

P.E.R.C. NO. 2024-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM COUNTY SHERIFF'S DEPARTMENT,

Respondent,

-and-

Docket No. CO-2022-167

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL 400,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission sustains the refusal of the Director of Unfair Practices to issue a complaint on an unfair practice charge filed by the PBA. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when it issued a letter to two PBA members requiring them to use FMLA leave for their full 12-hour shifts rather than for partial shifts. Following a Commission Designee's interim relief decision issuing temporary restraints ordering the County to reinstate the PBA members' use of FMLA leave for partial shifts, the County rescinded the policy change and reimbursed the affected PBA members for any FMLA leave time lost. Finding that the County promptly returned the PBA to the status quo ante following the interim relief order and that there is no open issue in the case or evidence indicating a likelihood of recurrence of the County's alleged unfair practice, the Commission determines that the Director appropriately dismissed the charge as moot.

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, Karin M. Wood, County Counsel

For the Charging Party, Sciarra & Catrambone, LLC,
attorneys (Christopher A. Gray, of counsel)

DECISION

On May 19, 2023, the Policemen's Benevolent Association, Local No. 400 (PBA) appealed from the May 10, 2023 decision of the Director of Unfair Practices (Director) refusing to issue a complaint on an unfair practice charge, and amended charge, it filed on February 9, 2022 and December 13, 2022, respectively. D.U.P. No. 2023-24, 49 NJPER 551 (¶131 2023). The PBA's charge, as amended, alleges that the County violated sections 5.4a(1), (2), (3), (4), and (7) of the New Jersey Employer-Employee Relations Act (Act)^{1/} when it issued a January 14, 2022 letter to

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees on the exercise of the
(continued...)"

two PBA delegates unilaterally requiring that they use approved FMLA leave for the full duration of their twelve hour shifts, rather than for partial shifts.

We incorporate the Director's findings of fact and summarize the pertinent facts as follows. The PBA is the exclusive majority representative of a group of rank and file correctional officers employed by the County. The PBA and County are parties to a collective negotiations agreement (CNA) covering the period of January 1, 2021 through December 31, 2024. Doug Merckx (Merckx) and Brian Pio (Pio) are County employees and PBA members who serve as President and State Delegate for the PBA.

On March 12, 2021, Pio sent a request to the County to use FMLA leave for a serious health condition, which was approved by the County. Pio certifies that, in the past, he would use FMLA leave for partial shifts when his health condition prevented him from working an entire shift. In or about December 2021, Merckx sent a request to the County to use FMLA leave for a serious

1/ (...continued)
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 the rights guaranteed to them by the Act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and (7) Violating any of the rules and regulations established by the commission."

health condition, which was also approved by the County. Merckx certifies that, like Pio, he was previously permitted to use FMLA leave for partial shifts when his condition prevented him from working an entire shift.

On January 14, 2022, Pio and Merckx received nearly identical letters from County Personnel Director Stacy Pennington. The letters state, in pertinent part:

As you are aware, you are currently approved for intermittent FMLA for insomnia. The County of Salem has allowed you (sic) to take this time based on self-evaluation of your sleeping needs. However, after further assessment the County believes that due to the nature of your job and for the safety and security of yourself, your fellow correctional officers, and the inmates, the County can no longer continue this practice. As such, if at any time you believe that your lack of sleep will prevent you from working any portion of your shift, the County is requiring you to take off the entire shift. This will alleviate any concern that you have not evaluated your body properly, thereby causing safety issues at the facility.

This change in how you can use your FMLA will be effective immediately.

On February 9, 2022, the PBA filed an application for interim relief along with its initial unfair practice charge. On February 11, a Commission Designee issued an Order to Show Cause on the PBA's interim relief application. On April 20, the Designee issued a revised Order to Show Cause with Temporary Restraints, ordering the County to allow Officers Merckx and Pio to use intermittent FMLA leave for partial shifts. Following

that Order, the County rescinded the FMLA policy change. On July 27, the PBA advised the Commission that Officer Merckx and Officer Pio had received all of their FMLA time back and that the injunctive relief aspect of the charge had been resolved. On December 13, 2022, the PBA amended its unfair practice charge to include allegations of retaliation against Officers Merckx and Pio for their filings on behalf of the PBA in 2021.

In D.U.P. 2023-24, the Director refused to issue a complaint on the PBA's unfair practice charge. The Director concluded that the charge is moot because the County rescinded the contested FMLA policy change following the Designee's Amended Order and that by July 27, 2022, Merckx and Pio were reimbursed all their FMLA time that was lost due to the policy. The Director additionally found that the PBA failed to allege or present sufficient facts establishing that the County acted in retaliation for protected activity.

The PBA asserts that the Director failed to properly assume the facts as alleged by the PBA were true. According to the PBA, direct action was taken by the administration of the County against the President of the PBA as well as the PBA's State Delegate. The PBA asserts that this action was in retaliation for a recent series of filings and decisions that have come out in favor of the PBA. The PBA contends that its charges are not moot and that a hearing should be held concerning retaliation.

The County asserts that the PBA did not allege that the County instituted the new FMLA policy in retaliation against the PBA until ten months after its initial unfair practice charge. The County argues that as all parties agree that the County rescinded the contested policy in April 2022 and returned the impacted employees all of their time back, there is no harm and no nexus between alleged protected activity and an alleged adverse employment action to support a retaliation claim.

The Commission has the authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. Where the complaint issuance standard has not been met, the issuance of a complaint may be declined. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012). Where no complaint is issued by the Director, the charging party may appeal to the Commission, which may sustain the refusal to issue a complaint or may direct that further action be taken. N.J.A.C. 19:14-2.3(b).

After a careful review of the parties' submissions, we sustain the Director's decision not to issue a complaint and dismiss the PBA's unfair practice charge.

The Commission will find a case moot where "continued litigation over past allegations of misconduct which have no

present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Ramapo Indian Hills Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581, 582 (¶21255 1990). Other considerations are whether there remain open issues which have practical significance; whether there is a continuing chilling effect from the earlier conduct which has not been erased; whether, after a respondent's corrective action, a cease and desist order is necessary to prevent other adverse action against the same or other employees; and, whether the offending conduct is likely to recur. See Galloway Township Bd. of Ed. v. Galloway Township Ed. Assn, 78 N.J. 25 (1978); Neptune Tp. Bd. of Ed., P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd, 21 NJPER 24 (¶26014 App. Div. 1994); Rutgers University, P.E.R.C. No. 2017-4, 43 NJPER 71 (¶18 2016); County of Hudson, P.E.R.C. No. 2012-48, 38 NJPER 331 (¶111 2012); and Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 82-56, 8 NJPER 31 (¶13013 1981).

Here, it is undisputed that the County rescinded its disputed FMLA policy in April 2022 following the Designee's Amended Order issuing temporary restraints. Furthermore, the PBA notified the Commission that the impacted officers had all of their FMLA leave time returned by July 27, 2022. While we agree that a posting can be an important remedy to a violation of the Act, it would not promote the Act's purpose to decide this past dispute. The facts do not indicate any open issues with any

practical significance, and there is nothing in the record to suggest a likelihood of recurrence of the County's alleged misconduct or chilling effect on the PBA. While it is unfortunate that the County made a unilateral change to its FMLA policy that the parties were unable to resolve without proceeding through the interim relief process, the Designee's Amended Order proved to be effective in getting the County to rescind the modified FMLA policy and reimburse the affected PBA unit members. Accordingly, under these circumstances, where the County's changed FMLA policy had only been in effect approximately three months and the PBA officers were returned to the status quo fairly promptly, we find that the Director appropriately dismissed the PBA's charge for mootness.

ORDER

The refusal to issue a complaint is sustained. The unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: September 28, 2023

Trenton, New Jersey