

P.E.R.C. NO. 82-96

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF STONE HARBOR,

Respondent,

-and-

Docket No. CO-78-46-41

P.B.A. LOCAL 59 and
DANIEL R. LLOYD,

Charging Party.

SYNOPSIS

In the absence of exceptions, the Chairman of the Commission, acting pursuant to authority delegated by the full Commission, issues a decision adopting the Hearing Examiner's recommendation to dismiss the Complaint. The Hearing Examiner found that the Charging Party's discharge did not stem from his activities in support of P.B.A. Local 59.

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Appearances:

For the Respondent, Cafiero & Balliette, Esqs.
(William M. Balliette, of Counsel)
Aron, Till & Salsberg, Esqs.
(David A. Wallace, of Counsel)

For P.B.A. Local 59, Schneider, Cohen, Solomon &
DiMarzio, Esqs.
(David Solomon, of Counsel)

For Daniel R. Lloyd, Way, Way, Goodkin & Taylor, Esqs.
(Robert L. Taylor, of Counsel)

DECISION AND ORDER

On September 7, 1977, P.B.A. Local 59 ("Local 59") filed an unfair practice charge against the Borough of Stone Harbor ("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), (3) and (5),^{1/} when on

^{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 guaranteed to them by this Act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

July 5, 1977, it discharged patrolman Daniel Lloyd, a Local 59 department representative, because of his pro-union activity and when it sought to restrain arbitration over the discharge.

On December 12, 1977, the Director of Unfair Practices deferred this matter to arbitration. However, the Borough obtained a restraint of arbitration in Superior Court.^{2/} Accordingly, the Director issued a Complaint and Notice of Hearing on December 4, 1979. On December 12, 1979, the Borough filed an Answer admitting the discharge and that it had successfully sought to enjoin arbitration over the discharge, but denying that Lloyd's union activity played any role in his discharge.

On January 28 and 29, May 7 and 8, June 18 and 19, and July 30, 1980, Commission Hearing Examiner Edmund G. Gerber conducted hearings and afforded all parties an opportunity to present evidence, examine and cross-examine witnesses, and argue orally. The parties filed briefs by October 29, 1980.

On February 25, 1982, the Hearing Examiner issued his Recommended Report and Decision. H.E. No. 82-35, 8 NJPER ____ (¶ ____ 1982) (copy attached). He recommended the dismissal of the Complaint. He specifically found that the Borough discharged Lloyd because of its honest and best judgment that Lloyd was not fit to be a police officer, not because of his activities supporting Local 59. He also found that the Board's success in enjoining arbitration mooted the subsection 5.4(a)(5) allegations.

^{2/} Borough of Stone Harbor v. P.B.A. Local 59, 164 N.J. Super. 375 (App. Div. 1978).

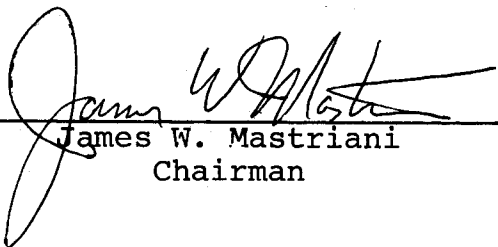
The Hearing Examiner served a copy of his report on all parties and notified them that Exceptions, if any, were due on or before March 10, 1982. No exceptions were filed.

I have reviewed the record. I agree with the Hearing Examiner that the alleged unfair practice has not been proved by a preponderance of the evidence. In the absence of any Exceptions, and acting pursuant to authority delegated to me by the full Commission, I adopt his recommendation and dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 23, 1982

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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SYNOPSIS

In an unfair practice proceeding before the Public Employment Relations Commission a Hearing Examiner recommends that the Commission find the Borough of Stone Harbor did not commit an unfair practice when it discharged Daniel Lloyd, an active officer in the P.B.A. Local 59.

It was found that although sufficient evidence of anti-union animus existed to establish a prima facie case, the employer demonstrated that the discharge would have taken place even in the absence of protected concerted activity in accordance with Madison Borough Bd/Ed, P.E.R.C. No. 82-46, 8 NJPER (1981) and Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980).

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

Cafiero & Balliette, Esqs.
(William M. Balliette, Esq.)

and

Aron, Tills & Salsberg, Esqs.
(David A. Wallace, Esq.)

For P.B.A. Local 59

Schneider, Cohen, Solomon & DiMarzio, Esqs.
(David Solomon, Esq.)

For Daniel R. Lloyd

Way, Way, Goodkin & Taylor, Esqs.
(Robert L. Taylor, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On September 7, 1977, P.B.A. Local 59 filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Stone Harbor (Borough) violated N.J.S.A. 34:13A-5.4(a)(1) and (3).^{1/} It was specifically alleged that

^{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 guaranteed to them by this Act."

Daniel Lloyd, a patrolman employed by the Borough and a department representative to P.B.A. Local 59, was discharged by the Borough because of his activities on behalf of Local 59. On December 12, 1977, the Director of Unfair Practices deferred this matter to arbitration. However, the Borough brought an action in Superior Court to restrain the arbitration. The Board was successful and the court restrained the arbitration. Borough of Stone Harbor v. P.B.A. Local 59, 164 N.J.S. 375 (App. Div. 1978). ^{2/} Accordingly the Director issued a Complaint and Notice of Hearing on December 4, 1979. Pursuant to the Complaint, Hearings were held on January 28, January 29, May 7, May 8, June 18, June 19 and July 30, 1980. Both parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs. ^{3/}

Local 59 of the P.B.A. is an employee representative of police officers in various municipalities in Cape May County including Stone Harbor. Daniel Lloyd was the representative of Local 59 in Stone Harbor. He was employed by the Stone Harbor Police Department since September 21, 1971. Until this suspension and discharge he was never the subject of any disciplinary action other than oral reprimands. The PBA maintains that his discharge was pretextual and the true reason for the discharge was Lloyd's participation in pro-

^{2/} It was also alleged that the Borough violated § 5.4(a)(5) of the Act when the Borough brought a court action to restrain arbitration of this matter. (§ 5.4(a)(5) prohibits public employers, their representatives or agents from: "Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.") In light of the Borough's success in that court action, this portion of the charge is moot.

^{3/} Both parties' briefs were received by October 29, 1980.

tected activities, specifically in negotiations and the processing of grievances on behalf of the PBA.

The contract between the parties expired on December 31, 1976. Negotiations for a successor agreement commenced in October 1976. Lloyd participated in the negotiations along with Sgt. McDevitt and Ptl. Gorski. The Borough was represented in these negotiations by the three Borough councilmen who comprised the Police Committee, Messrs. Arrenberg, Fitzpatrick and Clelland. There were a series of meetings, both with and without attorneys for the respective sides present. ^{4/} In May 1977 Lloyd issued the first of a series of press releases which appeared in the Atlantic City Press. The first concerned a departmental order for four bullet proof vests. The Borough council rejected the purchase and ordered that two of the vests be returned. In the newspaper story Lloyd was quoted as being critical of the Borough; he stated that this action could eventually endanger the lives of police officers. In the article Lloyd was also critical of the mayor for his failure to sign a Federal grant allowing the department to obtain a traffic safety car. In other newspaper articles Lloyd was critical of the Borough's failure to hire a full-time detective. These press releases were immediately followed by Lloyd's suspension and discharge

Lloyd also filed a series of grievances. These included one concerning a Christmas bonus for 1976. This grievance was in-

^{4/} There was testimony that at times these negotiations became heated but there was no testimony as to specific incidents in those negotiations.

formally resolved. Also in 1976 Lloyd represented Ptl. Beamon who was brought up on charges by the chief in a disciplinary hearing before the Borough council police committee. (The Borough police committee consists of three members of the Borough council.) Lloyd and Officer Gorski argued that the chief played favorites both as to making criminal investigations in the department and as to who was brought up on charges. Beamon's suspension was reduced at the hearing. After the hearing there was a meeting between the chief and the members of the department. Donahue was very upset. The PBA officers never told him of the grievance and took it directly to the Borough police committee. Donahue stated that he would never forgive Lloyd and Gorski for what they did and further he would no longer accept Lloyd as PBA representative for the department. Donahue then retracted this statement by saying that he could not reject Lloyd since Lloyd was selected by the patrolmen in the department.

Finally Lloyd filed a grievance on May 26, 1977. There was a promotion to sergeant within the department. The officer promoted was six years Lloyd's junior and the promotion occurred on the same day that one of the articles mentioned above appeared in the local newspapers. Lloyd grieved his failure to receive the promotion and Lloyd received the denial of this grievance on the same day he received his notice of suspension. At the time, Donahue stated that if Lloyd pressed the grievance, Donahue would use Lloyd's file against him. Lloyd asked to see his file but Donahue said it was not available since Donahue had brought it home to review it.

The Borough argues the motivation of Lloyd's discharge was based solely on his conduct in office and the conduct which convinced Donahue, and subsequently the police committee, of this occurred on May 8, 1977. After this incident additional charges and specifications were drafted by Chief Donahue and served on Lloyd; but it was this incident, the Alford incident, which the Borough claims precipitated the discharge.

In the early morning hours of May 10, 1977, Lloyd was advised by another officer who was in plain clothes that two men were asleep in a car in a motel parking lot. Three officers, Lloyd, Bevan and Solice then approached this vehicle, ^{5/} awoke the occupants and had them leave the vehicle. Lloyd then searched the vehicle while the other two officers acted as backups. At this point, one of the suspects, later identified as Alford, moved behind Lloyd. As Lloyd turned around he said the suspect put his hand in his pocket. Lloyd became suspicious and decided to search him. When Lloyd touched the pocket he felt what proved to be a gun. Ptl. Lloyd took the object out of the suspect's pocket. It was a loaded .357 Magnum, double-barrel derringer. (The versions of what happened after this point were disputed at the hearing. However the following version is from an official report composed by McDevitt, the PBA negotiator, two days after the incident. In preparing this report McDevitt spoke to Lloyd on the morning following the incident.) Lloyd shoved the gun in the suspect's stomach and told him to step back. One of the other officers then told Alford to lie on the ground. Alford was then handcuffed.

^{5/} It was not clear whether Bevan and Solice or Bevan and Lloyd were working together on that evening.

Lloyd testified at the hearing that he held the derringer with the hammer of the gun cradled in the web of his hand, between the thumb and forefinger, so it could not go off and pushed the subject away with both hands only for his own protection.

Donahue testified that he first became aware of the incident when he overheard Lloyd joking with other officers the following morning. Lloyd described how he kept poking the gun into Alford's stomach and how Alford responded in a frightened manner that the derringer is loaded.

Donahue testified that prior to this incident he had come to believe that Lloyd's temperament was not suitable to carry on the functions of a police officer but it was this incident which convinced him of this. Accordingly he wrote up the charges and specifications against Lloyd and included other actions which Donahue believed demonstrated Lloyd's overaggressive behavior. Donahue testified that he believed that Lloyd might eventually kill someone.

The charges and specifications against Lloyd were (1) The Alford incident - specifically that Lloyd did threaten the life of Gerald Alford by repeatedly poking him in the chest with a loaded .357 caliber derringer-type handgun, which weapon had its safety disengaged lacking a trigger guard and which was unfamiliar to Lloyd. In fact Lloyd had immediately prior thereto removed it from the person of the said Gerald Alford. (2) On May 8, 1977, threatened one Curtis Moore when Moore had dropped certain papers on the ground Lloyd told him to pick up the papers or I'll "split your head open." (3) On May 19, 1974, Lloyd drew his weapon to stop a running juvenile

without just cause, resulting in a citizen's complaint." (4) On August 23, 1975, while in plain clothes in an unmarked vehicle, Lloyd pointed his service revolver at the occupants of a motor vehicle which Lloyd was pursuing for a motor vehicle violation. This resulted in a citizens complaint. (5) On July 1, 1974, Lloyd made statements of disrespect to his superior officer, Sgt. Anderson. (6) On August 1975 in connection with a motor vehicle violation Lloyd used profane language in front of a woman and her male companion, to wit, Lloyd would put his "f ___ ___ foot up your ass." (7) On May 6, 1976, Lloyd was verbally reprimanded by the chief of police at the request of Stone Harbor municipal judge, Vincent LaMana, for being surly and uncooperative with respect to supplying information to defendants in motor vehicle cases. (8) On April 7, 1977, Lloyd used profane language to Edward Mossbrook, to wit, "shut the F ___ ___ up." (9) On April 12, 1977, a witness, William Skerett, signed a complaint against Lloyd accusing him of constant harassment when he was operating his motor vehicle.

Lloyd was thereupon suspended and a four-day hearing was held by the Police Committee of the Borough council. It was the decision of the Committee that Lloyd be discharged. In its deliberations the Committee reviewed each of the allegations in the specifications. There was a consensus of the Committee members that what many of these incidents did show was an excessive reliance on force and aggression that was inappropriate for a police officer in their town. At the hearing before the undersigned the Charging Party introduced extensive evidence which attempted to attack the factual

accuracy of these findings. This evidence was admitted to allow the Charging Party to attempt to prove that the reasons for the discharge were pretextual. The undersigned does question the appropriateness of some of the specifications. LaMana testified that his complaint against Lloyd had nothing to do with aggressiveness or the use of force. The statement of disrespect against Sgt. Anderson seems to be rather minor. The Mossbrook incident was highly disputed. Further there were inconsistencies and some failure of recall in Chief Donahue's testimony. Nevertheless, some of these incidents - the verbal threats numbers 2 and 6, the harassment of Skerett number 9, and particularly the drawing of his weapon, numbers 3 and 4, are evidentiary of Lloyd's inclination to resort to violence. Moreover, on balance Donahue proved to be a credible witness. ^{6/} The undersigned does not believe that Donahue's testimony was colored by Lloyd's protected activities on behalf of PBA Local 59. Donahue was aware that Lloyd was formerly a police officer in New York City. While on duty Lloyd was involved in two separate shooting incidents. In one of them Lloyd killed a suspect. Donahue was not aware of the circumstances of these incidents but it was not an unfair practice within the meaning of the Act for Donahue to consider this part of Lloyd's history in determining whether Lloyd should continue as a police officer. It is noted that the Charging Party had a psychologist testify as to Lloyd's suitability to serve as a police officer. The psychologist testified that Lloyd was intelligent and had a personality that was appropriate for police work and did not exhibit evidence of an overly aggressive personality.

^{6/} It must be remembered that Donahue was testifying approximately three years after the discharge and some lapse of memory is inevitable.

Donahue did not, of course, have the benefit of the psychologist's opinion in reaching his decision. Rather, Donahue made his decision on the basis of what he knew and saw and the Police Committee had to rely in large measure on Donahue's testimony.

The improper conduct of Lloyd in the Alford incident cannot be seriously in doubt. The suspect should have been told to assume a position in which he could not easily harm Lloyd or any of the other officers, i.e., have Alford spread eagle against a wall, or lie face down on the ground, etc. Similarly, one of the two back-up officers should have been called to cover Lloyd during the search and, most importantly, an unfamiliar gun, particularly this type of weapon, should not have been used in place of the officer's own firearm. The possibility of an inadvertent firing is very real. Lloyd poked the derringer into the suspect's belly several times creating a very real and very needless danger. It should be noted that Lloyd had served not only as a New York City patrolman prior to coming to Stone Harbor, he also served as a military policeman. He therefore has had extensive experience as a police officer.

The Charging Party attempted to show that the police Committee was unlawfully biased against Lloyd. At the time of the processing of the Beamon grievance in 1976, committee member Arrenberg stated that "we back the Chief 100%. If you don't like the working conditions, leave." In the period of January to March 1977 Arrenberg had made two comments to the effect that he was tired of Lloyd and "we are going to get his job." In one instance the comment was ambiguous as to what Arrenberg was tired of and in one conversation

it was clear that the comment was prompted by Lloyd's unsafe driving. In any event, Arrenberg disqualified himself from sitting on the Police Committee when it ruled on Lloyd's discharge.

In the first negotiation session between the union and the Borough after Lloyd's dismissal, Clelland made a statement to the effect that the parties could make progress in negotiations now that they got rid of the "trouble maker." Although the Borough's attorneys attempted to dismiss this statement as a bad joke, the statement is still very troublesome. But these statements must be counterbalanced by the history of other union activity in the Borough. During the PBA's organizational years, Officer Sweitzer served as a public relations officer, vice president, president and the departmental representative. Sweitzer had a chief role over contract negotiations in 1972. These lasted for quite a lengthy period and were hotly contested. At one point Sweitzer presented 26 written complaints to the Borough and had news items published in the local papers. Sweitzer was also co-ordinator of P.B.A. picket lines that sealed off neighboring island resort communities. However, Sweitzer was never disciplined, he was promoted to sergeant in 1974, served as the sergeants' negotiator for one year and was then promoted to lieutenant in 1976. Similarly, there is no evidence that other P.B.A. officers were otherwise intimidated by Lloyd's dismissal.

There was testimony from one officer, Michael DeVito, who claimed he was a PBA representative who was fired and "black-balled" from his union activity. However there was substantial evidence to

indicate that DeVito repeatedly would go home while on night shift duty for extended periods, apparently to sleep. Further, Sweitzer and DeVito's shift commander, Anderson, denies DeVito was a PBA representative. The testimony of local police chiefs contradict DeVito's claim that he was black-balled. On balance, I do not credit DeVito's testimony.

In the Matter of Madison Bd/Ed, P.E.R.C. No. 82-36, 7 NJPER 669 (1981), the Commission approved the use of the National Labor Relations Board decision in Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980) and adopted the following test in (a)(3) cases which turn on employer motivation:

First we shall require the general counsel make a prima facie showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once this is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

Here, on the basis of the comments made by Arrenberg and Clelland, there may very well be evidence to establish a prima facie showing that Lloyd's PBA activities were a motivating factor in his discharge. However, I am satisfied the record establishes that Lloyd's discharge would have occurred in any event since it was clearly established that Lloyd was not a competent police officer as demonstrated by his callous disregard for the suspect's safety in the Alford incident.

The test here is not whether one may personally agree or disagree with the decision of the hearing body; the test is whether

the Police Committee's decision was based on its honest and best judgment that Lloyd was not fit to be a police officer. Having so found, I hereby recommend that the Commission make the following

Conclusions of Law

1. That the Borough of Stone Harbor did not violate § (a)(1) and (a)(3) of the Act when it dismissed Daniel Lloyd.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER that the Unfair Practice Charge in this matter be dismissed in its entirety.



Edmund G. Gerber
Hearing Examiner

Dated: February 25, 1982
Trenton, New Jersey