

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and-

Docket Nos. CO-2022-231,
CO-2023-102, CO-2023-135,
CO-2023-142, CO-2023-143,
CO-2023-145, CO-2023-148.

ESSEX COUNTY SUPERIOR OFFICERS,
FOP LODGE 106,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission sustains the Director of Unfair Practices' refusal to issue a complaint in D.U.P. No. 2024-10, 50 NJPER 215 (¶48 2023) on unfair practice charges (UPC) filed by the FOP. The UPCs allege that the County violated sections 5.4a(1), (5), and (7) of the Act when it required unit members to sign a "defense agreement" as a precondition to providing that member with legal representation in a federal civil matter. The Commission agrees with the Director's finding that the issues arising from the defense agreement are now moot following the County's elimination of the agreements and its repeated assertion, in writing, that it was willing to represent employees, even without signing the agreement. Further, the Commission finds that the County notified the FOP and the subject employees that the County would not pay legal fees if they retained FOP Counsel. The Commission concludes that the FOP has not met the complaint issuance standard because they commenced representation of the defendants, and filed the instant UPCs, before any adverse outcome had resulted from the County's alleged refusal to represent the defendants.

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,
(Sylvia Hall, Director of Labor Relations)

For the Charging Party,
C. Elston & Associates, LLC, attorneys
(Catherine M. Elston, of counsel)

DECISION

Essex County Superior Officers, FOP Lodge No. 106 ("FOP" or "Union") appeals from the refusal of the Director of Unfair Practices (Director) to issue a complaint on unfair practice charges (UPCs) it filed between May 23, 2022 and February 27, 2023 against the Essex County Department of Corrections ("County").^{1/} D.U.P. No. 2024-10, 50 NJPER 215 (¶48 2023). The

^{1/} In addition to CO-2022-231, the Union filed the following unfair practice charges: CO-2023-102 (filed December 14, 2022, regarding Lt. C.B and Sgt. S.G.); CO-2023-135 (filed (continued...))

charges allege that the County violated sections 5.4a(1), (5), and (7) of the New Jersey Employer-Employee Relations Act ("Act")^{2/} when it: (1) required unit members to sign a "defense agreement" as a precondition to providing that member with legal representation in a federal civil matter; (2) incorrectly stated that the County obtained a vacation of a default judgment that had been entered against a unit member; and (3) refused to confirm or deny whether the County would be providing representation notwithstanding the unit member's refusal to sign the "defense agreement." The charges further allege that, given the County's failure to respond to multiple inquiries about whether it would represent the unit member in the civil

1/ (...continued)
February 10, 2023, regarding Lt. D.T.); CO-2023-142 (filed February 17, 2023, regarding Sgt. H.P.); CO-2023-143 (filed February 22, 2023, regarding Sgt. C.M.); CO-2023-145 (filed February 23, 2023, regarding Lt. R.T.); and CO-2023-148 (filed February 27, 2023, regarding Lt. G.B and Sgt. J.C.). Each aforementioned charge contains alleged violations of sections 5.4a(1) and (5) of the Act. CO-2022-231, CO-2023-102, and CO-2023-135 also contain alleged violations of section 5.4a(7) of the Act.

2/ 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; (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; and, (7) Violating any of the rules and regulations established by the commission." The original charge also contained an alleged violation of section 5.4a(3), but that allegation was withdrawn.

litigation, the Union was forced to provide the member with legal representation.

The Director processed the charges together. The County filed position statements on January 9, 2023 and March 24. The FOP filed position statements on January 26 and April 5. An exploratory conference was conducted with a Commission staff agent on March 28. On July 7, the County sent correspondence to the Commission, with a copy to the FOP, stating, in part, that since on or about March 28, 2023, the County has not required the execution of a "defense agreement" from any FOP unit member, and that it does not intend to do so in the future.

On October 10, 2023, the Director dismissed the UPCs, finding that the County did not unilaterally alter a term and condition of employment, as unit members previously signed defense agreements in connection with obtaining County representation. The Director further found that, with respect to the instances asserted in the charges, the County did not deny representation to members that refused to sign defense agreements, particularly S.G.. The Director also found that the FOP failed to assert a cognizable claim for costs and fees, and that the matter is moot given that the County ceased requesting defense agreements from unit members since March of 2023.

On October 20, 2023, the FOP appealed the Director's decision, filing a letter brief with exhibits that incorporated

the position statements and exhibits submitted to the Director. On November 6, the County opposed the FOP's appeal with a letter brief and exhibits. We have reviewed the record, the Director's findings of fact and conclusions of law, and the parties' submissions. We adopt and incorporate the Director's findings of fact (D.U.P. at 4-13). We summarize the following material facts that are pertinent to our analysis:

1. The FOP represents a group of correctional sergeants, lieutenants, and captains employed by the County. The FOP and County are parties to a collective negotiations agreement ("CNA") which expired on December 31, 2017, but continues to be in effect.

2. Article 13 of the parties' CNA ("Extent of County Liability") provides, in pertinent part:

A. POLICY

Whenever an action is instituted against any employee for any act or omission arising out of and in the course of, and within the scope of, the performance of the duties of his/her office, position or employment, the County shall defer the cost of defending such action as set forth below:

The County's obligation hereunder shall be limited to those cases in which:

1. The proceeding is dismissed or results in a final disposition in favor of the employee; and

2. the employee was acting in a matter in which the County had an interest; and

3. the employee was acting in the discharge of a duty imposed or authorized by law; and

4. the employee was acting in good faith; and

5. the employee is a named defendant in a matter pending before a court of competent jurisdiction.

* * *

C. PROCEDURE

1. Any employee who is served with a summons and complaint shall, within ten (10) calendar days of the time he/she is served with the summons and complaint, deliver the summons and complaint along with any accident or incident reports relevant to the action, to the County Counsel.

2. The County Counsel will review all documents submitted to determine if the employee is entitled to have representation provided to him/her. If the employee is entitled to representation, such representation shall be provided by the County Counsel, an attorney selected by any insurance carrier insuring the County, or by private counsel to be retained by the County. In no event will private counsel retained by the employee be compensated for his/her services by the County of Essex.

3. The County shall provide representation to the employee at all stages of the litigation, and shall save harmless and protect the employee from any financial loss resulting from any action in which the County provides such representation.

3. On or about April 26, 2021, a former inmate at the Essex County Correctional Facility filed a federal civil lawsuit against five County correctional officers, including S.G.. On or

about September 1, the Court entered a default judgment against the five defendants for failure to plead. On September 21, the Assistant Essex County Counsel wrote a letter to the court seeking vacation of the default judgment against the defendants because the County had only just become aware of the lawsuit.

4. On or about September 22, S.G. signed a "defense agreement" and allowed the County to provide her with a legal defense in a different federal civil lawsuit. Other unit members also signed defense agreements, as had been the County's prior practice when representing correction officers in lawsuits. The defense agreement provides:

1) Covenant. By entering this agreement, the Public Employee affirms that at all times relevant to the Legal Matter she acted within the scope of her county-paid employment and understands that the County of Essex has entered into this agreement based upon its reliance on this representation.

2) Defense or Representation. County Counsel shall have exclusive control of the Public Employee's defense or representation or designation of counsel. Public Employee shall cooperate fully with the County Counsel's defense or representation. Public Employee is advised that the County will not provide for or continue her defense if she fails to comply with this Agreement, if County Counsel or the trier of fact determines that Public Employee did not act within the scope of her employment, or that her conduct involved actual fraud, actual malice, or the defense or representation would create a conflict of interest for the County.

3) Methods of providing defense. County Counsel may provide for Public Employee's

defense herself, by designating an attorney from her own staff, by employing a special counsel for this purpose, or by asserting the County's right of the Public Employee under any statute, rule, or applicable insurance policy which requires any other entity to provide the defense and/or indemnification.

4) Indemnification. The County's agreement to provide a defense does not obligate it to provide for indemnification. The County reserves its rights not to indemnify Public Employee for punitive or exemplary damages and will not pay for any fines for contempt of court resulting from Public Employee's actions or omissions. The County may only indemnify Public Employee for compensatory damages if it is determined that Public Employee acted within the scope of her county-paid employment.

5) Bankruptcy. Public Employee is advised that damages for a willful and malicious injury cannot be discharged by bankruptcy. Public Employee is further required to inform the County's designated attorney for the Legal Matter if she has filed for bankruptcy in the past three years or is contemplating doing so. Public Employee is advised to inform her bankruptcy counsel because claims for negligence, for example, can be discharged.

6) Cooperation. Public Employee will cooperate fully and completely as set forth above and as set forth as stated in this provision [sic]. Public Employee will cooperate fully and completely in her defense and the County's defense of the Legal Matter. Public Employee will cooperate fully and completely in all claims advanced by the County Counsel's designated assistance or special counsel on behalf of the Public Employee.

7) Independent Review. Public Employee is advised and encouraged to seek counsel at her own expense to review this agreement or to

provide independent counsel at any stage of the litigation.

8) Entire Agreement. Even if the representation has already begun, this agreement constitutes acceptance of the foregoing terms and conditions with regard to the Legal Matter. This agreement constitutes the entire understanding between the County and Public Employee, and that understanding cannot be modified except in a writing signed by an authorized representative of the County and the Public Employee. (Amended Charge, Ex. C.).

5. On or about October 18, FOP Counsel had a telephone conversation with the Assistant Essex County Counsel regarding whether the County would represent S.G. in the pending federal civil lawsuit. The Assistant Essex County Counsel forwarded to FOP Counsel a copy of the "defense agreement" that the County was requesting S.G. sign for the pending lawsuit. It was identical to the agreement S.G. had previously signed. On October 22, 2021, FOP Counsel objected to S.G. signing the agreement because it allegedly conflicted with the CNA provisions regarding legal representation and indemnification.

6. On October 27, FOP Counsel requested a status update regarding the motion to vacate the default judgment entered against the defendants, including S.G., and the County's representation of S.G.. The Assistant Essex County Counsel replied stating that the motion had not yet been decided. On October 29, the Assistant Essex County Counsel emailed FOP Counsel, requesting that she confirm representation for S.G. in

the federal lawsuit. On October 30, FOP Counsel replied by asking whether the County would represent S.G. because FOP Counsel needed the County's formal denial of representation to commence S.G.'s representation.

7. On November 17, FOP Counsel emailed the Assistant Essex County Counsel, again asking whether the County would be representing S.G.. The Assistant Essex County Counsel replied that same day, stating "[a]t no time did I ever indicate the County would not represent [S.G.] if she desires. However, today for the second time, [S.G.] has told an [E]ssex employee she will be represented by [FOP Counsel]."

8. On December 1, 2021, the default judgment against the defendants was vacated, which was communicated to the FOP counsel. On January 5, 2022, FOP Counsel again emailed the Assistant Essex County Counsel, demanding written confirmation that the County was representing S.G. in the lawsuit and that all court documents filed with the court be provided to the FOP Counsel. The Assistant Essex County Counsel responded that S.G. had agreed for a second time to be represented by the County, that she had told the Assistant Essex County Counsel twice that she would sign the defense agreement, that the County has not denied representation to S.G. and that the County obtained the vacation of default on behalf of S.G..

9. On January 12, FOP Counsel filed a notice of appearance on behalf of S.G. and notified the FOP Legal Plan that she would be seeking its approval to provide coverage for the representation of S.G..

10. On May 3, the Assistant Essex County Counsel sent correspondence to FOP Counsel stating, in part, "Since the County did not deny representation, and has always been willing to represent Sgt. S.G., until she expressed her desire not to be represented by us, I have been authorized to say that the County of Essex will not pay legal fees on her behalf."

In its appeal, the FOP argues that the Commission must reverse the Director's decision because his findings of fact are erroneous. The FOP maintains that the County never confirmed in writing that it was representing S.G. in the federal lawsuit; that S.G. did not state that FOP Counsel was representing her until after the County failed to provide written confirmation that it would represent her and continued to insist on S.G. signing the defense agreement; that the County failed to confirm that they would file an answer on behalf of S.G.; that the County did not obtain a vacation of the default on S.G.'s behalf, but instead expressly excluded her because she had not signed the defense agreement; and, that the defense agreement conflicts with the defense and indemnification rights provided by the CNA. The FOP further argues that the Director's decision erroneously

dismissed the issues with the defense agreements on the basis that FOP members had previously signed the defense agreements and the practice was consistent with longstanding County policy. The FOP maintains that the previous defense agreements were signed without the advice of counsel, did not constitute a waiver of the FOP's objections to the defense agreements, and that the County did not provide any previously signed defense agreements for the other FOP members who are the subjects of the UPCs. Lastly, regarding the Director's decision on the FOP's request for reimbursement of attorney's fees and costs, the FOP argues that were it not for the County requiring S.G. and other FOP members to sign the defense agreements, which unilaterally changed the FOP members' contractual defense and indemnification rights, the FOP members would not have had to obtain private counsel through the FOP and incur legal expenses.

The County responds that it ceased using the defense agreements which has rendered the UPCs moot, and the FOP has usurped litigation control over the seven cases involving the corrections officers who are the subjects of the UPCs. The County submits additional correspondence between the parties following the March 28, 2023 exploratory conference. At the exploratory conference, the County represented it had ceased using the defense agreements, which was confirmed in the County's July 7, 2023 correspondence to the Staff Agent. The County also

proposed the return of the client employees if they chose to be represented by the County in the lawsuits. If they chose to be represented by the FOP, the County advised that they would not have their legal fees paid by the County. In response, via a September 26, 2023 email, FOP Counsel responded:

In recent discussions with the FOP National Defense Plan, it was decided that the County's representation to PERC in its July 10, 2023 letter, (attached), specifically, that it would undertake representation in litigation matters involving our members, including those pending before PERC, without execution of the County's "Defense Agreement," satisfactory. For this reason, attached please find substitutions of attorney for the subject matters, listed below for your convenience. We ask authorization from the County to electronically sign for the County for each case and file same. In this regard, please let us know whose signature should appear on behalf of the County. The status of each case is also provided. Please note those matters that must be immediately addressed are highlighted in red.

However, the FOP Counsel reversed her previous position. In a October 10 email to the County, the FOP Counsel advised:

The officers are now aware that we will continue representation. The consent forms are, therefore, moot. Our clients reserve the right to seek attorneys' fees and costs. Further, they will not waive reimbursement for legal fees and expenses as the County requested.

Thus, the County maintains that the Director's decision was correct and should be affirmed because the matter is now moot and the FOP has affirmatively declined the County's continued offer

to represent the subject employees, and therefore, the County is within its contractual rights to deny payment of legal fees. The County argues that the UPCs are a vehicle for FOP counsel to bill fees. The County maintains that the seven subject employees, including S.G., were not harmed by the County's legal representation or request to sign the defense agreements, rather the County successfully vacated the default entered against the defendants. The County repeatedly stated it would represent the subject employees in the lawsuits, and after the March 28 exploratory conference, that it would do so without a defense agreement, and yet, the FOP proceeded to usurp the County's legal representation of the subject employees and then demand reimbursement of legal fees from the County.

The Commission has 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-5.4©; 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). After a careful review of the parties' submissions, we sustain the Director's decision to not issue a complaint for the following reasons.

The FOP claims that the Director's decision ignores the differences between the defense agreements and the parties' CNA that unilaterally alter the subject employees' indemnification and defense rights. However, we agree with the Director's finding that the issues arising from the defense agreement are now moot following the County's elimination of the agreements and its repeated assertion, in writing, that it was willing to represent S.G. and the other subject employees, even without signing the agreement. A case will be found 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 that 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 Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1 (1978) and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).

The FOP claims that the County never confirmed representation of S.G. and the other subject employees in the lawsuit. However, the factual record establishes that the County requested that S.G. and the other defendants sign the defense agreements, consistent with the County's longstanding policy. When the FOP objected to the defense agreements, the County did not refuse to represent S.G. or any other defendant in the lawsuits. The County, several times, and as recently as July 10, 2023, proposed that the defendants be represented by the County without having to sign the agreement. In response, the FOP's September 26, 2023 correspondence establishes that the FOP was willing to allow the County to represent the subject employees without a signed defense agreement and that it submitted notices of attorney substitution to the County to effectuate the same, along with the pending litigation deadlines for the County to meet. However, following that resolution between the parties, the FOP declared it would continue representation of the defendants.

Th FOP further argues that the County did not obtain a vacation of default for S.G., but rather, expressly excluded her in its motions to vacate the default. However, the factual record shows that, during the pendency of the lawsuits, none of the defendants suffered any adverse result from the County's legal representation, and indeed, the County counsel filed a

motion to vacate defaults entered against the defendants, including S.G., which was granted. The factual record does not show that the County missed any of the pending litigation deadlines or missed filing any responsive pleadings.

The FOP claims that but for the County's refusal to represent the subject employees unless they signed the defense agreements, the subject employees would not have had to retain private counsel through the FOP and incur legal expenses. However, the FOP ultimately rejected the County's proposal to represent the subject employees even without signing the agreements. The factual record shows that the County advised the FOP and the subject employees, multiple times, that if they chose to be represented by FOP counsel that the County would not pay for their legal fees, which is consistent with the provisions of the CNA. Thus, the Director properly concluded that the parties' CNA expressly provides that the County will not pay the expenses for private counsel retained by a defendant employee.

For the foregoing reasons, we sustain the Director's Decision as the matter has been rendered moot by the County's elimination of the defense agreements. Further, the FOP has not met the complaint issuance standard because they commenced representation of the defendants, and filed the instant UPCs, before any adverse outcome had resulted from the County's alleged refusal to represent the defendants. The County: 1) repeatedly

represented that it would provide legal representation to the defendants; 2) did so even after eliminating the use of defense agreements; and, 3) notified the FOP and the subject employees that the County would not pay legal fees if they retained FOP Counsel. Notwithstanding, the FOP Counsel persisted in representing the subject employees and seeking legal fees from the County. In sum, the Director correctly concluded that the FOP has not met the complaint issuance standard.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Bolandi, Eaton, Ford, Higgins, Kushnir, and Papero voted in favor of this decision. None opposed.

ISSUED: January 25, 2024

Trenton, New Jersey