

P.E.R.C. NO. 88-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP &
ORANGE PBA, LOCAL 89,

Respondents,

-and-

Docket No. CI-87-31-130

CHESTER PENTA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Chester Penta against the City of Orange Township. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act when it ordered Penta to stay home while on injury leave. The Commission finds that most of the Complaint was time-barred and the remainder does not allege facts sufficient to constitute a violation of the Act.

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Appearances:

For the Respondent Township, Robert L. Penza, Esq.

For the Respondent PBA, Zazzali, Zazzali & Kroll, Esqs.
(Paul L. Kleinbaum, of counsel)

For the Charging Party, Jack Gold, Esq.

DECISION AND ORDER

On November 14, 1986, Chester Penta ("Penta") filed an unfair practice charge against the City of Orange Township ("City"). The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(1),^{1/} when it ordered Penta to stay home while on injury leave. The charge alleges that this order was effective during the following periods: July 28 to September 13,

^{1/} This subsection prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act."

1985; November 15 to November 23, 1985; December 9, 1985 to January 15, 1986; and May 30 to June 18, 1986. The charge further alleges that Penta requested the PBA to grieve these actions.

On February 13, 1987, Penta amended this charge and alleged that the Orange PBA Local 89 ("PBA") violated the Act when it ignored Penta's request to grieve the City's order to stay home.

On May 18, 1987, Penta amended the charge to allege that the City violated the Act, specifically subsections 5.4(a)(1), (3) and (4),^{2/} when on May 8, 1987, the Chief allegedly spoke to him in an offensive tone and "harassed" him in the presence of other police officers.

On March 27, 1987, a Complaint and Notice of Hearing issued.

On April 23, 1987, the PBA and the City filed motions for summary judgment. Both contend the charge is untimely. On April 29, 1987, Penta responded. He contends the charge was timely because the PBA had misled him to believe that his grievance against the City was being processed and he filed the charge within six months of discovering this was not so.

On May 4, 1987, Chairman Mastriani referred these motions to Hearing Examiner Alan R. Howe for determination. On June 9,

^{2/} Subsections 5.4(a)(3) and (4) provide: (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 this 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."

1987, during oral argument on the motions, Penta withdrew the charge against the PBA and stated that he had no evidence that the City pressured the PBA not to process the grievance.

On July 2, 1987, the Hearing Examiner granted the City's motion and dismissed the Complaint. H.E. No. 88-2, 13 NJPER 610 (¶18229 1987). He found that the Complaint did not set forth sufficient allegations establishing, if true, that the City violated the Act and that the Complaint was time barred by the six month statute of limitations set forth in N.J.S.A. 34:13A-5.4(c).

On August 5, 1987, after receiving an extension of time, Penta filed exceptions and supporting documents. He requests that the Commission, as a matter of "fundamental fairness," permit him to proceed with the case and notes that the City was not prejudiced by the late filing because it was aware of his grievance. Penta also contends the amended charge should not have been dismissed because it was timely filed.^{3/}

On August 14, 1987, the City responded. It objects to Penta's submission of additional documents and urges dismissal of the Complaint because of untimeliness and lack of merit.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 6-8) are undisputed and accurate. We adopt and incorporate them here. We agree with the Hearing Examiner that summary judgment dismissing the Complaint was proper. Most of the


3/ Penta also requests oral argument. We deny that request.

Complaint was time-barred. We cannot extend this time period absent a finding that the charging party was "prevented" from filing the charge sooner. There is no such evidence here. The only portions that were considered and not time-barred pertained to the May 30 - June 18, 1986 injury leave order and the May, 1987 allegations. But the Complaint, in its entirety, does not allege facts concerning these portions sufficient to constitute a violation of our Act. There is no allegation that the Township engaged in these actions because of any activity by Penta protected by this Act. Nor do the Township's actions, as stated, violate the Act.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Smith, Johnson, Reid and Bertolino voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
September 23, 1987
ISSUED: September 24, 1987

H.E. NO. 88-2

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP &
ORANGE PBA, LOCAL 89,

Respondents,

-and-

Docket No. CI-87-31-130

CHESTER PENTA,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Respondent Township's Motion for Summary Judgment, it appearing that there were no genuine issues as to any material facts vis-a-vis the Township having violated §5.4(a)(1) of the New Jersey Employer-Employee Relations Act. The Township's Motion for Summary Judgment was based on the contention that the Unfair Practice Charge was untimely since there were no events alleged to have occurred within six months of the filing of the Charge, which could constitute an unfair practice. At a hearing on June 9, 1987, the Charging Party had withdrawn its Unfair Practice Charge against the Respondent PBA and, thus, it was not involved in the decision.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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For the Respondent PBA
Zazzali, Zazzali & Kroll, Esqs.
(Paul L. Kleinbaum, Esqs.)

For the Charging Party
Jack Gold, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION ON RESPONDENTS'
MOTIONS FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on November 14, 1986, by Chester Penta, (hereinafter the "Charging Party" or "Penta") alleging that the City of Orange Township by its Police Department (hereinafter the "Respondent" or the "Township") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et

seq. (hereinafter the "Act"), in that Penta was injured while on duty on July 28, 1985, after which he was hospitalized on August 10, 1985, and returned to work on September 13, 1985, and was again injured while on duty on November 15, 1985, and hospitalized again on December 9, 1985, returning to work on January 15, 1986. During the period prior to his return to work on January 15, 1986, Penta had been under "house arrest" and, after returning to work on January 15th, he protested that his "house arrest" had been improper; that on May 1, 1986, Penta filed a grievance with Orange PBA, Local 89 (hereinafter the "PBA"); and that on May 30, 1986, Penta again suffered an injury, this time while off duty, having returned to work on June 18, 1986, and having been under "house arrest" during the entire time that he was recovering. On some intervening date prior to July 29, 1986, Penta filed a second grievance with the PBA President and, not having received an answer to the grievance, he requested the PBA President to petition the Commission, and when nothing transpired he filed his own "petition" with the Commission; all of which is alleged to be a violation by the Respondent Township of N.J.S.A. 34:13A-5.4(a)(1) of the Act. 1/

1/ This subsection prohibits 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."

On February 13, 1987, Penta amended his Unfair Practice Charge to include as a Respondent the PBA and alleged that it had engaged in unfair practices within the meaning of the Act. Penta averred that the PBA had violated the Act in that on August 26, 1985, Penta notified the PBA President that he wanted to file a grievance and on September 26, 1985, Penta spoke to the PBA President. On March 13, 1986, Penta spoke to the successor PBA President, requesting that his grievance be processed; and on May 5, 1986, Penta submitted a written grievance when he learned that nothing further had been done regarding his prior request; and on July 29, 1986, Penta was advised by the Police Chief of the Township that he had never received a position statement from the PBA; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)[no subsections having been specified].

Again, on May 18, 1987, Penta amended his Unfair Practice Charge against the Respondent Township to allege that on May 8, 1987, the Chief of Police harassed him in the presence of other employees of the Police Department; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) of the Act.^{2/}

^{2/} These additional subsections of the Act prohibit public employers, their representatives or agents from: "(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 this act; and (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."

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 27, 1987, scheduling hearings for May 8 and May 11, 1987, in Newark, New Jersey. However, before the hearings commenced as scheduled, counsel for the PBA filed a Motion for Summary Judgment with the Chairman of the Commission on April 20, 1987, the thrust of which was that the Unfair Practice Charge, as amended, was untimely as to the PBA.^{3/}

On April 21, 1987, counsel for the Township joined in the PBA's Motion for Summary Judgment, adopting the PBA's argument that the Unfair Practice Charge, as amended, was untimely under §5.4(c) of the Act, supra. Finally, on April 27, 1987, counsel for the Charging Party filed a letter objecting to the grant of the two Motions for Summary Judgment, supra, on two grounds: (1) that on November 18, 1986, the Commission's Director of Unfair Practices wrote to the Charging Party, in which he stated that after a review of the Unfair Practice Charge he believed "...that the charge, as it is worded, is a timely charge..."; and (2) that the Charging Party was prevented from filing an Unfair Practice Charge at an earlier time "...due to the fact that it was led to believe that the charge was being processed by the Orange PBA..."

^{3/} Section 5.4(c) provides, in part, that no complaint shall issue based upon any unfair practice occurring more than six (6) months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge.

On May 4, 1987, the Chairman of the Commission referred the two Motions for Summary Judgment to the undersigned Hearing Examiner for disposition pursuant to N.J.A.C. 19:14-4.8(a).

On June 9, 1987, the Hearing Examiner conducted a hearing, which was limited to the subject matter of the Motions for Summary Judgment of the Township and the PBA.^{4/} The purpose of the hearing was to determine whether or not there existed a genuine issue as to any material facts: (1) whether or not the initial Unfair Practice Charge filed by Penta on November 14, 1986, was timely filed under §5.4(c) of the Act and, (2) if the Charge was not timely filed, was Penta prevented from filing the Charge at an earlier time due to his having been led to believe that the Charge was being processed by the PBA. At a certain point in the hearing, counsel for Penta brought to the attention of the Hearing Examiner the fact that the only reason that the PBA had been named as a Respondent in the amended Unfair Practice Charge of February 13, 1987, was based on information received from the Commission that in order to proceed against the Township the PBA had to be named as a Respondent (1 Tr 20). The Hearing Examiner, having explained to counsel for Penta that this was not the case, i.e., there was no requisite that the PBA be named as a Respondent in order to proceed against the Township, counsel for the Charging Party withdrew the

^{4/} The transcript of the June 9th hearing was received on June 18, 1987.

amended Unfair Practice Charge of February 13, 1987, against the PBA and, with that, the PBA was dismissed as a party Respondent and its Motion for Summary Judgment was deemed withdrawn (1 Tr 20-22). Thereafter the hearing proceeded with the Charging Party and the Township stipulating as to the relevant dates and their accuracy as set forth in the initial Unfair Practice Charge.^{5/}

Based upon the documents filed in this matter to date and certain stipulations reached at the hearing on June 9, 1987, the Hearing Examiner makes the following:

UNDISPUTED FINDINGS OF FACT

1. The City of Orange Township is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Orange PBA, Local 89 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Chester Penta is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
4. As stipulated at the hearing between counsel for Penta and counsel for the Township, the following chronology of dates and events contained in the initial Unfair Practice Charge is accurate:

^{5/} The subject matter of the second amendment to the initial Unfair Practice Charge, which was filed on May 18, 1987, against the Township only, supra, was plainly timely, having alleged events in or around May 8, 1987. Thus, the second amendment was not the subject of the timeliness hearing on June 9, 1987 (1 Tr 11, 12).

a. On July 28, 1985, Penta was injured while on duty. He received treatment at a hospital and on August 10, 1985, he was admitted to a hospital for treatment.

b. Penta returned to work on September 13, 1985, and during the period from July 28th to September 13th he had been placed by the Chief of Police under "house arrest" wherein he was confined to his home except on the occasion of receiving treatment.

c. During the period of his "house arrest," supra, the matter was brought to the attention of the PBA President, who stated that the matter would be addressed, but nothing happened.

d. On November 15, 1985, Penta was again injured while on duty and, while out of work until November 23, 1985, he was again under "house arrest."

e. On December 9, 1985, Penta was admitted to the hospital for surgery and was again under "house arrest" until he returned to work on January 15, 1986.

f. During the period of the December 9th to January 15th "house arrest," supra, Penta protested to the PBA and was advised that the policy of the Chief of Police on "house arrest" was improper and that the PBA was working on the matter in the grievance procedure.

g. On May 1, 1986, after being frustrated by the PBA's lack of action, Penta filed his own written grievance with the PBA.

h. On May 30, 1986, Penta was injured while "off duty" and, after hospitalization, returned to work on June 18,

1986. He was under "house arrest" during the period between May 30th and June 18, 1986.

i. Sometime between June 18, 1986, and July 29, 1986, Penta filed another grievance with the PBA and on July 29th was advised by the Chief of Police that he could not act on Penta's grievance since the PBA had not submitted its position in writing. Subsequently, Penta learned that the PBA had submitted its position in writing to the Chief of Police, and had agreed with his grievance.

j. Penta next alleged that he requested that the PBA "petition PERC." The PBA thereafter advised Penta that PERC had been notified and that he would be receiving a hearing date. When nothing transpired, he contacted PERC himself and ultimately filed his own "petition" (the instant Unfair Practice Charge).

k. Finally, Penta alleges, "Looking in retrospect, I believe pressure was applied to Officer Fogarty (PBA) not to process or submit this grievance..."^{5/}

5. Counsel for Penta, upon inquiry by the Hearing Examiner on June 9, 1987, agreed that the Charging Party had no specific proof under any standard of evidence (1) that the Township prevented Penta from filing an unfair practice charge prior to the date of the initial Charge, namely November 14, 1986, or (2) that the Township did anything to interfere with the processing by the PBA of the grievance that Penta gave to it (1 Tr 27-29).

^{5/} Note, however, that Penta has alleged no facts to support his "belief" that pressure was applied not to submit his "grievance."

DISCUSSION AND ANALYSIS

Based on the foregoing undisputed Findings of Fact, it is clear that the this case is ripe for disposition on the Township's Motion for Summary Judgment: see analysis and discussion by the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) and the New Jersey Civil Practice Rules, 4:46-2. Under these authorities a motion for summary judgment may properly be granted when the record papers disclose that "...there is no geniune issue as to any material fact...and that the moving party is entitled to a judgment or order as a matter of law..." The Hearing Examiner is fully satisfied that the requisites for the granting of the Township's Motion for Summary Judgment have been met since there are no genuine issues as to any material facts in the instant record.

Thus, the Hearing Examiner hereby grants the Township's Motion for Summary Judgment for the following reasons:

* * * *

It is first noted that the PBA is "out of the case" and nothing that might be attributed to it as illegal conduct in this proceeding is before the Hearing Examiner at this time.^{6/} We must therefore look only at what the Township may or may not have done, which might constitute a violation of §5.4(a)(1) of the Act, this

^{6/} Consider, also, that five of the ten stipulated events in the chronology, supra, pertain to the PBA alone (see ¶'s 4c, 4f, 4g, 4i & 4j).

being the only subsection of the Act alleged by Penta to have been violated by the Township in the initial Charge.

Section 5.4(a)(1) of the Act prohibits a public employer such as the Township from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act. Thus, the inquiry must necessarily focus upon whether or not the Township has in any way interfered with, restrained or coerced Penta in the exercise of the rights guaranteed to him by the Act. Initially, the Hearing Examiner concludes that injuries on or off duty and "house arrests" cannot without more implicate the Township in a violation of the Act.

The Act does, however, protect employees of public employers in their right to file grievances: Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984). The only perceivable conduct that Penta engaged in, which would bring him within the ambit §5.4(a)(1) of the Act, is his filing of several grievances with the PBA, of which the Township had probable knowledge. As concluded above, the events between July 28, 1985, the date of Penta's first injury, and the subsequent "house arrests," which occurred between July 28, 1985 and June 18, 1986, are not probative on the issue of whether the Township violated the Act by the conduct of its Chief of Police. Thus, the only remaining

question is whether or not a genuine issue as to any material fact exists as to the Township having in any way interfered with the efforts of Penta to file and process a grievance or the filing of the initial Charge.

Within the six-month limitation period between May 14, 1986 and November 14, 1986, when filed the initial Unfair Practice Charge, the only event, involving Penta's grievance vis-a-vis the Township, was the Chief of Police having stated on July 29, 1986, that he could not act on Penta's grievance due to the PBA not having submitted a position in writing. Thereafter, although the PBA did subsequently submit a position in writing, the only allegation pertaining to the Township is the averment of Penta that he "believed" that pressure was applied to the PBA not to process or submit his grievance to "PERC." This allegation is vague in the extreme and does not raise an issue of "material" fact, which might defeat a motion for summary judgment. It will be recalled that counsel for Penta conceded that he had no evidence of specific proof that the Township did anything to interfere with the processing by the PBA of Penta's grievance (1 Tr 27) or, that Penta could prove that the Township prevented him from filing a charge prior to November 14, 1986.

Thus, the Hearing Examiner finds no "genuine issue as to any material fact," involving the Township in an unfair practice under §5.4(a)(1) of the Act. As noted above, the only activity, in which Penta was involved with the Township, was his efforts to file

and process several grievances. His dealings were mainly with the PBA, which has been dismissed from the instant Unfair Practice Charge. The Township had no involvement in Penta's efforts to file and process a grievance other than the vague allegation, referred to above, of alleged pressure on the PBA not to process or submit his grievance. As noted previously, the Charging Party has conceded that it had no proof to support this allegation.

* * * *

Based on the instant record, the Hearing Examiner has no alternative but to grant the Township's Motion for Summary Judgment, based not only on the six-month limitation under §5.4(c) of the Act, i.e., that there are no allegations of unfair practices by the Township between May 14 and November 14, 1986, but, also, that there do not appear to be any sufficient allegations of unfair practices by the Township vis-a-vis Penta whatsoever.

Upon the foregoing, and upon the undisputed factual record in this case, supra, the Hearing Examiner makes the following:

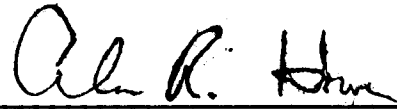
CONCLUSIONS

1. The Respondent Township's Motion for Summary Judgment is granted.
2. The Respondent Township, by its conduct herein, did not violate N.J.S.A. 34:13A-5.4(a)(1) as alleged in the initial Unfair Practice Charge of November 14, 1986.
3. The Respondent PBA is dismissed as a party to the instant proceeding by virtue of the voluntary withdrawal by the Charging Party on June 9, 1987.

RECOMMENDED ORDER

1. The Hearing Examiner recommends that the Commission ORDER that the Respondent Township's Motion for Summary Judgment be granted and the Complaint against the Respondent Township be dismissed in its entirety.

2. The Hearing Examiner further recommends that the Commission ORDER that the Complaint against the Respondent PBA be dismissed as a result of the voluntary withdrawal of the Unfair Practice Charge against the said PBA on June 9, 1987.



Alan R. Howe
Hearing Examiner

Dated: July 2, 1987
Trenton, New Jersey