P.E.R.C. NO. 83-137

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF TETERBORO,

Respondent,

- and - Docket No. CO-83-51-27

LOCAL 945 Teamsters,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Borough of Teterboro violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it laid off a Department of Public Works ("DPW") employee in retaliation for his support of a representation petition filed by Local 945 Teamsters.

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- and - Docket No. CO-83-51-27

LOCAL 945 Teamsters,

Charging Party.

Appearances:

For the Respondent, Parisi, Evers & Greenfield, Esqs.
(Irving Evers, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, of Counsel)

DECISION AND ORDER

On September 2, 1982, Local 945 Teamsters ("Local 945") filed an unfair practice charge against the Borough of Teterboro ("Borough") with the Public Employment Relations Commission. The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (3),[1] when it laid off Andrew DeKorte, a Department of Public Works ("DPW") employee, allegedly in retaliation for his support of a representation petition filed by Local 945.

1/ These subsections 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" and "(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."

On September 9, 1982, the Borough filed a response. It admitted that DeKorte was laid off, but denied that the layoff was in retaliation for his union activity. It asserted that the layoff was solely for reasons of economy.

On October 4, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Borough then filed an Answer in which it reasserted its position.

On October 22, 1982, the Hearing Examiner, Joan Kane Josephson, conducted a hearing at which the parties examined witnesses and presented evidence. They waived oral argument, but filed post-hearing briefs by November 24, 1982.

On March 4, 1983, the Hearing Examiner issued her report and recommendations, H.E. No. 83-22, 9 NJPER ___ (¶_____ 1983) (copy attached). Applying East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981) ("East Orange"), she concluded that the Borough violated subsections 5.4(a)(1) and (3) when it laid off DeKorte because of his support of Local 945 and that the Borough would not have done so absent the filing of the representation petition.

On March 11, 1983, the Borough filed Exceptions. The Borough maintains that the Hearing Examiner erred in finding that the Borough laid off DeKorte in retaliation for his protected activity, rather than because of its economic problems. It also contends that the Complaint should be dismissed because the Hearing Examiner took too long to issue her report.

On April 6, 1983, Local 945 filed a response to the Exceptions.

We have reviewed the record. We will set forth the pertinent facts developed at the hearing as a background to our analysis of the legal questions presented.

The DPW is primarily responsible for road maintenance, snow removal, grass cutting, and drain and sewer maintenance. It used to maintain the State roads, airport, and Conrail crossings in Teterboro, but no longer does so. In April 1980, the DPW consisted of one full-time employee, Joseph D'Antonio, and one supervisor, Joseph Fazio. There were also two summer helpers whose jobs ended in August. On May 1, 1981, Andrew DeKorte joined the DPW staff; he completed his probationary period on May 1, 1982. DeKorte, however, was laid off effective August 21, 1982. A summer employee hired in June, 1982 continues to work 40 hours every week.

In February 1982, Charles Rowett, the Borough manager, met with D'Antonio and DeKorte to discuss their salaries. Fazio, the DPW supervisor, was also in attendance at both meetings. Rowett gave both employees raises, but neither employee was happy about the amount of the increase. Rowett later called them in separately and gave D'Antonio an additional $500.00 and DeKorte an additional $1,000.00. Both employees also received a 4% increase in longevity pay. At neither of these meetings did Rowett mention that the Borough was having financial difficulties or that there might be layoffs. Sometime after these meetings, Fazio told Rowett that neither man was satisfied with his salary.

In May 1982, D'Antonio and DeKorte met with Local 945's business agent. They signed authorization cards.

On August 6, 1982, the Borough received notification that Local 945 had filed a representation petition seeking to represent DeKorte and D'Antonio in a two employee unit.

On August 10, 1982, Rowett called a meeting with D'Antonio, DeKorte, and Margaret Cahill, the municipal clerk. Rowett told D'Antonio and DeKorte that he had received notice of Local 945's petition. Rowett then stated that the Borough was trying to work within a 5% CAP and that if D'Antonio and DeKorte persisted in their attempts to unionize, they would be laid off.[2/] Rowett also told them that the DPW had operated in the past with only part-time help and could do so again. Later that day, supervisor Fazio spoke to DeKorte and said that Rowett had told him that DeKorte would be laid off if DeKorte went ahead with the attempt to obtain union representation.

On either August 10 or 11, 1982, DeKorte received a layoff notice effective August 21.

N.J.S.A. 34:13A-5.3 grants public employees "...the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization..." In East Orange, the Court followed the standards established in Mt. Healthy Board of Education

2/ Rowett testified that he never mentioned the union at the meeting or made any threats to the employees. The Hearing Examiner, however, credited the testimony of D'Antonio and DeKorte. We accept her credibility determinations.

v. Doyle, 429 U.S. 274 (1977) and Wright-Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980), aff'd 662 F.2d 899 (1st Cir. 1981), cert. den. 102 S. Ct. 1612 (1982) for determining whether an employer has acted discriminatorily against an employee for his exercise of a protected right. Under East Orange, the charging party must first establish that the aggrieved employee's protected activity was a substantial or motivating factor in the employer's decision. If the charging party succeeds, the employer must then establish by a preponderance of the evidence that the personnel action would have occurred even in the absence of the employee's protected activity. The factfinder must then resolve the conflicting proofs. See also Black Horse Pike Regional Board of Education, P.E.R.C. No. 83-73, 9 NJPER 36 (¶14017 1982).

Local 945 has convincingly established that DeKorte's support for its representation petition was *the* motivating factor in the Borough's decision to lay him off. Given the timing of events and the Hearing Examiner's credibility determinations, no other conclusion is possible. Rowett received notification of the representation petition on Friday, August 6, 1982, called a meeting with DeKorte and D'Antonio on Tuesday, August 10, told DeKorte and D'Antonio that they would be laid off if they proceeded with their attempts to unionize,[3/] and then laid DeKorte

3/ DeKorte's supervisor, Fazio, also warned DeKorte that he would be laid off if he continued to seek union representation. Fazio did not deny giving DeKorte this warning.

off later that day or the next day. We therefore conclude that the Borough laid off DeKorte in order to retaliate against him for supporting Local 945's representation petition.

We next consider whether the Borough would have laid off DeKorte if he had not supported Local 945. We conclude that the Borough would not have.

The Borough claims that it had decided to lay off DeKorte before it received any notice of the representation petition. We find the Borough's testimony in this regard unpersuasive.

The Borough asserts that the possibility of layoffs was considered at a July 7, 1982 meeting attended by Rowett, Fazio, Cahill, and the Chief of Police and called to discuss the Borough's budget problems and how to curtail expenditures. The Borough produced a memorandum dated July 8, 1982 and signed by Cahill which listed a series of 16 unexpected and emergency expenses purportedly discussed at the meeting the day before.[4/] The list specifically cited expenses for "Special Labor Attorney" and an accompanying document set these expenses at $9,497.00.

This testimony carries little weight. As of July 7, 1982, the Borough had not hired a "Special Labor Attorney." Indeed, Rowett admitted that the item could not have been discussed at that time. He denied that the memorandum was prepared for this litigation, but was unable to explain why "Special Labor Attorney"

4/ There was much testimony concerning item #1, the "Hackensack Meadowlands situation." The Borough apparently receives approximately $100,000.00 each year for the Meadowlands; in 1982, however, the Borough only received $17,000.00 due to litigation brought by a neighboring town.

was on a list dated July 8, 1982 when one had not yet been hired and the need for one had not yet arisen.[5/]

In addition, the memorandum specifically stated that "[i]t was necessary for the borough to retain a Special Labor Attorney in connection with this case." (Emphasis supplied) When reminded that he had denied that the memorandum was prepared specifically for this litigation, Rowett responded:

> We did it for ourselves. But we do this all the time to see where we stand with regard to our budget. This happened to be done about a couple of weeks ago. But we didn't know we were going to have a labor problem...

We find Rowett's denial that the memorandum was not prepared for litigation unbelievable. If the memorandum was prepared a "couple of weeks ago," i.e., in the beginning of October, 1982 and one month after this charge was filed, then the Borough certainly knew it had a "labor problem" at that time and the memorandum was prepared for litigation. If, on the other hand, the memorandum was prepared before the Borough knew it was going to have a "labor problem," as Rowett testified, then the memorandum would not have listed the services of a "Special Labor Attorney." Thus, we agree with the Hearing Examiner that the Borough's testimony concerning the July 7th meeting and the alleged discussion of possible layoffs is not credible.[6/]

5/ The preparer of the memorandum, the municipal clerk, was not called to explain the discrepancy. The failure of the Borough to produce Cahill on this issue, or to explain her absence, raises an inference that her testimony would have been unfavorable.

6/ We also adopt the Hearing Examiner's finding that the Borough's testimony concerning its decision to buy a new police car was not credible. While Rowett initially testified that the decision to buy a new car was made August 3, it is evident that the cost of repairs for the old car was not known until after DeKorte's layoff and that the decision was not made until then.

We also note that Rowett never informed DeKorte and D'Antonio before the August 10th meeting of the possibility of a layoff. Further, if the purpose of that meeting had been to inform DeKorte that he was going to be laid off because of the Borough's financial situation, then it is reasonable to believe Rowett would have said so at the beginning of the meeting. Instead, Rowett and Cahill attempted to prompt DeKorte and D'Antonio into renouncing their salary demands and desire for union representation. When DeKorte and D'Antonio refused to budge, Rowett threatened to lay them off. On this record, it is readily apparent to us that Rowett decided to lay off DeKorte because he had sought union representation in support of his salary demands, and that any budgetary problems the Borough had were not a motivating concern. In short, instead of exercising the Borough's right to resist DeKorte's salary demands through good faith negotiations with a majority representative, Rowett decided it was easier to avoid entirely such negotiations by laying DeKorte off.[7/]

We also reject the Borough's claim that it laid off DeKorte because the DPW no longer maintained the State roads, the airport, and Conrail crossings and therefore no longer needed his services. In fact, the work force was not reduced. Instead, a summer employee, who had worked only until September in prior years, was retained on a full-time basis and replaced DeKorte. Thus, it is clear that DeKorte was not laid off because

7/ The remaining one person unit would have been inappropriate, and the Borough thus would have had no obligation to negotiate with Local 945 on D'Antonio's behalf.

his services were no longer needed.[8/]

Accordingly, under all the circumstances of this case, we hold that DeKorte was laid off because he sought union representation and not because of the Borough's budgetary problems or a lack of work.[9/] We, therefore, conclude that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) and order it to reinstate him with back pay.[10/]

ORDER

IT IS ORDERED THAT the Respondent Borough of Teterboro:

1. Cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed

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8/ We recognize that the cost of retaining the part-time employee was cheaper than the cost of retaining DeKorte, but we find that it was not this cost differential that motivated Rowett to lay DeKorte off, but rather DeKorte's attempt to exercise his right to seek union representation on salary matters. Again, the Borough could have resisted DeKorte's demands and sought any necessary salary reductions through good faith negotiations with Local 945 if Local 945 gained majority representative status through its petition.

9/ Under East Orange, once Local 945 proved that DeKorte's protected activity was a substantial or motivating factor in his layoff, the burden shifted to the Borough to prove that it would have laid DeKorte off anyway. The Borough did not meet this burden and indeed its asserted reasons appear pretextual. Even if the burden on this issue had remained on the charging party, we find that Local 945 proved that DeKorte would not have been laid off but for his protected activity.

10/ The Borough also excepts to the length of time it took for the Hearing Examiner to issue her report. Without commenting on the merits of this exception, we note that it does not provide a basis for the dismissal of the Complaint or a refusal to award interest, as the Borough urges, since the Borough was not prejudiced in the presentation of its defense. In re Bernard Garber, 141 N.J. Super. 87 (App. Div. 1976), certif. den. 77 N.J. 494 (1976). It would not be fair to penalize DeKorte for any delay in the consideration of the charging party's meritorious claim.

to them by laying off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

2. Cease and desist from 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 the Act, particularly by laying off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

3. Forthwith offer to re-employ Andrew DeKorte for the position he formerly held in the Department of Public Works, or any other substantially equivalent position, and make him whole for lost earnings from August 21, 1982 at the rate he would have earned at the time he was laid off, less interim earnings,[13/] together with interest at a rate of 12% per annum from August 21, 1982.[14/]

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive

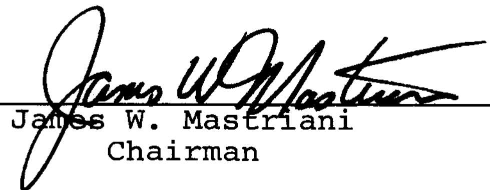
13/ On August 28, 1982, Andrew DeKorte was employed by the Schaeffer's Disposal in Midland Park, New Jersey.

14/ See Salem County Bd. for Vocational Educ. v. Daniel McGonigle, P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), affm'd in part, rev'd in part, remanded App. Div. Docket No. A-3417-78 (9/29/80).

days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Graves, Hipp, Suskin and Newbaker voted for this decision. None opposed.

DATED: Trenton, New Jersey
April 19, 1983
ISSUED: April 20, 1983

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing our employees in the exercise of the rights guaranteed to them by laying off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage our employees in the exercise of the rights guaranteed to them by the Act, particularly by laying off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

WE WILL forthwith offer to re-employ Andrew DeKorte for the position he formerly held in the Department of Public Works, or any other substantially equivalent position, and make him whole for lost earnings from August 21, 1982 at the rate he would have earned at the time he was laid off, less interim earnings, together with interest at a rate of 12% per annum from August 21, 1982.

BOROUGH OF TETERBORO
(Public Employer)

Dated ____________ By ____________________ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 83-27

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

In the Matter of

BOROUGH OF TETERBORO,

Respondent,

-and-

Docket No. CO-83-51-27

LOCAL 945 TEAMSTERS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Borough violated subsections (a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it laid off Andrew DeKorte shortly after a representation petition had been filed by the Teamsters for a unit of two employees including DeKorte. The Hearing Examiner was not persuaded that the Borough had taken the action because of economic problems which led to a decision to reduce the department to one employee.

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.

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

In the Matter of

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Respondent,

-and-

Docket No. CO-83-51-27

LOCAL 945 TEAMSTERS,

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Appearances:

For the Respondent
Parisi, Evers & Greenfield, Esqs.
(Irving C. Evers, Of Counsel)

For the Charging Party
Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, Of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On September 2, 1982, Local 945 Teamsters (the "Union") filed an unfair practice charge against the Borough of Teterboro (the "Borough") with the Public Employment Relations Commission. The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1) and (3), [1/] when it laid off Andrew DeKorte in retaliation for his support of Local 945 Teamsters.

On October 4, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Borough filed an answer denying

1/ These subsections 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; (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 guaranted to them by this act."

that the layoff of Andrew DeKorte was "with reference" to his union activities but rather was due to the Borough's economic conditions. Pursuant to the Complaint and Notice of Hearing, a hearing was held on October 22, 1982, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs by November 24, 1982.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and, after hearing and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following

Findings of Fact

The Borough of Teterboro is a public employer within the meaning of the Act and is subject to its provisions.

Local 945 Teamsters is a public employee representative within the meaning of the Act and is subject to its provisions.

Andrew DeKorte at the time the incident arose which gave rise to the filing of this unfair practice charge was a public employee within the meaning of the Act and subject to its provisions.

DeKorte was hired for the Borough's Department of Public Works ("DPW") on May 1, 1981. He joined a department that consisted of a supervisor, Joseph Fazio, and one other employee, Joseph D'Antonio. Also, during the summer months the Borough hired an additional

employee which the Borough characterizes as "part time," who normally worked 40 hours per week during the months of July and August only. At the time of this hearing on October 22, the "part-time" employee was still employed by the Borough, working 40 hours per week.

In February 1982, the Borough Manager, Charles T. Rowett, called in D'Antonio and DeKorte separately and told the men their salary would be increased by 10% in the coming year. Both men expressed some dissatisfaction with the amount and they communicated this directly to Rowett and to their immediate supervisor, Joseph Fazio. Rowett reconsidered the increases and advised the men they would receive additional amounts: D'Antonio was to receive an additional $500 and DeKorte an additional $1000. Rowett never brought up the possibility of any layoffs at this time. (Tr. 44)

D'Antonio and DeKorte then decided they would "try to get a union so [they could] get overtime and a little more money." (Tr. p. 9) They went to Local 945 Teamsters' union hall and met with Business Agent Robert J. Fusco. The union had some question as to whether the two employees would constitute a bargaining unit in the public sector and forwarded this inquiry to their attorney for an opinion.

On August 6, 1982, the Borough received notification that Local 945 Teamsters had filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission to represent these two employees. On August 10 Rowett called D'Antonio and DeKorte in to meet with him. Borough Clerk Margaret J. Cahill was also present at this meeting. At the meeting Rowett

initiated a discussion with the men concerning potential additional budgetary expenses and their salary concerns. Rowett had not had any discussions with the men concerning their compensation between the February meetings discussed above and this meeting.

Rowett asked the men "did they have any item of discontent they felt." (Tr. p. 80) On prodding from Ms. Cahill the men indicated they felt they should receive more money. Rowett reminded the men that there was a State mandated five percent limit (CAP) on the amount the budget could be increased over the previous year. He told them any extraordinary increases might precipitate layoffs. According to D'Antonio in the course of the discussion when they informed Rowett they went to the Teamsters because they wanted greater salary increases Rowett said:

> he [Rowett] said he was working within a five per cent CAP and he had that notice of our wanting to join Teamster's. And if we went through with it, that we would both receive pink slips at the end of the month. (Tr. p. 9)

The men were told to think about the discussion and discuss it with their supervisor, Fazio. According to DeKorte, later that day Fazio told him:

> he [Fazio] came and called me outside and he told me that Mr. Rowett told him to tell me that I would be laid off if I continue to go ahead with the union. And if not, he would drop the whole idea. He would drop the layoff and we would go back to the way we were...I told my supervisor I went this far. I will go the complete route. (Tr. 46, 47)

Rowett admitted he called the men in and discussed CAPs, the men's salaries, additional expenses and layoffs, but denied that the union was discussed. I credit the testimony of D'Antonio and DeKorte for several reasons.

(1) Teamsters Business Agent Fusco testified he was called by D'Antonio and DeKorte on the day of this meeting. They told Fusco they were told to drop the idea of joining the union or they would be laid off. He instructed them to put all the information in a letter and mail it to the union. D'Antonio composed the letter, both men signed it and it was mailed to the union.

(2) Ms. Cahill was at this meeting and had firsthand knowledge of what transpired and was not called as a witness.

(3) The DeKorte-Fazio conversation is unrefuted and Fazio did testify at the hearing.

(4) The timing of events gives additional credibility to the union-layoff testimony. There had been no discussion of salaries between February and August. After the petition was received in August, Rowett called the two men into his office -- they had not requested either a meeting or additional increases -- yet Rowett cautioned them that additional expenses that might "pop up...might precipitate layoffs." (Tr. 82) Even without the anti-union testimony, one might well infer illegal motivation on the part of the employer from the timing of events and the admitted discussion that transpired.

On August 12, 1982, Andrew DeKorte received a notice that he would be laid off effective August 21.

The unfair practice charge was filed on September 2, 1982.

Did the Respondent violate subsections (a)(1) and (3) of the Act when it laid off Andrew DeKorte?

Discussion and Analysis

In East Orange Public Library v. Taliaferro, 180 N.J.Super. 155 (App. Div. 1981)("East Orange"), the Court, followed the lead of the United States Supreme Court in Mount Healthy City Bd/Ed v. Doyle, 429 U.S. 274 (1977) and the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980)("Wright Line") in establishing the standards for determining whether an employer's motivation makes a personnel action illegal under our statute. The charging party must first establish that the protected activity was a substantial, i.e., a motivating factor in the employer's decision to take that personnel action. If the charging party makes this initial showing, then the employer must go forward and establish by a preponderance of the evidence that the personnel action would have occurred even in the absence of the charging party's protected activity. The factfinder must then resolve the conflicting proofs. [2/] Counsel for both parties agree that this is the test to be applied.

N.J.S.A. 34:13A-5.3 provides that public employees "shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization..." The undersigned concludes based on the above that a motivating factor in the employer's decision to lay off Andrew DeKorte was his joining and assisting in the formation of an employee organization - Local 945 Teamsters - to act for and negotiate agreements on his and Joseph D'Antonio's behalf. Once DeKorte was laid

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2/ For a complete discussion of the evolution of the Wright Line-East Orange standard see Black Horse Pike Reg. Bd/Ed, P.E.R.C. No. 83-73, 9 NJPER 36 (¶14017 1982), n. 7.

off, the remaining one employee would not be eligible to form a negotiations unit. Mass. v. Boro of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), affm'd 174 N.J.Super. 25 (App. Div. 1980), pet. for certif. den. 85 N.J. 129 (1980).

Having found that the Charging Party made an initial showing that DeKorte's protected activity was a substantial, i.e. motivating factor in the decision to lay off DeKorte, the second step of the Wright Line-East Orange test is would the layoff have occurred in the absence of the protected activity?

The Respondent argues that DeKorte was laid off because of the economic condition that existed and a determination that the work of the DPW could be performed without the second employee in view of a cut back on certain Borough DPW services being performed. I am not persuaded that the layoff would have occurred absent the protected activity.

The Borough posits that as early as July 7, 1982, at a meeting of department heads Rowett pointed out to the department heads that layoffs might be necessary because of fiscal problems. Minutes of the "July 7" meeting were placed in evidence (CP-1). The minutes have a date at the bottom which indicates they were typed by Ms. Cahill on "7/8/82." The minutes list 16 unanticipated emergency expenses discussed including "Special Labor Attorney." Rowett admitted that on July 7 the Borough did not anticipate the need for a Special Labor Counsel as an unanticipated emergency expense, yet he claimed that except for that item the memorandum is an account of a meeting that transpired on July 7. He denied that the memorandum was prepared for this litigation (Tr. 105) but he

could not explain how the Special Labor Attorney item appeared on the July 7 list. It is difficult to give credibility to an argument that layoffs were considered on July 7 when the purported minutes of this meeting contain such an unexplained error.

Rowett also testified initially that on August 3 an additional unanticipated expense occurred. He testified that around August 3 the Borough decided to purchase a new police car when the "engine went out." (Tr. 114) He initially testified that on August 10 when he discussed layoffs with DeKorte and D'Antonio, the Borough anticipated the car purchase. DeKorte was laid off on August 12. R-3 in evidence indicates that it was not until August 19 that the Chief of Police found out the cost of the engine repair, and Rowett testified on cross-examination that it was after they obtained this repair cost that the decision to purchase the car was made. (Tr. 118)

Since part of the Respondent's defense is that unanticipated additional expenses placed the Borough in a position where they might exceed their legal CAP limit, the undersigned might infer from the unrefuted testimony that the Borough considered that the potential for additional expense after the petition was filed was a legitimate management reason to lay off an employee. In February the Borough anticipated the cost of the salary increases of these employees. In August, after receiving the notice of the representation petition from the union, the Respondent approached the men directly and questioned them concerning additional raises and the CAP and layoffs (Tr. 80), and two days later laid off DeKorte.

The second part of Respondent's economic defense is that the determination was made that the DPW work could be performed

without the second employee. Actually the size of the department was not reduced. The summer employee was retained and remained working 40 hours per week at the time of the hearing on October 22. The summer employee had only worked until September in prior years. Therefore there was no net reduction in the work force. The summer employee replaced the laid off employee.

Also the cost difference between the two employees was not great. The summer employee continued to work 40 hours per week at $6.50 per hour. Annual base pay of the summer employee would be $13,520. DeKorte's in 1982 would have been $14,763. [3/]

Based on the above the undersigned is not persuaded that the Borough would have laid off DeKorte had he not decided to continue with the union.

It is therefore recommended that the Commission find the Borough of Teterboro violated N.J.S.A. 34:13A-5.4(a)(3) and derivatively (a)(1) when it laid off Andrew DeKorte.

Upon the entire record before me, I recommend the Commission issue the following

ORDER

It is ORDERED that:

A. The Respondent Borough of Teterboro cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by laying

3/ According to Respondent's post-hearing brief DeKorte also would have received $590.52 longevity allowance, $624.58 holiday pay and the additional increment of $1000, but there is no information on what if any of these items the summer employee would receive.

off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

2. 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 the Act, particularly by laying off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

B. The Respondent Borough of Teterboro take the following affirmative action:

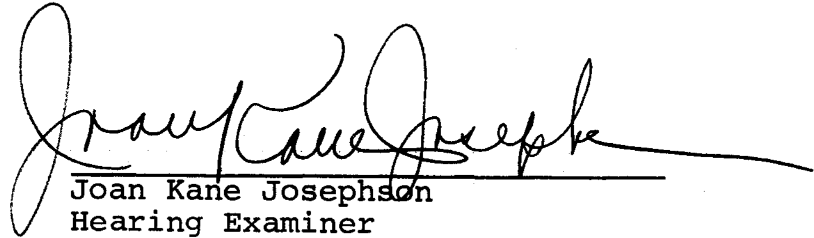
1. Forthwith offer to re-employ Andrew DeKorte for the position he formerly held in the Department of Public Works, or any other substantially equivalent position, make him whole for lost earnings from August 21, 1982 at the rate he would have earned at the time he was laid off, less interim earnings, [4/] together with interest at a rate of 12% per annum from August 21, 1982. [5/]

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

4/ On August 28, 1982, Andrew DeKorte was employed by the Schaeffer's Disposal in Midland Park, N.J.

5/ See Salem County Bd for Vocational Educ. v. Daniel McGonigle, P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), affm'd in part, rev'd in part, remanded App. Div. Docket No. A-3417-78 (9/29/80).

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Joan Kane Josephson
Hearing Examiner

Dated: March 4, 1983
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by laying off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage our employees in the exercise of the rights guaranteed to them by the Act, particularly by laying off Andrew DeKorte for engaging in protected activities on behalf of Local 945 Teamsters.

WE WILL forthwith offer to re-employ Andrew DeKorte for the position he formerly held in the Department of Public Works, or any other substantially equivalent position, make him whole for lost earnings from August 21, 1982 at the rate he would have earned at the time he was laid off, less interim earnings, together with interest at a rate of 12% per annum from August 21, 1982.

BOROUGH OF TETERBORO
(Public Employer)

Dated ____________ By ____________________
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.