P.E.R.C. NO. 84-105

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVALON,

Respondent,

-and- Docket No. CO-82-122-99

LOCAL 1983, CIVIL AND PUBLIC EMPLOYEES OF CAPE MAY COUNTY, NEW JERSEY, IBPAT, AFL-CIO,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint alleging that the Borough of Avalon violated the New Jersey Employer-Employee Relations Act when it granted a holiday (Election Day, 1981) to unrepresented employees, but not to employees represented by Local 1983, Civil and Public Employees of Cape May County, New Jersey, IBPAT, AFL-CIO. The Chairman concluded, in agreement with a Commission Hearing Examiner, that Local 1983 did not prove by a preponderance of the evidence that the Borough had discriminated against Local 1983. Neither party filed exceptions to the Hearing Examiner's report.

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Charging Party.

Appearances:
For the Respondent, Fineberg & Rodgers, Esqs.
(Robert A. Fineberg, of Counsel)

For the Charging Party, Gorman & Goodkin, Esqs.
(Bruce M. Gorman, of Counsel)

DECISION AND ORDER

On November 30, 1981, Local 1983, Civil and Public Employees of Cape May County, New Jersey, IBPAT, AFL-CIO ("Local 1983") filed an unfair practice charge against the Borough of Avalon ("Borough") with the Public Employment Relations Commission. The charge alleged that the Borough violated subsection 5.4(a)(3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it granted a holiday (Election Day, 1981) to unrepresented employees, but not employees whom Local 1983 represented.

1/ This subsection prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On May 22, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing.[2/]

On June 6, 1983, the Borough filed an Answer. It asserted that the ordinance in question predated fully-bargained contracts by which Local 1983 contracted not to accept the holiday; the affected employees were offered the options of working, taking a personal day, or receiving compensatory time off for the holiday; and Local 1983 failed to follow contractual grievance procedures.

On July 26, 1983, Hearing Examiner Mark A. Rosenbaum conducted a hearing. The parties stipulated the facts. The Board submitted a post-hearing brief.

On January 31, 1984, the Hearing Examiner issued a report recommending that the Complaint be dismissed. H.E. No. 84-38, 10 NJPER ___ (¶_____ 1984) (copy attached). He found, under all the circumstances of the case, that Local 1983 had not proved that the Borough discriminated against it in granting a holiday to employees outside the unit.

The Hearing Examiner served a copy of his report on all parties and informed them that exceptions, if any, were due on or before February 14, 1984. Neither party filed exceptions or requested an extension of time.

2/ The parties had agreed that the charge should be held in abeyance pending a related court proceeding. The Commission resumed processing of the charge in early 1983.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to decide this case in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-3) are accurate. I adopt and incorporate them here. Based on these findings and my review of the record, I agree with the Hearing Examiner that Local 1983 has not proved by a preponderance of the evidence that the Borough violated subsection 5.4(a)(3).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
February 21, 1984

H. E. No. 84-38

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

In the Matter of

BOROUGH OF AVALON,

Respondent,

-and-

Docket No. CO-82-122-99

LOCAL 1983, CIVIL AND PUBLIC EMPLOYEES OF CAPE MAY COUNTY, NEW JERSEY, IBPAT, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a charge by Local 1983 that the Borough discriminated against union employees by granting an additional holiday to non-union employees. The Hearing Examiner finds that the Charging Party failed to establish that the exercise of protected activity was a substantial or motivating factor in the Borough's personnel action.

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.

H. E. No. 84-38

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

In the Matter of

BOROUGH OF AVALON,

Respondent,

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LOCAL 1983, CIVIL AND PUBLIC EMPLOYEES
OF CAPE MAY COUNTY, NEW JERSEY, IBPAT,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Fineberg & Rodgers, Esqs.
(Robert A. Fineberg, Esq.)

For the Charging Party, Gorman & Goodkin, Esqs.
(Bruce M. Gorman, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On November 30, 1981, Local 1983, Civil and Public Employees of Cape May County, New Jersey, International Brotherhood of Painters and Allied Trades, AFL-CIO ("Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the Borough of Avalon ("Borough" or "Respondent") committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charging Party asserted that the Respondent discriminated against members of the Charging Party by affording non-union employees holidays not given to members of the Charging Party, allegedly in violation of N.J.S.A. 34:13A-5.4(a)(3). 1/

1/ This subsection prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

It appearing that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued by the Director of Unfair Practices on May 22, 1983. 2/ Pursuant to the Director's order, a hearing was held before the undersigned on July 26, 1983. At the hearing, the parties elected to stipulate the facts of this matter pursuant to N.J.A.C. 19:14-6.7. A brief was submitted by December 12, 1983.

Upon the entire record the Hearing Examiner finds that:

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

2. The Local 1983, Civil and Public Employees of Cape May County, New Jersey, International Brotherhood of Painters and Allied Trades, AFL-CIO is an employee representative within the meaning of the Act and is subject to its provisions.

3. An Unfair Practice Charge having been filed with the Commission alleging that the Borough has engaged in unfair practices within the meaning of the Act, questions concerning the alleged violation of the Act exist and are appropriately before the undersigned Hearing Examiner for determination.

4. The parties stipulated the following facts:

A) Blue Collar employees had always heretofore worked on the November Election Day.

B) Prior to the 1981 White Collar Contract, White Collar personnel (represented by the Charging Party) had always had

2/ At the request of the parties, the Commission held the charge in abeyance pending possible resolution of the issue in a related court proceeding. Upon request of the Charging Party, the Commission resumed processing of the charge in early 1983.

the November Election Day off pursuant to Borough Ordinance (Exhibit J-1).

C) November Election Day was not a holiday for Union personnel pursuant to the Borough Administrator's memo of 10/27/81 (Exhibit J-2). According to that memorandum, employees were required to take a vacation day or a personal day if they wanted a day off.

D) Eight white collar employees were affected.

E) Approximately 14 management employees had the day off in Borough Hall. Of the eight white collar employees, only four of them worked in Borough Hall. There was a 14 to 4 ratio of management versus union employees in the Borough Hall.

F) White collar negotiations for 1982 were about to be reopened.

G) All affected union personnel took a personal day or vacation day.

Analysis

In East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981), the Court established standards for determining whether an employer's motivation makes a personnel action illegal under our statute. [3/] The Charging Party must first establish that the protected activity was a substantial, i.e., a motivating factor in the employer's adverse action. If the Charging Party meets this burden, the employer will be found to have violated subsection 5.4(a)(3) of the Act unless it can establish by a

3/ In so ruling, the Court adopted the standards 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). See also, NLRB v. Transportation Management Corp., ___ U.S. ___, 113 LRRM 2857 (1983), where the U.S. Supreme Court approved the NLRB's adoption of Mt. Healthy standards in Wright Line.

preponderance of the evidence that the personnel action would have taken place even in the absence of the Charging Party's protected activity. Of course, should the Charging Party fail to meet its initial burden, the complaint must be dismissed. Fair Lawn Board of Education and Raymond Grosiak, P.E.R.C. No. 84-46, 9 NJPER 665 (¶14288 1983).

In the instant matter, the Charging Party alleges that the Borough violated subsection 5.4(a)(3) of the Act by granting a holiday to non-union employees which employees represented by the Charging Party did not enjoy. The charge itself is unclear as to the alleged protected activity which would have been the motivating factor for the Borough's action; however, it appears that the Charging Party is alleging that its existence as an employee organization which negotiated a collective agreement with the Borough is its protected activity, and that the existence of the Charging Party as an employee representative was a motivating factor in the Borough's personnel action with respect to non-unit, non-unionized employees. So construed, the charge suggests that the conferral of benefits by a public employer to non-unionized employees, when unionized employees do not enjoy such benefits, may discourage the unionized employees in the exercise of their rights under the Act by creating the inference that greater benefits will be enjoyed by employees who are not represented by an employee organization.

While the undersigned does not doubt that the timing and extent of the conferral of benefits on non-union employees by a public employer may constitute impermissible discouragement of

employees in the exercise of protected activity, [4/] the facts of this case do not support such a finding. Instead, the record indicates that the Borough granted only one holiday to non-unionized employees which was not included in the Charging Party's collective agreement. At the same time, a review of the collective agreement (Exhibit J-4, p. 7) and the Borough Ordinance establishing holidays for non-unionized employees (J-1) indicates that the employees represented by the Charging Party had a holiday (the day before Christmas Day) which non-unionized employees did not receive, and non-unionized employees received an additional holiday (Martin Luther King Day) which employees represented by the Charging Party did not receive. Also noteworthy is the fact that another group of unionized employees in the Borough received two personal holidays in 1981 (Exhibit J-3, p. 11) while non-unionized Borough employees and employees represented by the Charging Party received only one personal holiday.

The evidence clearly reveals that the difference between holiday benefits granted by the Borough to non-unionized employees and those granted to employees represented by the Charging Party (as well as other unionized Borough employees) is de minimis. The Charging Party did not offer any other evidence which established anti-union animus by the Borough through the disputed personnel action. Accordingly, the undersigned concludes that the Charging Party did not prove that its existence as an employee organization was a substantial or motivating factor in the Borough's granting of

4/ This issue usually arises in the representation context in the form of election objections. See, e.g. Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980).

a holiday to non-unionized employees on Election Day, 1981.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Mark A. Rosenbaum
Hearing Examiner

Dated: January 31, 1984
Trenton, New Jersey