SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1391-21

CITY OF OCEAN CITY,

Respondent-Appellant,

and

EDWIN YUST,

Petitioner-Respondent.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Argued March 14, 2023 – Decided August 18, 2023

Before Judges Gilson and Rose.

On appeal from the New Jersey Public Employment Relations Commission, PERC No. 2022-2.

Thomas G. Smith argued the cause for appellant.

Joseph C. Ruddy, Jr., of the Maryland bar, admitted pro hac vice, argued the cause for respondent Edwin Yust (Barry, Corrado, & Grassi, PC, and Joseph C. Ruddy,

Jr., attorneys; Frank L. Corrado and Joseph C. Ruddy, Jr., on the brief).

John A. Boppert, Deputy General Counsel, argued the cause for respondent Public Employment Relations Commission (Christine Lucarelli-Carneiro, General Counsel, attorney; John A. Boppert, on the brief).

PER CURIAM

Following a protracted administrative process, the City of Ocean City appeals from a November 29, 2021 final agency decision of the Public Employment Relations Commission (PERC). Deeming the hearing examiner's decision final pursuant to N.J.A.C. 19:14-8.1(b),[1] PERC found the City engaged in an unfair labor practice pursuant to the New Jersey Employer-Employee Relations Act (EERA), N.J.S.A. 34:13A-1 to -64, by unlawfully demoting petitioner Edwin Yust from his position as assistant captain to lieutenant with the Ocean City Beach Patrol (OCBP), and "concomitantly" reducing his wages "in retaliation for protected conduct."

On appeal, the City challenges the denial of its motions made prior to and during the hearing: (1) PERC's February 26, 2009 decision denying the City's

[1] N.J.A.C. 19:14-8.1(b) provides, in relevant part, "[i]f no exceptions are filed, the recommended decision shall become a final decision." Because no exceptions were filed to the hearing examiner's October 15, 2021 decision in this case, it was deemed final under the regulation.

summary judgment; (2) the hearing examiner's May 8, 2014 decision denying the City's motion to dismiss or limit Yust's claims; and (3) the hearing examiner's May 31, 2016 decision denying the City's motion to strike the testimony of, or recall, the witnesses who had appeared before the first hearing examiner prior to his retirement.

Having considered the City's contentions in view of the record and applicable legal principles, we affirm the decisions under review. However, because Yust relinquished any claim occurring after January 1, 2008 and the hearing examiner awarded Yust compensatory damages "from 1999 through 2008, his last year of employment with the City," we remand to modify the compensation award to reflect a December 31, 2007 end date.

I.

Hired as a lifeguard by the City in 1957, Yust was a member of the OCBP, working seasonally until 2008. Yust ascended to the rank of assistant captain but was demoted to lieutenant in 1988; his pay was reduced by thirty percent accordingly. Yust claimed the demotion and pay cut were the result of the votes he cast while a member of the OCBP Life Guard Pension Commission (Pension Commission). Yust attempted to meet with City officials to discuss the demotion but was denied his right to a grievance hearing.

In June 1999,[2] Yust, filed a pro se unfair practice charge against Mark Baum, the president of the OCBP Administrative Association, and other members of the Association's "negotiating team," for failing to support Yust's position as assistant captain. On the same day, Yust filed a pro se unfair practice charge against Dominick Longo, the City's director of public safety for refusing to grant a grievance hearing.

In August or September 2000,[3] with the assistance of counsel, Yust amended the unfair labor charges, asserting Longo, and other City officials committed "acts of retaliation" against Yust for "refus[ing] to follow the dictates and vote in a manner prescribed by [Longo] . . . or other City Officials," while he served on the Pension Commission. Yust sought judgment against the City, the director of public safety, and other City officials. In essence, Yust contended the City "failed to comply with the appropriate grievance procedures set forth in the Collective Bargaining Agreement [(CBA)] between the City and the [OCBP] Administrative Association in which he was a member." After the City and

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[2] In its February 26, 2009 decision PERC noted: "The original charge was filed on June 9, 1999 and processing was held in abeyance due to illness and related federal court litigation."

[3] The amended complaint included in the City's appendix is dated August 4, 2000, but PERC's February 26, 2009 decision states the charge was amended on September 5, 2000.

Longo filed an answer and position statement denying the charge, Yust filed a second amended charge against them, asserting additional violations under the EERA in March 2001.

On June 28, 2002, Yust filed a complaint in the United States District Court for the District New Jersey, against the City, Longo, and the City's mayor asserting violations of federal and state laws, including the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. On May 30, 2008, the District Court dismissed Yust's federal complaint on the City's unopposed summary judgment motion. Substantively, all claims were dismissed except Yust's "CEPA claim arising from events after 1999." Procedurally, however, the court "decline[d] to exercise supplemental jurisdiction over the remaining CEPA claim."[4]

In September 2008, the City moved for summary judgment before PERC seeking dismissal of all administrative charges. We glean from PERC's February 26, 2009 written decision that the City made five arguments in support of its motion – all of which were rejected. We address those arguments seriatim.

[4] We glean from the District Court's decision that the federal action was administratively terminated in February 2004 at Yust's request for health reasons. Over the objection of the defendants in that case, the matter was reopened in August 2007, and they moved for summary judgment the following month.

Initially, the City contended Yust's unfair practice charge was time-barred under the governing statute. See N.J.S.A. 34:13A-5.4(c) (providing "no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge"). The City asserted Yust's alleged unfair practice claim arose on March 20, 1999, when Longo "informed Yust his grievance would not be processed because it was untimely." Acknowledging Yust's June 1999 charge against Longo was filed within the six-month statutory period, the City argued Yust's August 2000 amended charge against the municipality was time-barred because it was not filed by September 20, 1999.

PERC rejected the City's argument. Citing N.J.S.A. 34:13A-5.3, PERC found a public employer's "designated representatives" are empowered to "negotiate in good faith with respect to grievances." Further, N.J.S.A. 34:13A-5.4(a) prohibits "[p]ublic employers, their representatives[,] or agents" from "violating an employee's rights." Because "[p]ublic employers act through [their] representatives" under the EERA, and "Longo was the City's representative" under the EERA, PERC concluded the charge against the City was deemed filed in June 1999, "less than six months after the alleged unfair practice."

Turning to the City's second contention that Yust's grievance was untimely filed, PERC found there were material facts in dispute that precluded judgment as a matter of law. Specifically, the City contended the grievance was not made within seven days of Yust's receipt of the December 23, 1998 correspondence stating his assistant captain position was being eliminated contrary to the parties' CBA. Conversely, Yust certified that "after receiving the December 23 letter, he contacted the [OCBP c]aptain and they agreed to an extension of the time to file a grievance until Yust had the opportunity to meet with Longo regarding the proposed elimination of the position."

PERC also denied summary judgment on the City's third ground, "the elimination of Yust's position was a managerial right and not a grievable event under [the governing authority]." PERC reasoned, "although a public employer may have a managerial prerogative to eliminate a position, it cannot do so in retaliation for the exercise of protected rights, as alleged here."

Nor was PERC persuaded by the City's argument that Yust's amended retaliation charge was untimely. Citing a 2007 PERC decision that adopted Rule 4:9-3's relation-back provision, PERC found "the March amendments date[d] back to the allegations in the original complaint and [we]re timely."

Finally, PERC rejected the City's contention that Yust's activities as a member of the Pension Commission were not union activities, and as such, they were not protected under the EERA. The City argued that under N.J.S.A. 43:13-28, the mayor appointed the members of the Pension Commission, who were not public employees under the EERA. Assuming that premise to be true, PERC nonetheless concluded "the City has not shown that the statutory exclusion would permit it to retaliate against a covered employee for his activity on the Pension Commission, an appointment that by statute must be held by a public employee." Accordingly, PERC denied the City's motion in its entirety.

Yust's unfair practice charges proceeded before the first hearing examiner. The hearing spanned eight nonconsecutive days between March 17, 2010 and September 1, 2011, during which Yust and two other witnesses testified. On June 7, 2012, the matter was reassigned to another hearing examiner, in view of the first examiner's retirement.

In the interim, in May 2010, Yust filed a complaint in the Law Division against the City and certain of its employees, alleging age discrimination under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, and CEPA. On December 21, 2012, Yust executed a settlement agreement resolving the Law

Division action.[5] Pertinent to this appeal, the City was released of "any and all claims which arose on or after January 1, 2008 . . . and the claims for events before January 1, 2008 which were pled in the PERC matter survive[d]."

In May 2011, the City moved to dismiss or limit Yust's claims, arguing Yust waived his unfair practices under CEPA because he asserted CEPA claims in his 2002 federal action and 2010 Law Division complaint. Alternatively, the City argued Yust's claim concerning his salary reduction "should be limited to the year 1999." On May 8, 2014, the hearing examiner issued a cogent written decision, denying the City's motion in its entirety.

The hearing examiner thoroughly considered the District Court's decision that had granted the City summary judgment "on all claims except Yust's CEPA claims concerning adverse employment actions that occurred after 1999." He also considered the circumstances of the Law Division settlement, which expressly provided "Yust's amended unfair practice charges . . . 'will continue' and are not waived by the Agreement."

The hearing examiner rejected the City's contention that Yust's 2010 Law Division complaint served as a "retroactive waiver" of his unfair practice

[5] Because the copy of the settlement agreement provided on appeal does not contain the signature of the City's mayor, the agreement's effective date is unclear from the record.

charges. Citing our decisions in Crusco v. Oakland Care Ctr., Inc., 305 N.J. Super. 605, 611 (App. Div. 1997) and Ballinger v. Del. River Port Auth., 311 N.J. Super. 317 (App. Div. 1998), aff'd, 172 N.J. 586 (2002), the hearing examiner determined the waiver provision did not bar Yust's administrative charges. The hearing examiner also stated "the Agreement releasing the City from liability for any claims arising on or after January 1, 2008 d[id] preclude Yust from seeking remedies for harm after 2007."

The City subsequently moved to strike the testimony of the witnesses who appeared before the first hearing examiner or recall the witnesses before his successor. In essence, the City contended the "new hearing examiner w[ould] not be able to make observations of 'character or demeanor'" of those witnesses who testified before the first examiner. On May 31, 2016, the hearing examiner issued a well-reasoned decision, denying the motion. Citing N.J.A.C. 19:14-6.4(a),[6] the hearing examiner concluded the regulation expressly permitted his substitution in this matter "for the purpose of further hearing."

[6] The regulation provides, in pertinent part: "If the hearing examiner becomes unavailable, the Director of Unfair Practices or [PERC] may designate another hearing examiner for the purpose of further hearing or issuance of a report and recommended decision on the record as made, or both." N.J.A.C. 19:14-6.4(a).

The testimonial hearing continued before the present hearing examiner on three additional days in July 2016. Six witnesses testified, including Yust and another witness who had testified before the first hearing examiner.

After reviewing the written submissions of counsel, on October 15, 2021, the hearing examiner issued a comprehensive, 119-page report and recommended decision, finding Yust was "unlawfully demoted from assistant captain in the OCBP to lieutenant in 1999 and that his wages were concomitantly and unlawfully reduced in retaliation for protected conduct, violating section 5.4a(l) and (3) of [the EERA]." As a remedy, the hearing examiner "recommend[ed] that Yust be made whole for losses in compensation, lifeguard pension benefits and otherwise other emoluments, plus interest, that would have otherwise accrued to him from 1999 through 2008, his last year of employment with the City." This appeal followed.

II.

Our scope of review of an agency's decision is circumscribed. See e.g., Russo v. Board of Trustees, Police & Firemen's Retirement System, 206 N.J. 14, 27 (2011). "Our inquiries are limited to: (1) whether the agency followed the law; (2) whether the agency's decision is supported by substantial evidence in the record; and (3) whether in applying the law to the facts, the agency reached

a supportable conclusion." In re County of Atlantic, 445 N.J. Super. 1, 11 (App. Div. 2016). Accordingly, "[i]n the absence of constitutional concerns or countervailing expressions of legislative intent, we apply a deferential standard of review to determinations made by PERC." City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 567 (1998); see also Commc'ns Workers of Am., Local 1034 v. N.J. State Policemen's Benevolent Ass'n, Local 203, 412 N.J. Super. 286, 291 (App. Div. 2010) (recognizing "PERC is charged with administering the [EERA], and its interpretation of the Act is entitled to substantial deference"). "[W]e owe no special deference to PERC's interpretation of the law outside its charge." In re Camden Cty. Prosecutor, 394 N.J. Super. 15, 23 (App. Div. 2007).

Motions for summary judgment in administrative proceedings are governed by N.J.A.C. 19:14-4.8(e), which provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

In considering a summary judgment motion, all favorable inferences must be granted to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142

N.J. 520, 529 (1995). The motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e). Similarly, motions to dismiss should be granted "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989).

On appeal, the City reprises the same arguments raised before the agency, limiting its contentions to the denial of its pre- and mid-hearing motions before PERC and the hearing examiner. In its responding brief, PERC argues that because the City did not file exceptions to the hearing examiner's October 15, 2021 decision, it failed to exhaust administrative remedies under Rule 2:2-3(a)(2). Yust urges us to affirm without opinion pursuant to Rule 2:11-3(e)(1)(D).

As a preliminary matter, we reject PERC's procedural argument. "The exhaustion of remedies requirement is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts." Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975). "Exhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle. . . . This principle requires exhausting available procedures, that is, 'pursuing them to their appropriate conclusion and, correlatively . . . awaiting their final outcome

before seeking judicial intervention.'" Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 558-59 (1979) (quoting Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947)).

Under Rule 2:2-3(a)(2), appeals are not maintainable in this court "so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise." As to the interests of justice, the Supreme Court has explained:

> [T]he doctrine of exhaustion of administrative remedies serves three primary goals: (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.
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> [City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979).]

However, "[t]he exhaustion doctrine is not an absolute." Garrow, 79 N.J. at 561. "Exceptions exist when only a question of law need be resolved; when the administrative remedies would be futile; when irreparable harm would result; when jurisdiction of the agency is doubtful; or when an overriding public interest calls for a prompt judicial decision." Ibid. (citations omitted).

As noted, because no exceptions to the hearing examiner's October 15, 2021 decision were filed in this case, the decision became final on November 29, 2021 under N.J.A.C. 19:14-8.1(b). The regulation does not, however, provide that a party to an administrative proceeding waives its right to appeal by failing to file an exception to an initial agency decision.

We therefore consider the merits of the City's arguments before us. Having done so in view of the record and applicable legal principles, we conclude the City's contentions are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1). We affirm, substantially for the reasons expressed in the well-reasoned decisions denying the City's motions. We add only the following comments regarding PERC's decision rejecting the City's claim that Yust's activities were not protected under the EERA.

The City maintains that under N.J.S.A. 43:13-28, "[m]embership on the Pension Commission in no way correlates to membership in the OCBP union." The statute provides, in relevant part:

> The mayor or chief executive officer shall appoint, with the advice and consent of the governing body of the city, a life guard pension commission of four members. One member shall be a superior officer of the life guard force, one a life guard and two citizens who are not members of the force.
>
> [N.J.S.A. 43:13-28.]

Because two members of the Pension Commission must be private citizens under the statute, the City argues it is "mere coincidence" that members of the Pension Commission are also members of the OCPB Administrative Association. However, the City does not explain how that distinction applies to Yust. Indeed, at the ensuing testimonial hearing, OCBP's representative testified that "Yust was put on the Pension Commission as basically a representative of the [OCBP Administrative Association]." Accordingly, we discern no error in PERC's determination that Yust's activities were protected under the EERA. We conclude, as did PERC, the City was not entitled to judgment as a matter of law.

Affirmed in part and remanded solely to modify the compensation award to reflect a December 31, 2007 end date.