about January 16, 2014, the Association informed the County that the Association would provide the County a proposed agreement that month. On or about March 5, however, the Association notified County Counsel Barse that "the Association's proposed contract was with the Prosecutor for review." On or about April 9 and June 3, Barse "again sought a proposal from the Association."[8/]

7/ A copy of the proposed agreement along with Barse's transmittal email to Smith were attached to the Association's charge. Unless otherwise noted, the remaining facts are based on documents provided by one or the other party, the authenticity of which documents has not been disputed.

8/ This information is set forth in the Association's charge.

On August 7, Prosecutor Taylor, on behalf of the assistant prosecutors, met for preliminary negotiations with the County's negotiating team, consisting of Human Resource Director Lindsay, Operations Director Laffey, and Freeholder Board Clerk Bozzelli. During the meeting, Taylor negotiated additional compensation to be distributed to Association members. Lindsay informed Taylor that the County team thought the County "would be agreeable, but that the County wanted to change a few provisions in the contract." Taylor responded that if the assistant prosecutors were "assured of the compensation, it should not be a problem."[9/]

On August 19, 2014, Taylor sent the County negotiations team an email attaching "the [Assistant Prosecutors'] highlighted, new contract proposal" for consideration before a meeting to be held on August 27. Taylor added, "I have not indicated my agreement to any of these new terms."[10/]

When the parties' representatives met again on August 27, Lindsay mentioned to Taylor that there might be changes to the health benefits program. Taylor responded that the assistant prosecutors were focused on additional compensation and would be

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9/ The County's submissions included a copy of Taylor's email to the County's team confirming the meeting. The remainder of these facts are taken from the certifications of Lindsay and Laffey. Taylor's certification does not refute Lindsay's and Laffey's accounts of what occurred at the meeting.

10/ The County provided a copy of the email but not the "new contract proposal."

willing to concede certain terms to get the increases.[11/] However, at no time did Taylor, on the Association's behalf, "agree to the [County's] new health insurance proposal or give the County reason to believe the Association would agree" to it.[12/]

On November 3, 2014, Lindsay sent Assistant Prosecutor Smith "a modified contract proposal."[13/] Under this proposal, the contract would be in effect from January 1, 2015 to December 31, 2018, rather than January 1, 2014 to December 31, 2016, and effective January 1, 2015, employees would receive an annual 2% wage increase, rather than a 1% increase.[14/] Additional changes were made to the health benefits provision. In place of the statement of the prior proposal regarding three plans, the modified proposal said:

> The level of benefits ... will be appreciable (sic) comparable to the coverage currently provided and will be more fully described in the Benefit Information Guide for Cape May County employees distributed at open enrollment each year.

11/ See n.9 above.

12/ This information is set forth in Taylor's certification.

13/ This information is set forth in the Association's initial charge. A copy of the "modified contract proposal" was attached to the charge.

14/ A copy of the proposed contract along with Barse's transmittal email to Smith were attached to the Association's charge.

On November 5, 2014, Smith sent an email to Lindsay stating that she would like the phrase "appreciable comparable" defined. On November 6, Lindsay responded that the phrase was used "with its plain meaning." On November 18, Smith sent Lindsay an email stating as follows:

> I sent the following message to you last Monday, November 10, 2014 and did not receive a response. I am resending this for your consideration. Paragraph #3 is no longer an issue and is "off the table."
>
> We have reviewed the proposed contract and there are a few items that need clarification. In speaking with the Prosecutor this morning, I understand that he will be reaching out to you to discuss one of the items of concern. There remain a few matters, however, that the association would like clarified.
>
> 1) Firstly, the 2% is acceptable, however, the contract dates should be January 1, 2014 through December 31, 2017.
>
> 2) The language "appreciably comparable" is too vague and is open for misinterpretation. The Association needs this phrase defined within the context of the contract. The Association prefers the phrase "substantially equivalent" as that is how we interpret "appreciably comparable."
>
> 3) . . .
>
> We look forward to resolving this matter expeditiously. Again, thank you for your time.

On November 21, Smith sent an email to Lindsay advising him that the item she previously told him was off the table was now back on the table. That item was a proposal to modify a

provision of the expired CNA under which employees with 25 years of service with the County were provided health insurance upon retirement. Under the Association proposal, employees would be eligible for that benefit if they retired with 25 years of service credit in the Public Employment Retirement System, the last 15 of which were from employment with the County.

In late November and early December 2014, the County hosted several open enrollment meetings to inform employees about the 2015 health benefits program. The information shared included notice that the so-called "core medical plan" would be eliminated.[15/] On December 1, Smith sent Lindsay an email stating:

> After attending this morning's health insurance meeting, and speaking to the Prosecutor, I am sending you this email request for clarification. I understand that . . . the county has unilaterally removed any out-of-network benefits for [the core plan] option. As you are aware, the current health insurance core benefits plan includes an out-of-network option. Our concerns are that the unilateral removal of an out-of-network benefit option violated the terms of the language found in most employee's (sic) contracts under health insurance coverage that suggests any health insurance modification shall be "appreciably comparable." We find that the unilateral removal of all out-of-network benefits is not providing us with "appreciably comparable" coverage.

15/ This information is from Lindsay's certification and is consistent with both the Association's complaint seeking to prevent the change in health benefits and Smith's December 1, 2014 email to Lindsay, recounted next in this decision.

Lindsay responded to the email on the same day, asking Smith to advise him exactly what she was seeking to be clarified.

On December 5, 2014, Lindsay sent Smith another email. It advised that the Freeholder Board was "in agreement with the terms as we have exchanged" but not the Association's proposal to alter the provision regarding health insurance upon retirement. Lindsay asked Smith whether "we have agreement on the contract" or need to "engage in further negotiations."

Smith did not respond to the email.[16/] Instead, on December 12, 2014, the Association filed a verified complaint and order to show cause seeking to prevent the County from making any changes to the health insurance program as proposed to take effect on January 1, 2015.

On December 18, 2014, the County agreed to extend the core plan for 2015.[17/] On the same date, Lindsay sent an email to employees outlining changes to the health plan options for that

16/ This information is set forth in Lindsay's certification and in a narrative accompanying a Notice of Impasse filed by the Association on April 14, 2015. The Notice identifies the facts giving rise to the request for mediation as, "The principal items in dispute are the terms and conditions of the proposed new labor contract between" the Association and the County. Docket No. I-2014-004. A case notation indicates that this matter was settled in March 2016.

17/ This is set forth in an order entered on January 2, 2015, dismissing the verified complaint and order to show cause on motion of the Association.

year and setting forth the annual premium for each.[18/] The core plan's premium for family coverage had increased to $31,433.88.

Also, on December 18, 2014 Lindsay sent Smith an email informing her that the County had identified a few provisions of the contract proposal sent to her on November 3 that needed to be modified and, therefore, it was rescinding that proposal. He also requested dates in January 2015 for negotiations.

Further with regard to the withdrawal of the proposal, Lindsay certifies:

> The decision to offer the Core Medical Plan added a substantial cost to the County budget that was not previously anticipated. Likewise, it added additional cost to the Association's contract that was not previously anticipated. Accordingly, based upon a change to the total cost of the contract, which was not previously anticipated, the County rescinded the offer . . . .
>
> . . . .
>
> It was not done for any type of retaliatory, punitive or otherwise improper reason.

The Association's certifications do not specifically respond to Lindsay's explanation although Taylor certifies that after the Association "sued, the County refused to give the raises [he] negotiated and they agreed to" and that the County repeatedly

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18/ Employees choosing not to remain in the core plan could enroll in a plan that did not provide out-of-network coverage, which we understand to be the plan that the County wanted to substitute for the core plan, or in a high deductible plan. Their 2015 annual premiums for family coverage were $29,317.03 and $23,099.64, respectively.

stated that "the Assistant Prosecutor's cost [the County] 3 million dollars without providing any proof."[19/]

On January 2, 2015, the court dismissed the Association's complaint without prejudice at the Association's request.

On January 20, the County representatives, now joined by labor counsel Barse, met with Association representatives Smith and Michelle DeWeese to continue negotiations. At the meeting, the County representatives presented a third "contract proposal."[20/] This proposal, like the initial one, included a 1% wage increase, was effective for calendar years 2014, 2015 and 2016, and made changes to the health insurance provision. Among the latter was a new provision requiring employees to be responsible for any "Cadillac Tax" assessed against the County under the Affordable Care Act due to the high cost of the coverage.[21/] The County included the requirement in other contracts where the unit would not agree to the plan option the

19/ There is no evidence that the Association requested proof of the cost to continue the core plan.

20/ This information is from the Association's charge. The Association submitted a copy of the "contract proposal."

21/ At the end of 2015, a law was passed delaying the tax. The effective date of the tax changed from 2018 to 2020. Under current threshold amounts, the plan options offered by the County for 2015, except the high deductible plan, would trigger the tax. For an overview of the tax, see https://www.cigna.com/health-care-reform/cadillac-tax.

County preferred, the Community Advantage Plan.[22/] When asked by the Association representatives why the County was making a different "contract proposal," Lindsay responded that the County had taken "a big hit on insurance that [it] did not anticipate."[23/]

By email sent on February 4, 2015, Smith asked Barse to agree to changes to the modified contract proposal that Lindsay sent to Smith on November 3, 2014.[24/] She indicated that Lindsay had presented that "contract" to Taylor after "our last contract meeting." Smith continued, "As we discussed, the only modification to the [November 3] contract mentioned by Lindsay was the inclusion of the Cadillac Tax provision." The changes proposed by Smith would extend the contract by one year to December 31, 2017; revert to annual 2% salary increases; exclude

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22/ This information is from Lindsay's certification. The Association did not submit a certification that refutes the statement.

23/ This statement is taken from the Association's charge and is consistent with Lindsay's explanation for rescinding the contract proposal and Taylor's certification that the "County" told him that the assistant prosecutors had cost the County, which we understand to refer to the cost to continue the core plan option.

24/ Smith refers in the email to the modified contract proposal as the "December 3, 2014 contract." In response, Barse also refers to a December 3, 2014 contract. However, we assume they meant the November 3, 2014 proposal. The Association only mentions in its charge three contract proposals from the County, one of which is the November 3 proposal and none of which is dated December 3. Also, Smith's list of sought-after changes coincides with the November 3, 2014 proposal.

the Cadillac Tax provision since the tax would "not come into effect during this contract"; omit a proposed change to the sick leave provision; make language changes to three other articles; and include the Association proposal regarding health insurance upon retirement but only with respect to three named members "and their eligible dependents."

By email of February 11, 2015, Barse responded to Smith, advising that she was mistaken that the County had agreed to "work off of the December 3, 2014 contract proposal" and that more time was needed to review and respond to her email and the issues she raised. By email sent on March 24, Barse addressed most of the changes Smith had requested, indicating which were acceptable (contract term, retroactive pay but from January 1, 2015), and which were not. Among the latter was the exclusion of the Cadillac Tax provision. Barse explained that while the tax would not take effect during the life of "this contract," "[e]xperience has shown that contract negotiations can extend beyond the expiration date of a contract," and in that event, the County would be subject to the tax in 2018.

By email sent on March 25, 2015 Smith informed Barse that the Association would not agree to the Cadillac Tax provision and required retroactive pay from January 1, 2014 for a 2% salary increase effective that date, and that in exchange, the Association would withdraw its other proposals and acquiesce to the County on those items. She added that if these terms were

not acceptable, the Association would consider the parties at impasse and proceed accordingly. The Association filed a notice of impasse on April 14, 2015.[25/]

In June, Taylor and Lindsay exchanged emails regarding the cost of the health insurance plans for the "APs." In one, Taylor asked, "[W]hat if each person opting for the more expensive paid extra to make up the additional cost to the county[?]"

The County's Charge

On May 12, 2015, Lindsay sent an email to eight employees inviting them and "another designee from your bargaining unit" to attend a focus group meeting on June 3, 2015 concerning the Community Advantage Plan. He asked recipients to let him know the names of the individuals from their units who would be attending. The Association and employees from another negotiations unit were not invited. At the time, the Association was still opposed to moving to the Community Advantage Plan.[26/]

On June 3, Association representatives Smith and DeWeese along with Assistant Prosecutor Meghan Hoerner appeared unannounced at the focus group meeting. After an exchange of

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25/ See n.16.

26/ Both parties filed a copy of the Lindsay email with their submissions. The Association's continuing opposition to the alternative plan and the other remaining facts are derived from the Association's response to the County's statement of facts accompanying its cross-motion. The other uninvited unit, comprised of clerical employees in the County Prosecutor's Office, is not represented by the Association.

greetings, Smith asked Lindsay if he minded them sitting in on the meeting. Lindsay replied, "Yeah, this is a small focus group. We sent out invitations. We are having another meeting you guys will be invited to." Smith asked Lindsay, "Why are we being excluded," and he answered, "You were not invited." As soon as Lindsay responded, Smith repeated the same question or said, "Why?" She did this at least a dozen times in the course of a minute. Lindsay continued to reply, "You were not invited," and again mentioned that they would be invited to another focus group meeting on a future date.[27/] Lindsay acknowledged that another meeting was not then scheduled.

The encounter began in the reception area of the human resources unit. When Lindsay turned and walked toward the room where the focus group was to meet, Smith followed Lindsay.[28/] She

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27/ Smith made an audio-recording of the encounter without Lindsay's knowledge. The Association submitted a copy of the recording with its amended charge; the County with its motion. We have listened to the recording. These facts are based upon the recording and the Association's reply to the County's statement of facts.

The County has not filed a charge based upon recording the interaction without its knowledge. We do not condone a party recording meetings with the other party without the latter's knowledge as such conduct is prone to generate labor relations distrust. New Jersey Turnpike Auth., P.E.R.C. No. 2017-51, 43 NJPER 354 (¶101 2017).

28/ These facts are set forth in the certifications of Lindsay, Captain Germanio, Clerk Simonsen, and Ms. Bakley and are not refuted by the Association's certifications. The certifications of DeWeese and Hoerner, which are identical

(continued...)

encouraged her companions to come, too, telling them, "They can't exclude us, they absolutely cannot exclude us." At that point, approximately a minute and twenty seconds into the encounter, Lindsay said, "I can; I'll call the cops if I have to." Smith answered at once, "Go ahead!" By this time, Lindsay, with Smith in tow, had moved away from the meeting room. After a brief lull, Smith again asks why they were "being excluded," and about a minute and forty-five seconds into the encounter, Lindsay points toward the door and says, "It's time for you to go." Smith again asks, "Why?"

Around two minutes into the encounter, Lindsay instructs someone to call the police. Smith responds, "We are entitled to an answer." After another fifteen to twenty seconds, she, Deweese, and Hoerner abandon their attempt to attend the meeting.

On June 3 or 8, 2015, Smith made a request pursuant to the Open Public Records Act (OPRA) for arrest records of Lindsay stemming from an incident in 2012. Lindsay certifies that the

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28/ (...continued)
to the other assistant prosecutor's certifications except Smith's, do not address the encounter. Nor does Taylor's. Smith, in her certification, does not set forth a detailed description of what occurred and where but acknowledges trying to attend the insurance meeting and Lindsay directing a staff member to call the police. Much of her certification consists of characterizations (e.g., Lindsay was confrontational) and conclusory statements (e.g., Lindsay prohibited her from attending). None refute the basic facts as heard on the audio-recording and set forth in the County's certifications.

charge resulting from his arrest was later dismissed. Smith certifies that her sole purpose in requesting the records was for her knowledge and safety. She denies using or attempting to use the records to "harass or intimidate" Lindsay or other members of the County's negotiations team or "to gain an unfair advantage in contract negotiations" with the County.

The other Association members, in certifications identical to one another, likewise deny using or attempting to use the arrest records to intimidate or harass Lindsay or other members of the County's negotiations team or to gain "an unfair advantage" in contract negotiations.[29/]

On June 12, 2015, Taylor requested to met with Freeholder Thornton. Clerk Bozzelli and Lindsay were present during the meeting. Taylor advised them that he had met with the "Association representatives" and told them that the information from the OPRA request could not be used.[30/]

29/ All of the certifications, including Smith's, are otherwise silent as to whether any assistant prosecutor shared the arrest records with persons outside the Association or County negotiations team.

30/ This information is from the certifications of Lindsay, Thornton, Bozzelli and, with respect to telling the Association representatives they could not use the information from the OPRA request, Taylor's. Lindsay, Bozzelli, and Thornton also certify that Taylor called the three assistants "troublemakers," told them he was outraged and that "curse words flew" during his meeting with them. Taylor certifies that it was the "representative of the

(continued...)

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). 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 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).

ANALYSIS

The Association's Motion Seeking to Dismiss the County's Charge

30/ (...continued)
County" who "first used" the term "troublemakers and that he did not recall "'curse words' flying or being outraged."

The County's unfair practice charge alleges that the Association failed to negotiate in good faith by obtaining Lindsay's arrest records and sharing them with other County employees for the purpose of harassing and intimidating Lindsay and the County's negotiations team and to gain an advantage in negotiations. N.J.A.C. 19:14-1.3(a)(3) requires a charge to set forth, among other information, the subsection or subsections of the Act alleged to have been violated. Although the County's charge only identifies subsection 5.4b(3) as the subsection of the Act allegedly violated, it also cites in its brief subsection 5.4b(2) and argues that Smith intended to interfere with the County's selection of Lindsay as one of its negotiators with the implicit threat of releasing his arrest records at any time.[31/] Since a complaint only issued with respect to the refusal to negotiate claim and the County did not seek to amend its charge to allege other claims, we may not entertain the 5.4b(2) claim in determining the pending motions. However, for the reasons that follow, we would reach the same conclusions regardless of which claimed violation was pled.

31/ Subsection 5.4b(2) prohibits employee organizations and their representatives or agents from interfering with, restraining or coercing a public employer in the selection of its representatives for purposes of negotiations or the adjustment of grievances.

A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. In re State of New Jersey, P.E.R.C. No. 76-8, 1 NJPER 72 (1975), aff'd, 141 N.J. Super. 470 (App. Div. 1977). The analysis will examine whether the party brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach an agreement. Ibid.

The County's argument focuses on what it asserts to be the ill-intentions of Smith in securing Lindsay's arrest records. For example, it argues that Smith, as an assistant prosecutor, should have been aware that arrest records, without proof of a conviction as here, serve no useful purpose, making her asserted reason for obtaining them - for personal knowledge and safety on account of Lindsay's behavior during the June 3, 2015 incident - implausible. The County also argues that Smith mischaracterizes Lindsay's behavior during the incident as physically aggressive.[32/] While Smith's actual motivation may be debatable,

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32/ Based upon our review of the audio-recording of the June 3 incident and the certifications filed in this matter, we do not conceive how a reasonable fact finder could find that Lindsay was aggressive during the incident. However, that does not foreclose a finding that, subjectively, Smith felt threatened on account of Lindsay's conduct during the incident.

the County has failed to show that Smith or any other Association member used or attempted to use Lindsay's arrest to intimidate or harass Lindsay or any other member of the County negotiations team or to gain advantage in contract negotiations. There is no evidence to show that Association members publicized Smith's request or the content of the arrest records. The County's arguments are only speculative. It has failed to come forward with evidence to refute the assistant prosecutors' certifications that they made no use of the arrest records. Therefore, the County's claim fails for lack of proof. Compare with Borough of Flemington, P.E.R.C. No. 88-82, 14 NJPER 240 (¶19087 1988)(finding that a majority representative violated the Act when it privately and publicly accused the Borough's negotiator of having committed crimes of bribery and extortion during negotiations even after it was advised by the prosecutor that the negotiator he had not violated any criminal statutes). Furthermore, an OPRA request for arrest records of the other party's negotiator, standing alone, does not constitute a failure to negotiate in good faith. Indeed, the parties continued to exchange proposals for a successor agreement before and after the incident. Therefore, we grant the Association's motion for summary judgment and dismiss the County's charge.

The County's Motion to Dismiss the Association's Charge

The Association's initial charge alleges that the County refused to negotiate in good faith and discriminated against Association members by withdrawing the contract proposal it made on November 3, 2014 and by proposing that Association members bear the Cadillac tax due to the high cost of the coverage afforded under the core medical plan. The Association claims that the County took this action because the Association had sued the County for breach of contract.

In re Bridgewater Tp., 95 N.J. 235, 244 (1984), sets forth the elements that a charging party must prove to establish that it has been retaliated against for protected activity. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. However, even if those grounds are established, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242.

Here, the protected activity engaged in by the Association was its filing of a lawsuit seeking to prevent the County from eliminating the core medical plan and making other changes to the health benefits program. The County knew of that activity. Therefore, this dispute centers around whether the County was hostile toward the Association's protected activity, and whether such hostility was a substantial or motivating factor in its rescinding the November contract proposal. Even if it is established that the County was hostile towards the Association's protected activity, the County will not have violated the Act if it can prove by a preponderance of the evidence that it would have rescinded the contract proposal absent the protected conduct.

Initially, we find that the Association has produced insufficient evidence that there is a causal link between its filing of the lawsuit and the consequences that followed. Such a connection is necessary to justify an inference of retaliatory motive or anti-union animus. The Association relies almost entirely upon the temporal proximity between the filing of the lawsuit and the withdrawal of the November contract proposal to demonstrate the causal connection. But time alone is insufficient to prove hostility under the circumstances of this case because less than a week after the filing of the lawsuit, the County agreed to maintain the core medical plan for 2015,

continued to negotiate with the Association over the health plan to be provided in later years, and proposed another contract that still offered employees a salary increase, albeit less than the prior proposal. These later acts countermand any inference of retaliatory motive arising from the temporal connection between the lawsuit's filing and the withdrawal of the November proposal. The later acts are inconsistent with a finding that the County was trying to punish members for engaging in protected activity.

Even if we accepted the temporal proximity between the filing and withdrawal of the contract proposal as marginally indicative of hostility, the record shows that the County had a legitimate, non-retaliatory, non-discriminatory reason for withdrawing the November proposal. The County rescinded the proposal because the decision to offer the core medical plan added a substantial and unanticipated cost to the County budget. Stated otherwise, as the Association quoted Lindsay, the County had taken a "big hit on insurance it did not anticipate."

It is not an unfair practice to withdraw, before acceptance, an economic proposal upon discovering that the other party will not agree to a proposal on another item that is anticipated to offset the total contract cost. Employers negotiate from the perspective of the total cost of the contract, and it is a common and lawful technique to package economic issues, linking employee compensation to insurance benefits, for example. That is what

the County did here. The evidence shows that it was willing to increase members' salaries to 2% rather than 1% because it was expecting a reduction in cost by changing health plans, and expecting employees to agree to the changes. When the County learned that the Association would not make concessions for the salary increase, it withdraw the 2% offer. Similarly, when the County learned that the Association would not agree to changes to the health benefits program, it proposed that employees bear the Cadillac tax that would otherwise fall on the County. While the Association had the right to not agree to these terms, the County had the right to reassess the amount of salary increase given health care costs, including the potential tax.[33/]

We emphasize that all the emails and contract documents before us refer to "proposals." There was no meeting of the minds on a final contract, and the Association had not accepted the November proposal before it was withdrawn. Furthermore, the parties continued to negotiate after the November proposal was rescinded. Therefore, we grant the County's motion and dismiss the Association's 5.4a(3) and (5) claims regarding the withdrawal of the November proposal and the Cadillac tax, and finding no

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33/ We note that Taylor does not deny Lindsay's and Laffey's assertions that at the outset, Lindsay told Taylor that the County might agree to additional compensation for assistant prosecutors but wanted changes in the contract, including to the health benefits program.

independent basis to sustain a 5.4a(1) claim, that claim as well.

Our analysis as to those alleged claims applies equally to the remaining allegation of the initial charge - that the County would not allow the Prosecutor to "award promotions" until the parties had come to agreement on a successor contract. Preliminarily, we note that the certifications of Taylor and the assistant prosecutors do not mention promotions. Nor does the Association explicate this allegation in its brief or provide any exhibits pertaining to it.

The County argues that discussions about promotions were part and parcel of the negotiations taking place over compensation issues, and that just as the Association was free to reject the County's health insurance proposal, the County was entitled to change its position on the other compensation matters once it learned of the Association's changed position.

The timing of promotions is not a mandatorily negotiable term or condition of employment and instead falls within the range of management prerogatives. See Paterson Police PBA Local v. Paterson, 87 N.J. 78 (1981). However, an employer violates 5.4a(3) if it denies a promotion based upon the particular employee's exercise of protected activity. Bloomfield Tp. and Pross, P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd, NJPER Supp.2d 217 (¶191 App. Div. 1989), certif. denied, 121 N.J. 633 (1990).

Here there is no allegation that promotions were denied because of a specific assistant prosecutor's protected activity. Moreover, there is no evidence that the County was hostile to the assistant prosecutors because they would not agree to the elimination of the core plan or due to their opposition to the County's Cadillac tax proposal. And we have found that the County did not refuse to negotiate in good faith. In the complete absence of evidence regarding this allegation, we grant summary judgment on it as well.

The initial charge also asserts that the alleged rescission of the November proposal and the County's proposal that employees bear the cost of any Cadillac tax violated subsection 5.4a(1), prohibiting "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." We have held that a violation of another unfair practice provision derivatively violates this subsection. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004). The Association does not develop this claim in its brief opposing the County's cross-motion. We fail to see how changing proposals during on-going negotiations interferes or even tends to interfere with the employee rights under the Act. Therefore, and given that the County's action did not violate another unfair practice provision, we grant the County's motion on this claim.

The amended charge also alleges that the County violated subsections 5.4a(1) and (4) of the Act by refusing to admit Smith and two other Association members to the focus group meeting on June 3, 2015.[34/] We disagree.

First, we find that it is not an unfair practice to invite some but not all employee representatives to a meeting to discuss health care options. The Association was not the only majority representative not invited to attend the meeting, and another group that was not invited had not filed a lawsuit against the County to prevent the health plan changes. Therefore, there is no causal link between the filing of the lawsuit and the Association not being invited to the meeting.

Moreover, Lindsay told Smith that he would schedule another focus meeting at a later date and invite the Association to attend it. Lindsay already knew the Association was opposed to the plan the County preferred and that the Association had filed a notice of impasse over the terms of a successor agreement. He was entitled to communicate with and solicit feedback from other

34/ The Association also alleged that the County violated subsection 5.4a(7) of the Act by not admitting the Association members to the focus meeting. Since it has not identified or discussed any Commission regulations allegedly violated by the County, the County is entitled to summary judgment on this allegation.

employee representatives about the County's preferred plan outside of the presence of the Association.[35/]

Smith was entitled to ask Lindsay if she could attend the focus meeting and then to ask him why she had not been invited to it. But Smith was not engaged in protected activity by repeating the same question, over and over again, while following Lindsay from room to room, within the eyesight and earshot of other

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35/ Our caselaw involving an alleged exclusion from a meeting is not contrary to our holding here. In Essex Cty. Vocational Sch. Bd. of Ed. and Marie Iadipaoli, P.E.R.C. No. 89-17, 14 NJPER 565 (¶19237 1988), we held that an employee's exclusion from a meeting on May 1 with other employees in her title was insufficient circumstantial evidence to infer that her employer was hostile to the charging party's earlier filing of a grievance in March and of an unfair practice charge and unit clarification petition on April 23 and accordingly dismissed her retaliation claim. Similarly, in Teamsters Local 331 and Howard Charles McLaughlin, P.E.R.C. No. 2001-30, 27 NJPER 25 (¶32014 2000), we found the allegation that shop stewards were excluded by the majority representative from negotiations meetings between it and the employer's attorney insufficient to support the issuance of a complaint against the union for violating its duty of fair representation. Conversely, in City of Garfield and PBA Local 46, P.E.R.C. No. 2013-88, 40 NJPER 54 (¶20 2013), aff'd, 41 NJPER 177 (¶63 App. Div. 2014), we adopted the Hearing Examiner's recommended decision finding that the City violated subsection 5.4a(1) when the police chief threatened the PBA vice president that he better leave the chief's office if he enjoyed working there. We distinguish Garfield from the facts here. In Garfield, the police chief had invited the vice president to meet with him, the meeting was behind closed doors with no employees present besides two union representatives and two management representatives, the topic of the meeting was a "serious workplace concern" for officer health and safety, and the Hearing Examiner found that the vice president never threatened the chief but that the chief threatened the vice president's employment.

employees. Smith was not presenting the Association's position on the health plan but rather demanding to know why she had not been invited to the meeting. She escalated the incident, taunting Lindsay to call the police. She ignored his request that she leave, while recording the incident without Lindsay's knowledge. Smith was not disciplined or threatened with discipline for her conduct. Under these circumstances, we decline to find that the County violated subsections 5.4a(1) or (4) by not inviting Smith to the focus group meeting on June 3, 2015.

ORDER

The motion for summary judgment filed by the Cape May County Assistant Prosecutor's Association is granted, and the County of Cape May's unfair practice charge is dismissed. The County's cross-motion for summary judgment is also granted, and the Association's unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: December 21, 2017

Trenton, New Jersey