

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

In the Matter of

BOROUGH OF MOUNTAINSIDE,

Respondent,

-and-

Docket No. CO-84-61-93

MOUNTAINSIDE PBA LOCAL NO. 126,

Charging Party.

SYNOPSIS

A Hearing Examiner denies a Motion to Dismiss by the Respondent, which was made at the conclusion of the Charging Party's case. Applying the rule of Dolson v. Anastasia, 55 N.J. 1, the Hearing Examiner determined that the Charging Party made out a prima facie case based upon at least a scintilla of evidence as to each aspect of the test in Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

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Appearances:

For the Respondent
David A. Wallace, Esq.

For the Charging Party
Loccke & Correia, Esqs.
(Manuel A. Correia, Esq.)

HEARING EXAMINER'S DECISION AND ORDER
ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 31, 1983 by Mountainside PBA Local No. 126 (hereinafter the "Charging Party" or the "PBA") alleging that the Borough of Mountainside (hereinafter the "Respondent" or the "Borough") had 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 a series of events occurred, commencing in February 1981, as follows: (1) Chief of Police William A. Alder assumed that position in February 1981 and immediately thereafter initiated charges against Patrolman Alan Kennedy, and in June 1981 he initiated charges against Sergeant Della Serra, and when Kennedy, as the then Vice President of the PBA, wrote a letter to the governing body on behalf of Della Serra, he was immediately directed by Alder to issue summonses enforcing a municipal parking ordinance, which activity continued through February 1982, during which it is alleged, Alder was attempting to discredit Kennedy as an officer of the PBA; (2) in February

1982 Kennedy commenced writing notations on the summonses indicating that they were issued at the direction of Alder, which resulted in a meeting on March 31, 1982 between Kennedy and Alder, following which Kennedy received a reprimand on April 2nd; (3) in March 1982 the PBA voted to provide financial support for Della Serra regarding charges initiated against him by Alder and on April 2, 1982 Alder refused to allow members of the PBA to attend a special meeting with the attorney for Della Serra contrary to past practice; (4) on May 4, 1982 Alder threatened the PBA and stated that he would get financial backing from the governing body to drain PBA funds; (5) in July and August 1982 Alder sought to harass Kennedy regarding his use of sick days and required Kennedy to provide medical verification for each day of absence thereafter in 1982; (6) on March 10, 1983 Kennedy was summoned to the office of the Borough Administrator and questioned regarding documents of the Borough, which had been found in Kennedy's personal brief case and in April 1983 Alder demanded that Kennedy disclose the names of any people involved; (7) and on June 1, 1983 Alder issued a letter of reprimand to Kennedy, which followed the submission of a scheduling grievance to arbitration on May 30, 1983; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 16, 1984. Pursuant to the Complaint and Notice of

^{1/} These Subsections prohibit public employers, their representative or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(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.

"(7) Violating any of the rules and regulations established by the Commission."

Hearing hearings were held on May 1, 15, 16, June 15, 18, 19, 20 and July 13, 1984. On the latter date the Charging Party rested and the Respondent made a Motion to Dismiss. Oral argument followed and the parties filed briefs by August 8, 1984.

For purposes of disposing of the instant Motion to Dismiss, the Hearing Examiner makes the following:

INTERIM FINDINGS OF FACT

1. The Borough of Mountainside is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Mountainside PBA Local No. 126 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The PBA and the Borough have had a collective negotiations relationship since 1978 and the most recent collective negotiations agreement was effective during the term January 1, 1981 through December 31, 1983, covering separate units of patrolmen and superior officers (J-1). The total complement of the Police Department up to Lieutenant is 18. The Borough's Chief of Police from 1969 through 1980 was Edward Mullin. Effective January 9, 1981 the Borough appointed William A. Alder as Mullin's successor, Alder having come up through the ranks.
4. Alan Kennedy has been a patrolman in the Borough's Police Department for 18 years. He was Secretary of the PBA in 1980 and part of 1981. In June 1981 he became Vice-President and upon the resignation of the President, John Olock, in or around February 1982, Kennedy assumed the Presidency. Kennedy was elected President in his own right in March 1982 and has continued in that position to date.
5. The PBA, its officers and members were totally dissatisfied with the selection process utilized by the Borough in appointing Alder as Chief of Police. At the time of Alder's appointment in January 1981, the PBA circulated a questionnaire posing nine questions regarding the selection process utilized by the Borough and an outside organi-

6. On January 17, 1981 Alder issued a reprimand to Kennedy, based on Kennedy's having had an unauthorized person in his police vehicle and having made unauthorized use of Borough gasoline.^{3/} Kennedy asked for a hearing before the Borough's governing body and the matter was dismissed in March 1981. According to Kennedy, this was the first indication of a bad relationship with Alder.^{4/}

7. In September 1981 Alder suspended Sergeant Raymond Della Serra, who had been indicted on a weapons charge. Della Serra was ultimately admitted to a program known as Pre-trial Investigation, which resulted in no formal record of conviction.

8. There were many exhibits and much testimony elicited in connection with allegations in the Unfair Practice Charge concerning directives to members of the Police Department regarding the enforcement of an overnight parking ordinance, which allegedly constituted an attempt to discredit Kennedy and the PBA (see CP-1 through CP-8, inclusive). In the several months preceding a reprimand on April 2, 1982 (CP-7), Kennedy, of his own volition, wrote on each summons issued by him that it was issued "By order of Chief Alder & Lt. H. Hafeken (sorry)." Kennedy freely acknowledged that the purpose of this notation was to shift responsibility for the issuance of the summonses from himself to Alder and Hafeken. When asked for an explanation of his conduct by Alder, Kennedy was evasive (see CP-2 & CP-4) and insisted that he was only attempting to indicate why the summonses were issued and that he was simply stating a fact (CP-6). The Hearing Examiner finds as a fact that all of the evidence pertaining to the overnight summonses issue occurred without discriminatory motivation on the part of the Borough or its agent, Chief Alder, including the reprimand of April 2, 1982 (CP-7), which was the last event involved. The Hearing Examiner does not credit

3/ Prior to January 1981 Kennedy's disciplinary record consisted of a three-day suspension in 1974 and a reprimand in 1976.

4/ After June 1981, when Kennedy became Vice-President of the PBA, he testified that his relationship with Chief Alder was "horrendous" and that Alder stated that "the issue is... your attitude... It's your representation of the PBA" (3 Tr. 17).
Note: Reference to the transcript begin with May 1, 1984 (1 Tr.) and continue through July 13, 1984 (8 Tr.).

the testimony of Kennedy that the April 2, 1982 reprimand was causally connected to Kennedy's having become President of the PBA in March 1982 when Olock resigned.

9. In the Spring of 1982, notwithstanding that Della Serra had been admitted to Pre-trial Investigation, departmental charges were brought against Della Serra by Alder. In March 1982 the PBA decided to back Della Serra financially in his defense against the foregoing charges. This was communicated to Alder. In or around March 1982 Detective Stephen Semancik, a PBA delegate for 16 years, had a conversation with Alder in the presence of Olock where Alder said that he had heard that the PBA was going to support Della Serra and that the PBA would be making "a grave mistake" since the Borough had the resources and "would outspend the PBA" (3 Tr. 81). Olock testified that he had an independent conversation with Alder on March 18 or 19, 1982 where Alder said, in connection with the PBA backing Della Serra, "I hope you know what you are getting into, because this is going to be a costly thing" (7 Tr. 101). Alder then made reference to his having the backing of the Borough Council.

10. Sergeant Edward H. Hafeken, a past officer of the PBA, testified credibly that on March 31, 1982 he recalled Kennedy going into Alder's office and, at one point within his hearing, Alder said to Kennedy that he was "...a zero and you will always be a zero..." (7 Tr. 21). Hafeken also testified that Alder said to Kennedy that, "...the PBA is going to be ruined financially by him (Alder)..." (7 Tr. 21).

11. On April 2, 1982 Della Serra's personal attorney, William L. Wertheimer, was scheduled to appear before a special meeting of the PBA to discuss the case and the financial arrangements with the PBA for Della Serra's defense. The meeting was originally scheduled to be held in Kennedy's home but, at the instance of Alder, Lt. Herman Hafeken sent a handwritten letter to Sergeant Hafeken, stating that the PBA meeting would have to be held at the Borough Hall and that employees on duty could attend for up to one hour (CP-23). The PBA alleges that the condition set by Alder as to which of the PBA's members might attend the PBA meeting was contrary to past practice, in that the only limitation had been that at least one member of the police

force be "on the road." The Hearing Examiner finds as a fact that, past practice or not, Alder's actions with respect to attendance at the April 2, 1982 special meeting of the PBA were within his legitimate discretion to insure adequate police coverage and were not discriminatorily motivated against the PBA or its members.

12. On May 4, 1982, during a hearing on the charges against Della Serra, John Garrett, the Vice President of the PBA, heard Alder say to Hafeken, "... the PBA may have won this battle, but without (sic) the backing the Council has given me, and will back me financially in every way until we outlast the PBA..." (6 Tr. 106). The Hearing Examiner credits Garrett's testimony in this regard.

13. The agreement in Article X, Sick Leave, Paragraph E, provides that the employer may require medical verification by the Borough physician for proof of illness "... whenever such requirement appears to be reasonable or appropriate..." (J-1 p. 26). This has been interpreted by the Borough to permit the Chief of Police to require verification after each absence when the number of sick days taken per year has been excessive. The Borough's sick leave policy provides for 14 days of leave per year.

14. On July 22, 1982 Kennedy took his eighth sick day for the year 1982. Alder summoned Kennedy to his office and, after threatening to invoke the medical verification provision in the agreement, supra, advised Kennedy that he was postponing it until the next day of absence. ^{5/} Kennedy next took a sick day on August 14, 1982 and on August 18th Alder sent a memo to Kennedy directing him to furnish ^{6/} a note from a physician for each sick day taken for the remainder of 1982 (CP-15).

^{5/} The Hearing Examiner does not credit the testimony of Detective Jerome M. Rice that he heard Alder say to Kennedy on July 20, 1982, "...I think it is about time we started looking at your sick day program" (7 Tr. 11). The statement attributed to Alder seems highly implausible under the circumstances.

^{6/} Kennedy had on August 17, 1982 sent Alder a letter regarding the Borough's unilateral changes in the Police Manual, and reminding him that the Unfair Practice Charge, infra, was still pending (CP-13).

On August 20, 1982 Kennedy responded to Alder's memo of August 18th, claiming that Alder was being unreasonable and vindictive (CP-16). Kennedy took no further sick days in 1982 until December 28th and December 29th.

15. On May 21, 1982 the PBA filed charges against Alder alleging violations of the rules and regulations, the Constitution and the By-laws of the PBA (CP-10). On June 8, 1982 the PBA's Judiciary Committee met and reviewed the charges and found them valid (CP-11). On June 11, 1982 Alder was notified that he was being removed from the rolls of membership of the PBA (CP-12).

16. On July 21, 1982 there was docketed with the Commission an Unfair Practice Charge by the PBA against the Borough (CO-83-15), in which it was alleged that the Borough was seeking to implement unilaterally certain changes in the rules and regulations in the Police Manual (CP-9). This Unfair Practice Charge never went to hearing.

17. On January 31, 1983 sensitive Borough documents, consisting of confidential minutes of a Council meeting and a legal opinion letter, were found in Kennedy's personal brief case. The name of the PBA's attorney was handwritten on one of the documents. Kennedy was summoned to a meeting on March 10, 1983 where the Borough Administrator and its attorney were present. ^{7/} At that meeting Kennedy was questioned regarding how the documents got into his brief case. Nothing conclusive occurred. Kennedy conceded at the hearing the propriety of the Borough's concern regarding the documents (5 Tr. 167).

18. The scheduling grievance, supra, reached Step 2 of the grievance procedure on April 1, 1983 when it was lodged with the Borough Administrator. ^{8/} The

^{7/} Kennedy initially claimed that his being summoned to the meeting was in retaliation for filing a grievance in January 1983, which involved a change in the work schedules of two police officers. However, Kennedy acknowledged on cross-examination that the grievance was filed on March 21, 1983 (6 Tr. 18). Thus, there was no causal connection between the filing of the grievance on March 21, 1983 and Kennedy being summoned to the March 10, 1983 meeting, supra.

^{8/} During the period of time that the scheduling grievance was being processed through the grievance procedure, the Borough's investigation of the purloined documents continued with Chief Alder also being involved.

grievance reached Step 3 on April 18, 1983 when it was lodged with the Mayor and Council.

19. On April 11, 1983 Alder had a conversation with Kennedy regarding Alder's investigation of the purloined documents (5 Tr. 184, 185). Kennedy indicated that he could "guess" the name or names of the person or persons involved but stated a reluctance to do so because he had no "proof" (5 Tr. 185). Kennedy indicated that he would "get back" to the Chief in a week regarding anything further that he might learn about the matter. This would be approximately August 18th. When Alder had not heard from Kennedy on April 19th he called him at his home but nothing transpired since Kennedy indicated that he could not find out any names (5 Tr. 189, 190).

20. On May 25, 1983 the attorney for the PBA submitted the scheduling grievance to the Commission, requesting a panel of arbitrators (CP-17 and CP-18). The Respondent has acknowledged that the Borough Administrator received a copy of CP-17 and CP-18 by at least May 27, 1983.

21. On June 1, 1983 Alder issued a reprimand to Kennedy for bringing the Police Department into disrepute, based upon his conduct in connection with the purloined documents, which were found in his brief case, supra (CP-19). ^{9/} Kennedy allegedly used loud and abusive language after receiving the reprimand for which he was summoned to a disciplinary hearing on September 13, 1983 before the governing body of the Borough. He was given a one-day suspension without pay. Although no appeal was taken by Kennedy or the PBA, the PBA did send a letter to the Mayor and Council on October 14, 1983 in which it expressed its support for Kennedy and criticized the governing body and Chief Adler (CP-22).

22. In addition to the scheduling grievance, supra, Kennedy also filed the following grievances as an officer of the PBA: (1) a scheduling grievance in

^{9/} This reprimand was never challenged or grieved by the PBA or Kennedy (5 Tr. 196), but is an allegation in the instant Unfair Practice Charge (C-1).

January 1982; (2) a scheduling grievance on April 27, 1982; (3) an overtime grievance on June 8, 1982; and (4) a scheduling grievance on June 20, 1982. None of these grievances were pursued through arbitration.

23. Councilman Ronald W. Romak, a witness for the PBA, testified that he has been a member of the Borough's Police Committee since the Spring of 1982 and that at a meeting of the Police Committee in July or August 1982 Alder raised the question of Kennedy's sick leave abuse. Alder wanted to take disciplinary action but the Committee asked Alder if anyone else in the Police Department was the subject of investigation. Alder stated that the records on sick leave were not available. The members of the Police Committee expressed concern that Kennedy was being singled out and the matter was dropped.

24. Romak testified further that the relationship between the Borough and the PBA has deteriorated since the Spring of 1982 and that this deterioration has assumed drastic proportions in the past 12 months. Romak also testified that while he is not "sympathetic to the PBA," it is his conclusion that the Borough has become anti-union.

DISCUSSION AND ANALYSIS

The Applicable Standard On A Motion To Dismiss

The Commission in New Jersey Turnpike Authority, et al., P.E.R.C. No. 79-81, 5 NJPER 197 (1979) amplified upon the standard that it had enunciated in Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (1977) with respect to the applicable standard on a Motion to Dismiss made at the conclusion of the Charging Party's case. The Commission there restated that it utilizes the standard set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 1 (1969). The Commission observed that:

"...Therein the Court declared that when ruling on a motion for involuntary dismissal (at the close of the plaintiff's case) the trial court 'is not concerned with the worth,

nature or extent (beyond a scintilla) of evidence, but only with its existence, viewed most favorably to the party opposing the motion' (emphasis added). Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be granted the moving party must demonstrate that not even a scintilla of evidence exists to support the plaintiff's case..." (Emphasis supplied).

The Hearing Examiner notes that there is nothing in the decision of the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), which modified the Dolson test, supra. If the Supreme Court had intended the contrary, it would have so stated.

The Respondent's Motion To Dismiss Is Denied Since At Least A Scintilla Of Evidence Has Been Adduced That The Borough Was Illegally Motivated When Alder Reprimanded Kennedy On June 1, 1983

The Respondent, in a letter memorandum dated July 27, 1984, concedes that for purposes of the instant Motion to Dismiss "...a finding of anti-union animus towards the exercise of protected activity, might be reached (sic) by the Hearing Examiner..." The Respondent then notes that the Supreme Court in Bridgewater stated that the "...Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action...." (95 N.J. at 242). The Respondent then contends that there is nothing in the record to support an inference of a "...motivating or substantial reason" as to the Respondent's conduct herein.

The Hearing Examiner first finds and concludes that the Charging Party has proven by at least a scintilla of evidence that certain actions of Chief Alder as to Kennedy and the PBA were motivated by anti-union animus (see Findings of Fact Nos. 9, 10, 12 and 25, supra). Next, the Hearing Examiner finds and concludes that, based on the record to date, the Charging Party has adduced at least a scintilla of evidence to support an inference that Alder's reprimand of Kennedy on June 1, 1983 was illegal under the Bridgewater test, in that the Respondent's

anti-union animus was a "substantial factor" or a "motivating factor" in the employer's decision to reprimand (95 N.J. at 242).

The basis for reaching this latter conclusion is as follows: Kennedy filed a scheduling grievance on March 21, 1983; this grievance reached Step 2 of the grievance procedure on April 1, 1983; on April 11th Alder had a conversation with Kennedy regarding his investigation of the purloined documents wherein Kennedy indicated that he could guess the name or names of the person or persons involved, but stated a reluctance to do so because he had no proof; the grievance reached Step 3 on April 18th; on April 19th Alder called Kennedy regarding the investigation but nothing transpired since Kennedy indicated that he could not find out any of the names; on May 25, 1983 the PBA submitted the grievance to arbitration; on May 27th the Borough Administrator received a copy of the submission of the grievance to arbitration; and on June 1, 1983 Alder issued a reprimand to Kennedy for bringing the Police Department into disrepute, allegedly based upon Kennedy's conduct in connection with the purloined documents. It is clear that the Hearing Examiner may infer from the foregoing sequence of events that Kennedy's exercise of the protected activity of filing and processing a grievance was the real reason for the reprimand of June 1, 1983. It will be recalled that Kennedy filed four grievances in 1982 (Finding of Fact No. 22, supra). Thus, he has a track record as to this type of protected activity.

The Respondent argues that even assuming the foregoing, the Charging Party's proofs satisfy the second element of the Bridgewater test, namely, that the Borough has established a legitimate business justification for its conduct herein, i.e., the June 1st reprimand. The Hearing Examiner finds the cited case of Swede v. Passaic Daily News, 30 N.J. 320 (1959) of interest. Naturally, the Hearing Examiner accepts the holding in that case that a plaintiff in its case in chief might, however intended, supply the necessary proofs as to the defendant's defense.

The Hearing Examiner concludes that the Respondent has failed to establish that the Charging Party has proven the Respondent's business justification defense. It is true that Kennedy conceded that the Respondent had a proper basis for investigating the purloined documents supra. However, in the opinion of the Hearing Examiner, the mere conceding of the propriety of the investigation does not negate the Hearing Examiner's conclusion that, for purposes of this Motion, Alder's reprimand of June 1, 1983 was inferentially based on Kennedy's filing of the scheduling grievance on March 21, 1983.

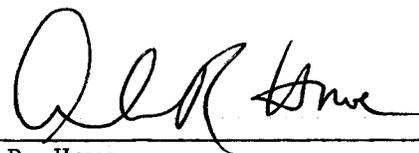
In summary, the Hearing Examiner finds and concludes that at this stage of the instant proceeding the PBA has made a prima facie case under the Dolson scintilla standard and the Bridgewater test that the exercise of protected activity on behalf of the PBA was a "substantial factor" or a "motivating factor" in the Borough's decision to reprimand Kennedy on June 1, 1983. As noted previously, the Hearing Examiner has not found that the Charging Party has proven the Respondent's defense. Thus, the Respondent must come forward and prove by a preponderance of the evidence that there was a legitimate business justification for the issuance by Chief Alder of a reprimand to Kennedy on June 1, 1983.

* * * *

For all of the foregoing reasons, the Hearing Examiner makes the following:

ORDER

The Respondent's Motion to Dismiss is denied and the Respondent is directed to present its defense or defenses at the next scheduled hearing on August 13, 1984.



Alan R. Howe
Hearing Examiner

Dated: August 10, 1984
Newark, New Jersey