P.E.R.C. NO. 2022-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Respondent,

-and-

Docket Nos. CO-2020-100
CO-2020-101

CAMDEN FIRE OFFICERS ASSOCIATION,
LOCAL 2578, IAFF,

Charging Party.

Appearances:

For the Respondent, Brown and Connery, LLP, attorneys (Michael J. DiPiero, of counsel)

For the Charging Party, Loccke, Correia & Bukosky, attorneys (Michael A. Bukosky, of counsel and on the brief; Corey M. Sargeant, of counsel and on the brief)

DECISION

On October 1, 2021, the City of Camden (City) filed a motion for summary judgment in an unfair practice case (Docket No. CO-2020-100) filed against the City by the Camden Fire Officers Association, Local 2578, IAFF (IAFF). The City's motion was supported by a brief, exhibits, and the certification of its counsel, Michael J. DiPiero. On October 25, the IAFF filed a cross-motion for summary judgment for both CO-2020-100 and CO-2020-101, supported by a brief, exhibits, the certification of IAFF Local 2578 President Samuel Munoz, and the certification of its counsel, Corey M. Sargeant.

The IAFF's charge in CO-2020-100, filed October 16, 2019 and amended on November 20, 2019 and March 5, 2020, alleges that the City unilaterally changed and repudiated the IAFF's contractual union leave benefits by denying the IAFF's requests for 24 consecutive hours of administrative leave for its executive board members to attend monthly union meetings and instead approving only 12 consecutive hours of administrative leave for such meetings. The charge alleges that the City's actions violate subsections 5.4a(1) through (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). The IAFF filed an application for interim relief along with its charge. On December 23, 2019, a Commission Designee denied interim relief. I.R. No. 2020-5, 46 NJPER 289 (¶71 2019).[1/] The IAFF's charge in CO-2020-101, also filed on October 16, 2019, makes nearly identical allegations regarding the City's denial of IAFF's request for union leave, except concerning only union leave to attend the union's state conventions.

On February 11, 2020, the IAFF filed a grievance with the City. (Arbitration Hearing T3:4-18).[2/] On February 27, 2020, the

1/ On March 12, 2020, the Commission Chair denied the IAFF's request for stay of the interim relief decision. On March 24, 2020, the Appellate Division denied the IAFF's motion for leave to appeal the interim relief decision.

2/ References to the transcript of the parties' August 5, 2020 grievance arbitration hearing, City Exhibit H, will be designated as "T" followed by the page and line number.

IAFF filed a demand for binding grievance arbitration with the Commission identifying the issue to be arbitrated as "union leave." Docket No. AR-2020-374. An arbitrator was appointed on March 26 and the arbitration hearing was held on August 5, 2020. The arbitrator issued his opinion and award on November 30, 2020. (IAFF Exhibit F, referred to as "Award").

On April 20, 2021, the Director of Unfair Practices (Director) issued a Complaint and Notice of Pre-Hearing on the 5.4a(1) and a(5) allegations in both CO-2020-100 and CO-2020-101 and consolidated them. The parties engaged in pre-hearing discovery before the assigned Hearing Examiner. The parties subsequently filed their respective summary judgment motions. On November 18, 2021, the City's motion and IAFF's cross-motion for summary judgment were referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a).

The IAFF is the exclusive employee representative of all uniformed superior officers employed by the City's fire department. The City and IAFF are parties to a collective negotiations agreement (CNA) in effect from January 1, 2014 through December 31, 2016. On September 28, 2018, the parties signed a Memorandum of Agreement (MOA) that made some modifications to the CNA and extended it from January 1, 2017 through December 31, 2020.

Article III of the CNA, entitled "Union Representation and Membership," contains seven sections setting forth union leave, or the granting of administrative leave with pay, for the IAFF President and other authorized union representatives for purposes of collective negotiations, administering and enforcing the CNA, attending county or state union meetings and monthly meetings of the Executive Board of Directors, and representing employees during disciplinary hearings/meetings. Article III, Section 6 of the CNA had provided (emphasis added):

> Any employee who holds a position with the city, county, state or national Union/Association shall be excused from all duties and assignments when required to perform the duties of his/her position.
>
> a. Any employee elected to the position of state or national President of the Union/Association shall receive the same rights as granted under Section 4 of this Article.
>
> b. Whenever a Union representative is required to be excused from an entire tour of duty to perform his/her duties as Union representative, written notification of such absences shall be given to the office of the Chief of Fire whenever practicable. When it is not practicable to give such prior notification, said Union representative shall notify the Division verbally and his/her immediate supervisor and submit written notification as soon as reasonably possible after utilizing such leave.

The MOA modified several provisions of Article III, including the removal of the words "an entire tour of" from the first sentence of Section 6.b. The modified Article III, Section 6.b. provides:

> b. Whenever a Union representative is required to be excused from duty to perform his/her duties as Union representative, written notification of such absences shall be given to the office of the Chief of Fire whenever practicable. When it is not practicable to give such prior notification, said Union representative shall notify the Division verbally and his/her immediate supervisor and submit written notification as soon as reasonably possible after utilizing such leave.

Other MOA modifications to Article III included reducing the number of authorized IAFF representatives for purposes of attending county or state meetings from four to two (Section 5), and requiring that the IAFF President be scheduled for 100 shifts annually unless otherwise excused by the Chief (Section 4).

We adopt and summarize the relevant facts from the arbitrator's award as follows. For many years, IAFF officers and representatives were permitted to take 24 consecutive hours of paid union leave for monthly meetings and other union functions. (Award at 6). On or about September 19, 2019, the IAFF sent a letter to the City requesting 24 hours of leave for two officers to attend the IAFF's September 25, 2019 monthly meeting. (Award at 7). The City approved the IAFF's union leave request for 12 hours of night shift work, but denied the request for 12 hours of day shift work. (Award at 7). The City asserted that the changed language in Article III, Section 6.b., combined with Section 5 language indicating that IAFF officers are permitted time off "on the day of the meeting," modified the parties' past practice of

allowing 24 hours of union leave. (Award at 9, 11). The IAFF asserted that the City violated the CNA by unilaterally ending the past practice of allowing 24 consecutive hours of union leave for monthly union meetings and other functions, and that the modification to the notice provisions in Article III, Section 6.b. did not change that practice (Award at 8, 11).

The arbitrator found that "the parties are in agreement that the 24-hour Union leave benefit was not expressly set forth in the Agreement, but rather was a longstanding and enforceable past practice that existed for decades." (Award at 11-12). He found that Article III, Section 6.b. does not concern the length of union leave available, but only the IAFF's obligation to provide notice of the need for union leave. (Award at 11). Therefore, the effect of the changed language is only that the union must provide notice of all union leave, not just union leave for "an entire tour of" duty. (Award at 11). The changes to Article III, Section 6.b. do not support the City's decision to reduce IAFF union leave from 24 to 12 hours. (Award at 12).

Based upon the above findings of fact, the arbitrator concluded that the City unilaterally reduced the IAFF's union leave time to 12 hours. (Award at 14). He stated: "My conclusion is further bolstered due to the Article XXXIII (Prevailing Rights) clause, requiring that all rights, privileges and working conditions presently enjoyed by employees be maintained 'unless

changed by written mutual consent.'" (Award at 14). The arbitrator thus sustained the IAFF's grievance, finding that "the City violated the parties' Agreement by unilaterally ending the longstanding practice providing for 24 hours of release and leave time for Union representatives in connection with monthly meetings and other Union functions." (Award at 14). The arbitrator's ruling applied to "any type of Union meeting that has been subject to the 24-hour practice, including Union Local monthly meetings, Union meetings at the county, state, or national level, as well as convention leave." (Award at 15). As a remedy, the arbitrator ordered that the City immediately:

> (1) Restore and re-establish the aforementioned 24-hour Union representative release and leave practice;
>
> (2) Comply with Article III and all other provisions of the Collective Negotiations Agreement related to Union representative release and leave time; and
>
> (3) Cease and desist from taking any future actions to suspend, end, or modify 24-hour Union representative release and leave time, without first negotiating in good faith with the Union and reaching agreement on the topic.
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> [Award at 16 (p. 1 of "Award" section).]

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. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co.

of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

In support of summary judgment and dismissal of the charge based on collateral estoppel, the City asserts that the IAFF's allegations were already determined in a binding arbitration award that sustained the IAFF's grievance. The City argues that the IAFF's disappointment in not being awarded monetary damages by the arbitrator does not justify the continuation of this unfair practice charge based on the same facts and seeking the same relief it sought in arbitration. The City asserts that the IAFF has supplied no evidence that the change from 24 to 12 hours of union leave prevented IAFF members from meeting with employees, attending union meetings, or joining or assisting the IAFF in violation of N.J.S.A. 34:13A-5.13 or 5.14. Finally, the City contends that the issue of convention leave in Docket No. CO-2020-101 should not be considered as part of this motion for summary judgment because there are material facts in dispute and the IAFF's brief did not substantively address that charge.

The IAFF asserts that deferral of its unfair practice charge to the arbitration award is not appropriate because the arbitrator considered a contractual violation but not a violation of the Act. The IAFF argues that summary judgment in its favor is necessary for it to obtain additional remedies, beyond those ordered by the arbitrator, for economic losses it has suffered

from pursuing arbitration and filing unfair practice charges to enforce its rights. It asserts that collateral estoppel applies only to preclude the City from disputing the arbitrator's finding that the City repudiated the CNA when it unilaterally reduced union meeting leave from 24 to 12 hours. The IAFF argues that these restrictions discouraged employees from assisting the union in violation of N.J.S.A. 34:13A-5.14. Finally, the IAFF contends that the City has failed to remedy it pursuant to the arbitration award and the Commission should grant the IAFF's requested relief in order to enforce the arbitration award.

Collateral estoppel is applicable when an issue of ultimate fact has been fairly and fully litigated in a prior action between, generally, the same two parties, regardless of whether the causes of action were identical, and bars relitigation of that particular question of fact. State v. Redinger, 64 N.J. 41 (1973); Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984), aff'd, NJPER Supp.2d 151 (¶134 App. Div. 1985). Here, collateral estoppel is applicable to the extent that the arbitrator's findings of facts are relevant to the unfair practice charge. See, e.g., Oakland Bd. of Ed, P.E.R.C. No. 82-125, 8 NJPER 378 (¶13173 1982) (Board estopped from arguing a different past policy than what Commissioner of Education found); State of N.J. (Judiciary), P.E.R.C. No. 2014-84, 41 NJPER 43 (¶11 2014) (collateral estoppel requires Commission to apply court's

interpretation of contract clause at issue); and Ocean Cty., P.E.R.C. No. 86-107, 12 NJPER 341 (¶17130 1986) (Commission may adopt relevant facts from binding arbitration between the parties concerning similar issues). We adopt the facts as determined by the grievance arbitrator and find that there are no material facts in dispute.

We note that collateral estoppel does not prevent the Commission from determining whether the facts established by a different tribunal might still form the basis of an unfair practice violation under our Act. See, e.g., Oakland Bd. of Ed. (Commissioner of Education proceeding only considered Board's policy change under education statutes, not under our Act, so union's charge could proceed); State of N.J. (Judiciary) (court's interpretation of contract clause was adopted by Commission to dismiss a(5) unilateral change claim, but did not preclude Commission from analyzing a(3) retaliation claim under our Act); and Middlesex Cty. ESC, P.E.R.C. No. 2005-63, 31 NJPER 115 (¶48 2005) (Commission did not defer to Division on Civil Rights decision regarding employee's termination because the DCR did not consider and decide the unfair practice issue).

Here, we are presented with the question of whether it is appropriate to defer the unfair practice charge to the arbitration award, or whether there are remaining issues that can only be resolved under our Act. Brookdale Community College,

P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). We will dismiss unfair practice allegations of mere breaches of contract based on good faith differences over contract interpretation because they do not rise to the level of a violation of subsection 5.4a(5) of the Act. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). But a complaint will normally issue where one party alleges a violation of the statutory duty to negotiate and the other party raises a contractual defense. Paterson Charter School for Science and Technology, P.E.R.C. No. 2021-6, 47 NJPER 145 (¶33 2020); East Brunswick Tp., P.E.R.C. No. 97-112, 23 NJPER 229 (¶28109 1997). However, the decision to issue a complaint is distinct from the decision to defer to arbitration. State of New Jersey (Dept. of Human Services and Dept. of Military and Veterans Affairs), P.E.R.C. No. 96-57, 22 NJPER 100 (¶27050 1996). The issuance of a complaint does not preclude deferral to binding arbitration; cases have been deferred to arbitration after complaints have been issued. See, e.g., Dunellen Bor., P.E.R.C. No. 97-30, 22 NJPER 370 (¶27194 1996); Montclair Tp., P.E.R.C. NO. 93-28, 18 NJPER 492 (¶23225 1992); Stafford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989). Such cases should be deferred before the hearing. Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987).

Deferral to binding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract. See, e.g., Passaic Cty. Prosecutor's Office, P.E.R.C. No. 2011-3, 36 NJPER 298 (¶112 2010) (alleged contract repudiation); Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004) (alleged contract repudiation and unilateral change); North Caldwell Bd. of Ed., P.E.R.C. No. 97-37, 22 NJPER 379 (¶27200 1996) (alleged refusal to negotiate); and State of New Jersey, P.E.R.C. No. 96-57, supra (alleged unilateral elimination of weekend off practice). "These contractual questions should be answered in the first instance by an arbitrator, the parties' mutually chosen expert on contractual matters." State of New Jersey (Dept. of Treasury), P.E.R.C. No. 89-39, 14 NJPER 656, 657 (¶19277 1988). Despite the potential unfair practices involved in such cases, the Commission "perceive[s] no inherent difference between the arbitrator's remedial authority and our remedial authority." Brookdale Community College at 270 n.4.

When deferral to arbitration occurs prior to issuance of the arbitration award, the Commission will retain jurisdiction or allow the charge to be reopened to review any contention that the award does not adequately resolve statutory issues or resolves them in a manner repugnant to our Act. See, e.g., Hillsborough

Tp. Bd. of Ed.; Dunellen Bor.; State of New Jersey, P.E.R.C. No. 96-57; Stafford Tp. Bd. of Ed; and Brookdale Community College.

When an arbitration award has already been rendered, the Commission has established the following criteria for determining when, in a case involving an alleged violation of subsections 5.4a(5) and a(1), deferral to the award is appropriate:

> (1) the arbitrator must have had authority to consider the issues of contractual interpretation underlying the unfair practice charge;
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> (2) the proceedings must have been fair and regular; and
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> (3) the award must not be repugnant to the Act.
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> [Hudson Cty., P.E.R.C. No. 86-127, 12 NJPER 439 (¶17162 1986).]

"When these criteria have been satisfied, recognition of an arbitrator's award furthers the desirable objective of encouraging the voluntary settlement of labor disputes." Town of Harrison, P.E.R.C. No. 82-73, 8 NJPER 118 (¶13051 1982). The Commission and its Hearing Examiners have thus held that deferral of an unfair practice charge to a binding arbitration award is appropriate when these criteria have been met. Harrison; Hudson Cty.; State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977); City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982); Hanover Tp., P.E.R.C. No. 2018-11, 44 NJPER 141 (¶41 2017); N.J. Transit, H.E. No. 88-13, 13 NJPER 771

(¶18294 1987), aff'd, P.E.R.C. No. 88-39, 13 NJPER 818 (¶18314 1987); and Hunterdon Central H.S. Bd. Ed., H.E. No. 87-55, 13 NJPER 305 (¶18128 1987), aff'd, P.E.R.C. No. 87-138, 13 NJPER 481 (¶18176 1987).

In the instant case, the City and IAFF are in the pre-hearing stage and the City's motion for summary judgment seeks deferral to a binding arbitration award that issued prior to the issuance of the Complaint. The arbitrator's award sustained the IAFF's grievance, finding that the City unilaterally ended the parties' practice of providing 24 hours of union leave for union meetings. As a remedy, the arbitrator ordered that the City immediately restore the practice of 24-hour union leave, comply with Article III and all other CNA provisions related to union leave, and cease and desist from taking any future actions to modify the 24-hour union leave practice without first negotiating in good faith and reaching agreement with the IAFF.

First, we find that the arbitrator had the authority to, and did, consider the issues of contractual interpretation underlying the unfair practice charge (i.e., whether the City violated the Act by repudiating contractual union leave provisions and/or unilaterally changing union leave past practices). The gravamen of both the grievance and complaint is whether the City unilaterally changed its application of certain Article III provisions and/or past practice concerning union leave when it

began approving 12 instead of 24 hours of paid administrative leave for certain union leave requests. We note that the arbitrator did not just consider the parties' conflicting interpretations of Article III and the MOA's modification thereto, but explicitly determined the issue of whether the City unilaterally changed an existing practice of 24 hours of union leave. That analysis is fairly congruent with our unfair practice analysis of an alleged 5.4a(5) violation for failing to negotiate in good faith before unilaterally changing a term or condition of employment. The arbitrator actually found that 24 hours of union leave is not expressly contractual, but a "longstanding practice." (Award at 11-12, 14-15). The arbitrator concluded that the City had unilaterally reduced the union leave time for meetings from 24 hours to 12 hours without negotiations. He also bolstered his conclusion with the CNA's prevailing rights clause, which pretty neatly overlaps with our Act's requirement that existing terms and conditions of employment be maintained unless the parties negotiate and agree to change them. Moreover, the arbitrator's remedy, akin to a Commission remedy for such a unilateral change, included the restoration of the status quo (24 union leave practice) and a cease and desist order to not modify the existing practice again without good faith negotiations and mutual agreement.

Second, the arbitration proceedings were fair and regular. The IAFF made the decision to file for binding grievance arbitration under the parties' negotiated grievance procedure. The parties examined witnesses, presented evidence, and submitted briefs. The IAFF has not asserted that the grievance arbitration proceedings were unfair or irregular in any way. Indeed, the IAFF prevailed in arbitration and its brief in support of summary judgment relies on the facts and conclusions found by the arbitrator. Neither party appealed in an attempt to judicially vacate the award.[3/] The IAFF's dissatisfaction with the extent of the remedy does not make deferral to the award inappropriate. State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977) ("Just because one party or the other is dissatisfied with an Award does not mean that deferral is inappropriate."); Englewood at 376 (holding that a party "cannot now complain solely because the result is displeasing").

Third, the arbitrator's award is not repugnant to the Act. As discussed above, the arbitrator sustained the IAFF's grievance based on a unilateral change analysis similar to what would be litigated in an unfair practice proceeding before the Commission.

3/ The IAFF's cited cases of appeals to the Commission are inapposite, as they all involve appeals of interest arbitration awards. Unlike grievance arbitration awards that are at issue here, there is a statutory appeal process by which interest arbitration awards are appealed to the Commission before any judicial review. N.J.S.A. 34:13A-16f(5)(a).

We concur with the arbitrator's findings of fact and his conclusion that the City acted unilaterally and was unable to prove a contractual defense for its union leave reduction. The arbitrator's remedy mirrors important aspects of typical Commission remedies for violations of sections 5.4a(5) and (1) of the Act, including restoration of the status quo and ceasing and desisting from future unilateral changes. From that perspective, we find that the arbitrator's award and remedy adequately covered and resolved any statutory issues under our Act.

We also find that the reduction of union meeting leave from 24 to 12 hours does not rise to the level of an unfair practice for interfering with employees' ability to meet with or assist their union under sections 5.13 or 5.14 of the Act. The record does not demonstrate that employees were prevented from meeting with union representatives or that union representatives were unable to attend meetings or other union functions as a result of the change from 24 to 12 hours. We cannot find that the arbitration award and remedy are repugnant to our Act just because the IAFF did not succeed in attaining all of its requested remedies such as monetary damages. Accordingly, we find that all of the criteria set forth above have been met and hold that deferral to the arbitration award is appropriate.

As for the City's contention that the issue of union convention leave contained in consolidated Docket No. 2020-101

should not be included in this motion for summary judgment, we find that it is appropriately included, as the arbitrator specifically considered the issue of 24 hours of union leave not just for monthly meetings, but also for conventions. (Award at 9). The arbitrator stated that his ruling applied to any type of union meeting that has been subject to the 24-hour practice, including "convention leave." (Award at 15). We accordingly find that deferral to the arbitration award is also appropriate for the union leave issue contained in Docket No. 2020-101.

Finally, we address the IAFF's allegation that the City has not complied with the arbitrator's remedy. We note that this allegation is unsupported by any facts or certification. To the extent that there may be any issues regarding the City's compliance with the arbitration award, the remedy includes the statement that the arbitrator "shall retain jurisdiction over any issues or disputes related to remedy." Furthermore, "[j]udicial enforcement of the Award is part of the arbitration process to which we have deferred." Stockton State College, supra, at 65.

ORDER

The IAFF's unfair practice charges are deferred to the related grievance arbitration award issued on November 30, 2020. The consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 27, 2022

Trenton, New Jersey