P.E.R.C. NO. 2003-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-H-2001-298

JNESO, DISTRICT COUNCIL 1, IUOE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the County of Essex. The Complaint was based on an unfair practice charge filed by JNESO, District Council 1, IUOE. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act by bypassing the majority representative and dealing directly with a unit employee and his attorney. The Commission answers only the question of whether the Civil Service Act, when read in light of the Employer-Employee Relations Act, grants the choice of attorney or union representative to the employee or the union. N.J.S.A. 34:13A-5.3 provides that its provisions shall not be construed to deny to any individual employee his rights under Civil Service laws or regulations. Those laws and regulations specifically provide for an employee's choice of attorney or union representative at a statutorily-mandated pre-disciplinary hearing. The Commission does not construe the Employer-Employee Relations Act to transfer the right to make that choice to the union. Neither the text nor the legislative history of the Civil Service statute or regulations, adopted after passage of the Employer-Employee Relations Act, suggests such a legislative intent. Accordingly, the Commission concludes that the County did not violate the Act when it dealt directly with the employee's private attorney.

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, Apruzzese, McDermott, Maestro & Murphy, P.C., attorneys (Arthur R. Thibault Jr., of counsel)

For the Charging Party, Lynch Martin, attorneys (Lori M. Smith, of counsel)

DECISION

On April 16 and 21, 2001, JNESO, District Council 1, IUOE filed an unfair practice charge against Essex County. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] by bypassing the majority representative and dealing directly with a unit employee and his attorney.

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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." The charge appears to have inadvertently alleged a violation of 5.4b(5).

On January 29, 2002, a Complaint and Notice of Hearing issued. On February 7, the employer filed an Answer asserting that the charge does not comply with our rules' specificity requirements. It also denies the charge's allegations. The County asserts that it brought disciplinary charges against a unit member; he retained a private attorney to represent him at a disciplinary hearing; it coordinated hearing dates with the private attorney; the union was given notice of the hearing; and the union appeared at the hearing and represented the employee, the private attorney having withdrawn in favor of union representation. Relying on a previously-filed Statement of Position, the County contends that N.J.S.A. 11A:2-18 and N.J.A.C. 4A:2-2.6(b) give an employee the choice of an attorney or a union representative at a disciplinary hearing.

The parties stipulated the facts and waived a hearing and hearing examiner's recommendations. Their verbatim stipulations follow:

1. JNESO, District Council 1, IUOE (hereafter referred to as the "Union") is a labor organization with its principal office located at 146 Livingston Avenue, New Brunswick, New Jersey 08901.

2. County of Essex (hereafter referred to as the "Employer") is a public employer within the meaning of N.J.S.A. 34:13A-1, et seq. and the Rules of PERC, promulgated in accordance.

3. The County of Essex is a jurisdiction subject to the Civil Service Act, N.J.S.A. 11A:2-1, et seq., and the regulations promulgated thereunder by the Department of Personnel, N.J.A.C. 4A:1-1 et seq.

4. The Union is the recognized majority representative of the Employer's professional nurses, both registered or with state permit, in the titles of Graduate Nurse, Head Nurse, Assistant Hospital Utilization Review Coordinator, Hospital Utilization Review Coordinator, Supervisor of Nurses, Instructor of Nurses, Clinical Specialist, Nursing, Head Clinical Nurse, Infection Control Coordinator, Special Child Health Services Program Coordinator and Staffing Coordinator for the purpose of collective negotiations with respect to salary, hours and other terms and conditions of employment.

5. The Union and the Employer are parties to a collective bargaining agreement with a period of January 1, 1996 through December 31, 1999, and are currently in dispute regarding a successor agreement (Joint Exhibit 1(e); hereinafter "J1" followed by the exhibit letter).

6. On March 7, 2001, the Employer issued a Preliminary Notice of Disciplinary Action to JNESO bargaining unit employee Byron Easterling, notifying Easterling that he was suspended effective March 2, 2001, without pay and setting the date for a departmental hearing on April 3, 2001 at 10:00 a.m. at the Courtroom of the Administrative Building of the Hospital Center at Cedar Grove, New Jersey (J1 (f)). A second notice was issued on March 14, 2001 which noted changes to the charges issued against Mr. Easterling. (J1(g)).

7. On March 7, 2001, the County sent a copy of the Preliminary Notice of Disciplinary Action to JNESO. The Notice to Mr. Easterling was the result of his arrest on charges of alleged conduct in violation of N.J.S.A. 2C:14-3B and official misconduct in violation of N.J.S.A. 2C:30-2A.

8. By letter dated March 10, 2001, Joseph Bell, Esq. appeared on behalf of Byron Easterling with respect to the Notice of Disciplinary Action and requested that the County direct all further correspondence to his attention and forward to him discoverable material in preparation for the scheduled hearing of April 3, 2001 (J1(h)). On

March 26, 2001, the County forwarded Mr. Bell the requested discovery in preparation for the hearing (J1,(i)).

9. Prior to the April 3, 2001 hearing, the hearing date was adjourned, without notice to the Union, by the Hearing Officer, and rescheduled for April 6, 2001 without notice to the Union by the Hearing Officer or by the Employer, of the rescheduled date.

10. Prior to around April 6, 2001, JNESO did not inform the county that it was representing Mr. Easterling with respect to the disciplinary charges, and did not request discovery with respect to the disciplinary charges.

11. On around April 6, 2001, William Macco, Labor Representative, JNESO District Council 1, IUOE, contacted Timothy Stafford, Assistant County Counsel, County of Essex, regarding the hearing date. Mr. Macco questioned Stafford about the scheduling of the matter for hearing on April 6 without notice to the Union or its participation in the process. Stafford agreed to postpone and reschedule the April 6, 2001 hearing. By letter dated April 6, 2001, Stafford notified Joseph A. Bell that the hearing was adjourned "at the request of the employee's union (JNESO)." The letter was copied to Macco (J1(j)).

12. On April 11, 2001, the Union filed a grievance against the Employer for engaging in direct dealing with the employee and the employee's personal attorneys (J1(k)). The grievance was subsequently denied by the Employer in a response dated April 23, 2001 (J1(n)).

13. On April 16, 2001, the Union timely filed an unfair practice charge with PERC regarding the same alleged misconduct (J1(c)). The charge was subsequently amended to include a full statement of the remedy sought (J1(d)).

14. On or about April 16, 2001, the Employer informed the office of Joseph Bell, Esq. of the rescheduled hearing date of May 10, 2001, and confirmed that date in writing. (J1,(1)). William Macco of JNESO was copied on that letter rescheduling the hearing. (Id.) The Union was

not notified of the discussion concerning the rescheduled date and therefore was unable to participate in the discussion.

15. By letter dated April 18, 2001, from Macco to Bell, with a copy to Stafford, Macco notified Bell that JNESO was the exclusive bargaining representative for Easterling and further notified Bell that "your participation in the primary notice of disciplinary action hearing conducted by the County of Essex is inappropriate." (J1(m)).

16. On around April 30, 2001, Macco tried to contact Stafford by telephone regarding the May 10, 2001 hearing date and to notify Stafford that he was not available on that date. By letter dated May 1, 2001, Macco confirmed in writing that he was not available for a May 10 hearing and requested Stafford to contact him to reschedule another date (J1(o)).

17. By letter dated May 4, 2001, Stafford responded to Macco's letter and offered two dates for hearing, those being Tuesday, June 4, 2001 or Wednesday, June 5, 2001. Stafford noted that "no further adjournments requested by the union regarding this matter will be granted." Bell was copied on the letter (J1(p)). By letter and subsequent telephone conversation, Macco notified Stafford that he was available on June 4, 2001 for the hearing (J1(q)). Stafford confirmed the date in writing by letter dated May 15, 2001 (J1(r)). Stafford again wrote on the same date to provide documents to Macco and to request reciprocal discovery and a reciprocal witness list (J1(s)).

18. On June 5, 2001, Joseph Bell, Esq. and William Macco appeared at the hearing on behalf of Mr. Easterling. Mr. Macco requested that the County inform Mr. Bell that it was the Union's responsibility to represent the employee at the hearing and that Mr. Bell's presence was inappropriate. The County refused to take that position, but explained to Mr. Bell that the Union believed it was Mr. Easterling's representative for the hearing. Mr. Bell thereafter excused himself from the hearing.

19. The Departmental Disciplinary Hearing was conducted on June 5, 2001 with the Union acting as the representative for Easterling.

20. The County asserts that until the June 5, 2002 hearing, Mr. Bell never informed the County that he was no longer representing Mr. Easterling with respect to the disciplinary charges. The Union has no information to the contrary regarding this point.

21. The Hearing Officer issued a written decision suspending Byron Easterling from his employment with the County without pay pending disposition of the criminal charges against him (J1(u)). The decision was sent to William Macco. Mr. Easterling had twenty days to file an appeal with the Merit System Board.

22. The County sent a copy of the decision continuing the suspension of Byron Easterling to Joseph Bell, Esq. (J1(u)).

23. JNESO verbally notified Mr. Easterling that it would not appeal the decision of the hearing officer regarding the suspension of the grievant pending resolution of the criminal charges, but informed Mr. Easterling that he could pursue the matter if he chose with private counsel. JNESO further informed the grievant that it would review the matter once the criminal charges had been decided.

24. Joseph Bell, Esq. appealed the decision of the hearing officer to the Merit System Board on behalf of Byron Easterling and the matter has been transferred to the Office of the Administrative Law as a contested case (J1(v)).

25. N.J.S.A. 11A:2-18 provides that "[a]n employee may be represented at any hearing before an appointing authority or the board by an attorney or authorized union representative."

26. N.J.A.C. 4A:2-2.6(b) sets forth that, at hearings before the appointing authority (in this case, the County), "[t]he employee may be represented by an attorney or authorized union representative."

27. N.J.S.A. 34:13A-5.3, provides, in pertinent part, that "[n]othing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations."

28. The Human Resources policy of the County of Essex contains a statement which provides that at a disciplinary hearing, an employee may be represented by legal counsel, union representative or representative of his/her own choosing. This policy was not negotiated with the Union and the Union has no record of such policies (J1(t)).

JNESO argues that the Employer-Employee Relations Act and the Civil Service Act, read together, establish a union's right to represent unit members during departmental disciplinary hearings. This allegedly holds true even where an employee expresses a preference to be represented by a private attorney. JNESO maintains that where a majority representative has not waived its right to pursue a matter as exclusive representative, its exclusivity must be respected.

The County argues that the Civil Service Act provides important rights to civil service employees and that the Employer-Employee Relations Act cannot be construed to deny the employee a right under the Civil Service Act. The County contends that it must proceed with disciplinary hearings in accordance with Civil Service statutes and regulations and that those provisions grant individual employees the right to choose whether to be represented by an attorney or a union representative. The employer argues that JNESO confuses its role as exclusive representative in a grievance setting with its statutorily-

mandated non-exclusive role in a disciplinary hearing where, as here, the employer seeks to impose major discipline.

The Civil Service Act was overhauled in 1986. The predecessor statute and regulations, adopted long before passage of the 1968 Employer-Employee Relations Act, provided that an employee had the right to an attorney in a departmental hearing or before the Civil Service Commission. The 1986 amendments recognized the arrival on the scene of union representatives and added an employee's right to have a union representative at a departmental hearing or before the Merit System Board, the successor to the Civil Service Commission and the body that now hears appeals of major discipline.

Thus, before 1986, neither an employee nor a union had a right under the Civil Service Act to have a union representative present at a departmental disciplinary hearing. After passage of the Employer-Employee Relations Act, such a right could presumably be negotiated, but it was not commanded by Civil Service statute or regulation.

The 1986 Civil Service Act expanded an employee's rights by providing a choice of representative -- attorney or union. The question we must now answer is whether that choice belongs to the employee or the union. We note that this question is narrow. We do not address a union's right to negotiate additional rights or protections in pre-disciplinary proceedings under the

Employer-Employee Relations Act.[2/] We answer only the question presented: whether the Civil Service Act, when read in light of the Employer-Employee Relations Act, grants the choice of representative to the employee or the union.

The departmental hearing at issue is statutorily mandated, N.J.S.A. 11A:2-13, as is the right of the employee to choose a representative, 11A:2-18. It is not part of a negotiated grievance procedure or disciplinary review procedure, procedures required to be negotiated under N.J.S.A. 34:13A-5.3.[3/]

2/ N.J.S.A. 11A:12-1 provides that the Civil Service Act is not to be construed either to expand or diminish collective negotiations rights under the Employer-Employee Relations Act.

3/ N.J.S.A. 34:13A:5.3 provides, in part:

> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreement, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees. . . .

The pre-disciplinary departmental hearing is part of the procedures a Civil Service employer must follow before imposing major discipline.4/

N.J.S.A. 34:13A-5.3 provides that its provisions shall not be construed to deny to any individual employee his rights under Civil Service laws or regulations. Those laws and regulations specifically provide for an employee's choice of attorney or union representative at a statutorily-mandated pre-disciplinary hearing. We do not construe the Employer-Employee Relations Act to transfer the right to make that choice to the union. Neither the text nor the legislative history of the Civil Service statute or regulations, adopted after passage of the Employer-Employee Relations Act, suggests such a legislative intent.

N.J.S.A. 34:13A-5.3 does provide that the majority representative shall be the exclusive representative of all employees in the negotiations unit concerning terms and conditions of employment. In Lullo v. IAFF, 55 N.J. 409 (1970), our Supreme Court upheld exclusive representation as the cornerstone of the Employer-Employee Relations Act. But the Legislature has chosen to establish procedures for major discipline of Civil Service employees outside of the collective

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4/ Under N.J.S.A. 34:13A-5.3, an appeal of a final major disciplinary determination can be made only to the Merit System Board, where, under the 1986 Act and regulations, the employee also has a choice of attorney or union representation.

negotiations process and exclusive control of the majority representative. Accordingly, we conclude that the County did not violate the Act when it dealt directly with Byron Easterling's attorney.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: December 19, 2002
Trenton, New Jersey
ISSUED: December 20, 2002