

P.E.R.C. NO. 2012-70

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROBERT RUFFIN,

Appellant,

-and-

OAL Docket No. CSV 13378-10  
Agency Docket No. 2011-1702

DEPARTMENT OF HUMAN SERVICES,  
ANCORA PSYCHIATRIC HOSPITAL,

Respondent.

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AFSCME COUNCIL 71, LOCAL 2218,

Charging Party,

Docket No. CO-2011-221

-and-

STATE OF NEW JERSEY  
ANCORA PSYCHIATRIC HOSPITAL,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms a decision of an Administrative Law Judge returning an unfair practice case to PERC for hearing. In a prior Joint Order issued by PERC and the Civil Service Commission, the charge and major disciplinary appeals of Robert Ruffin were consolidated for hearing before the Office of Administrative Law. The Civil Service appeals were dismissed and the CSC affirmed because the suspensions were reduced to minor discipline. PERC directs the Director of Unfair Practices to assign the charge for hearing.

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, Jeffrey S. Chiesas, Attorney  
General (Sally Ann Fields, Senior Deputy Attorney  
General, of counsel)

For the Appellant/Charging Party Geoffrey B. Gompers &  
Associates, attorneys (Geoffrey B. Gompers, of counsel)

DECISION

On November 30, and December 7, 2011, respectively, the  
Public Employment Relations Commission (PERC) and the Civil  
Service Commission (CSC), issued a joint order determining that  
PERC had the predominant interest in a case that had been  
consolidated for hearing before the Office of Administrative Law,

involving an appeal to the CSC from a major disciplinary sanction and a complaint based upon an unfair practice charge. See P.E.R.C. No. 2012-28, 38 NJPER \_\_\_\_\_ (¶84 2011).<sup>1/</sup> The consolidated cases involved Robert Ruffin's appeal to the CSC from a 15-day suspension and a charge filed by AFSCME Council 71, Local 2218, Ruffin's majority representative, against the State of New Jersey, Department of Human Services, Ancora Psychiatric Hospital, alleging that the suspension constituted retaliation against Ruffin for his exercise of rights protected by the New Jersey-Employer-Employee Relations Act, as amended, in violation of N.J.S.A. 34:13A-5.4a(1) and (3).

On February 24, 2012, while the matter was pending before ALJ Bingham, the public employer indicated that the penalty was being reduced to a five day suspension, considered to be minor discipline. The public employer asserted that Ruffin's appeal should be dismissed as there is no right to appeal minor discipline to the CSC. On March 6, 12, and 16, Ruffin's counsel objected to the amendment to the discipline on several grounds, including that Ruffin had not been paid for the ten day difference between a 15 and 5 day suspension; that the Notice of discipline was improper and that permitting amendment of the penalty after the appeal had begun was prejudicial because it

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<sup>1/</sup> The Joint Order modified a previous consolidation order issued by the Administrative Law Judge, Robert Bingham, II.

could impair Ruffin's ability to receive counsel fees for successfully contesting a major disciplinary sanction. Ruffin's counsel requested that an evidentiary hearing with testimony be conducted.

On March 30, 2012, the ALJ issued an initial decision in which he recommended that:

1. Ruffin's appeal to the CSC be dismissed because he was not entitled to an OAL hearing to review minor discipline.<sup>2/</sup>
2. The consolidated cases be severed and that the unfair practice case be returned to the Commission for hearing.<sup>3/</sup>

On May 17, 2012, after exceptions and cross-exceptions and responses thereto were filed by the appellant/charging party and the public employer, the CSC adopted the ALJ's recommendation to sever the consolidated cases; to dismiss the appeal from the disciplinary sanction and remand it to the JUMP procedure and to send the unfair practice case to PERC for hearing.<sup>4/</sup>

After considering the ALJ's initial decision in light of the parties' exceptions, cross-exceptions and responses thereto, we

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2/ The ALJ recommended that review of the minor discipline be returned to a contractual Joint Union/Management Panel (JUMP) for review.

3/ The appendix to the initial decision indicates that no testimony was received into evidence. Several documents are listed as exhibits.

4/ The CSC also vacated as moot, a discovery ruling made by the ALJ.

will order the Director of Unfair Practices to assign this case to a hearing examiner to conduct a hearing in accordance with our rules.<sup>5/</sup>

The May 17, 2012 decision of the CSC recites the exceptions, cross-exceptions and supporting arguments of each party that are relevant to our review of the initial decision.

Initially, we note that the public employer agreed with the ALJ's recommendations to dismiss the disciplinary appeal in light of the reduction of the penalty and with the recommendations to sever the consolidated cases and return the unfair practice case to this Commission for hearing. The CSC's decision granted the public employer's exception to vacate the ALJ's discovery order.

We defer to the CSC's ruling that the ALJ appropriately dismissed Ruffin's appeal after his sanction was reduced from major to minor discipline.<sup>6/</sup> However, as we are essentially in the pre-hearing stages of this unfair practice case, we neither agree nor disagree with the CSC's observation that review of the five-day suspension through the JUMP mechanism, or other means of

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<sup>5/</sup> We do not consider the Charging Party's additional submission of April 19, 2012.

<sup>6/</sup> The assertion of appellant/charging party that the reduction of the penalty gives it the right to attorney's fees under civil service law is not before us and must be raised in the appropriate forum. We do not have the authority to award attorney's fees in unfair practice proceedings. See Logan Tp. Bd. of Ed. and Waldman, P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), aff'd NJPER Supp.2d 138 (¶119 App. Div. 1983).

review, whether binding or non-binding on the public employer, is unrelated to the unfair practice case.<sup>7/</sup> We will not pre-judge the relevancy of any events or actions before an evidentiary hearing is held.<sup>8/</sup>

We reject the charging party's assertion that it and the public employer could bind the CSC and PERC to their choice of forum to hear the appeal filed by Ruffin and the charge filed by Local 2218.<sup>9/</sup> However, to the extent the charging party asserts that, based upon an alleged agreement it reached with the public employer, it withdrew or eschewed relief for other possible violations of the Act, we make no comment on whether those allegations are relevant or can be pursued in the upcoming hearing. Similarly, we do not review or comment upon any evidence that was placed in the record by the ALJ. Nor do we

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7/ The JUMP procedure in the parties' agreement contemplates that review of minor disciplinary sanctions of up to five-day suspensions will normally conclude after review through JUMP. However contract language provides that a neutral member of the panel may, in certain cases, indicate that a particular dispute can appropriately be resolved through arbitration. The union would have the option of proceeding to arbitration before a different neutral.

8/ It is possible that the CSC's comments were procedural and not substantive.

9/ We find that it would be counterproductive, at this point in time, to have the ALJ hear the unfair practice charge even though we believe that had he retained jurisdiction and conducted an unfair practice hearing, that path would have been procedurally and substantively sustainable even though, pursuant to N.J.S.A. 52:14F-8, PERC is an "exempt" agency. See N.J.A.C. 1:1-17.6(d).

comment on any arguments advanced by the charging party that certain events and actions violated the rights of the charging party. We do not consider proposed findings of fact and conclusions of law until a Hearing Examiner has issued a report and recommended decision.

ORDER

The Director of Unfair Practices shall assign CO-2012-221 to a hearing examiner to conduct a hearing.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: June 28, 2012

Trenton, New Jersey