H.E. NO. 89-9

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

In the Matter of

SOUTHEAST MORRIS COUNTY
MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and- Docket No. CO-H-88-294

MUNICIPAL EMPLOYEES ASSOCIATION
OF MORRISTOWN,

Charging Party.

SYNOPSIS

A Hearing Examiner, in granting a Motion to Dismiss at the conclusion of the Charging Party's case, recommends that the Public Employment Relations Commission find that the Respondent did not violate Subsections 5.4(a)(1), (3), (4) or (5) of the New Jersey Employer-Employee Relations Act when the Respondent terminated Robert P. Noyes on April 22, 1988. Admittedly, Noyes was engaged in protected activities as a negotiator for the Charging Party during meetings in March 1988. However, the Charging Party failed to adduce even a scintilla of evidence that the Respondent was hostile toward the exercise by Noyes of the protected activity of serving as one of the Charging Party's three negotiators nor was even a scintilla of evidence adduced of anti-union animus.

A Hearing Examiner's Decision to dismiss upon motion of the Respondent at the conclusion of the Charging Party's case is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

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Appearances:

For the Respondent, Wilentz, Goldman & Spitzer, Esqs. (Alfred J. Hill, of counsel)

For the Charging Party, Jerome J. LaPenna, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on May 16, 1988, by the Municipal Employees Association of Morristown ("Charging Party" or "MEA") alleging that the Southeast Morris County Municipal Utilities Authority ("Respondent" or "MUA") has 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. ("Act"), in that the MUA terminated Robert P. Noyes, a member of the MEA, on April 22, 1988, because of his having engaged in the protected activity of serving on the MEA's negotiations committee, which has

been engaged in collective negotiations for a successor agreement, commencing January 1, 1988, and that the termination of Noyes resulted from his exercise of protected activities, supra, and that the MUA has refused to negotiate in good faith by having terminated Noyes and, finally, that by terminating Noyes the MUA did so because he participated in the preparation of the instant Unfair Practice Charge; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (4) and (5) 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 May 20, 1988. Pursuant to the Complaint and Notice of Hearing, hearings were held on July 28 and August 17, 1988, in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case on August 17th, the Respondent made a Motion

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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. (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. (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.."

to Dismiss on the record and the Hearing Examiner, after hearing the oral argument of counsel for the parties, granted the Motion on the record as to all allegations in the Complaint.[2/]. The Hearing Examiner, after granting the Respondent's Motion to Dismiss, advised the parties that a written decision would follow..

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and upon the record made by the Charging Party only, and after consideration of the oral argument of the parties at the hearing on August 17, 1988, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the record made by the Charging Party only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Southeast Morris County Municipal Utilities Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Municipal Employees Association of Morristown is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2/ No evidence whatever was adduced to the §§5.4(a)(4) and (5) allegations in the Complaint. Thus, the discussion, infra, deals only with §§5.4(a)(1) and (3).

3. Robert P. Noyes is a public employee for purposes of this proceeding within the meaning of the Act, as amended, and is subject to its provisions.

4. Noyes was hired by the MUA in July 1980 and worked as a mechanic, principally at the 101 Western Avenue Garage in Morristown. Noyes has always been a member of the MEA, but was not active until he became a member of the negotiations committee in November 1987, after which he participated in collective negotiations on behalf of the MEA for a successor agreement, commencing January 1, 1988.

5. Noyes had a minor disciplinary history beginning in August 1981 and continuing through May 1986, as a result of which he was suspended on two occasions for either one day or three days.

6. On January 4, 1988, Noyes requested a review of his job classification during a period when collective negotiations between the parties had already commenced. Several days thereafter the MUA responded, stating that it needed a "Sr. Mechanic" but that Noyes would have to enroll for training which he never did.

7. On the Sunday prior to a collective negotiations meeting on March 18, 1988, the MUA used supervisory personnel on a water main break, which the MEA disputed as work which should have been performed by unit members. At the negotiations meeting on March 18th, one-third of the three hours spent at the meeting was devoted to resolving the "call out" problem raised by the MEA. The MUA was represented by its Executive Director, Harry G. Gerken,

along with several others and the MEA was represented by its President, Hugh Geraghty, Noyes and Alfred Ottavia. Noyes testified in detail as to what transpired at the meeting, the end result of which was that the MEA was satisfied that in the future it would receive a copy of the "call out" list and would be contacted regarding assignments. During the course of this meeting Gerken left the room and came back with what proved to be an acceptable "call out list," which he either "threw" or "slid" across the table at Noyes, asking him if he would "...be satisfied with this..." (1 Tr 28, 48, 49). This incident occurred in the course of the meeting which, according to Noyes, had become "...quite heated..." (1 Tr 48, 50). The remaining two hours of this meeting were devoted to collective negotiations.

8. The next collective negotiations meeting of the parties occurred on March 28, 1988, and was devoted to a discussion of the MUA's proposal for a "merit system" (1 Tr 52; CP-1). This meeting, which according to Geraghty lasted about five hours (1 Tr 23), was taken up in large part by Gerken's explanation as to what the MUA intended by its "merit system" proposal (1 Tr 52). When Noyes expressed strenuous objection to the wide differentials between the raises which certain employees would receive, Gerken questioned him closely and Noyes asked that he not be put "...on the spot..." (1 Tr 53, 54). When, at one point, Gerken became "...highly irritated...," he stated to Noyes "If you want to play that one for all, all for one stuff, then I will give you a 50 cents

across the board. Take it or leave it..." (1 Tr 54; see, also 1 Tr 23).[3/] The "merit system" issue was not resolved at this meeting and the balance of the meeting was devoted to a relatively brief discussion regarding longevity.

9. The termination of Noyes resulted from his work performance on three days, Wednesday, April 13, 1988 through Friday, April 15, 1988. The employer contended that Noyes failed to perform certain duties on those days and Noyes countered that he had performed satisfactorily. William Hutchinson, the MUA Superintendent, suspended Noyes at a meeting on April 19, 1988. Neither Hutchinson nor several other supervisors present made any statements which indicated a manifestation of anti-union animus on the part of the MUA. On April 22, 1988, Noyes was formally terminated by Hutchinson in a letter, which recited the deficiencies in his performance between April 13 and April 15, 1988 (CP-6). Thereafter, there was a grievance hearing before Gerken but the Charging Party adduced no evidence that anti-union animus was manifested by the MUA. Thereafter the instant Unfair Practice Charge ensued.

3/ This testimony as to what Gerken said to Noyes was given by Noyes on direct examination on July 28, 1988, the transcript of which was available at the hearing on August 17, 1988. Noyes testified in an almost identical fashion when he was cross-examined on August 17, 1988.

DISCUSSION AND ANALYSIS

The Applicable Standard On a Motion To Dismiss.

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

Additionally, there is involved in the instant case the necessity to include in the above analysis the decision by the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) since the thrust of the Association's charge, dealing with the non-renewals of Frain and Warczakowski, centers on the allegation that the Respondent Board violated §§5.4(a)(1) and (3) of the Act.

In Bridgewater, the Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases where the following requisites are utilized in assessing employer motivation: (1) The

Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to terminate; and (2) once this is established, then the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Court in Bridgewater further refined the above test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity, i.e., manifested anti-union animus (95 N.J. at 246).

The Respondent's Motion To Dismiss Is Granted Since The Charging Party Has Failed To Adduce Even A Scintilla Of Evidence That Hostility Was Manifested By The MUA's Agents Toward Noyes.

Leaving aside the "scintilla" and the Bridgewater tests for a moment, the Hearing Examiner notes preliminarily that an employer may legally discharge an employee for any cause whatsoever so long as its motivation is not interference with rights protected under the Act, either our Act or the NLRA: NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 669 (1st Cir. 1979). Similarly, an employer can fire an employee for good, bad, or no reason at all, so long as the purpose is not to interfere with union activities: NLRB v. Loy Foods Stores, Inc., 697 F.2d 798, 801 (7th Cir. 1983).

The Hearing Examiner is persuaded that when the testimony and the documentary evidence adduced by the Charging Party is viewed most favorably to it, the Charging Party has established only that

(1) Noyes engaged in the exercise of protected activities as a member of the MEA's negotiations committee which, however limited, is sufficient to meet the first part of the Bridgewater test[4/] and (2) that the Respondent necessarily knew of Noyes' exercise of this protected activity. However, the Charging Party has failed to adduce even a "scintilla" of evidence that the Respondent was hostile to or manifested anti-union animus toward Noyes in his exercise of protected activities. Thus, only two of the three requisites enunciated in Bridgewater for establishing a prima facie case have been met by the Charging Party.

As the Hearing Examiner stated on the record on August 17, 1988, when the Respondent's Motion to Dismiss was granted orally, the only evidence adduced, which could possibly constitute evidence of hostility by the Respondent was the exchange which occurred between Gerken and Noyes at the March 28, 1988, negotiations meeting. Bearing in mind that an employer has the right to freedom of speech under our Act.[5/] What Gerken said to Noyes at the March 28th meeting with respect to Noyes wanting to play "...that one for all, all for one stuff..." coupled with his statement that Noyes and the MEA could "...Take it or leave it..." (1 Tr 54) falls within the area of protected speech, particularly in the context of

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4/ See Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 9 (¶17002 1985).

5/ See Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981) and State of New Jersey, P.E.R.C. No. 88-147, 14 NJPER ___ (¶_____ June 24, 1988).

negotiations, and does not constitute evidence of hostility toward Noyes within the meaning of Bridgewater. This conduct of Gerken was the only possible evidence of hostility or animus, which could constitute a scintilla of evidence within the meaning of N.J. Tpk. Authority, supra. The Charging Party is not helped by reference to what Gerken said at the March 18th meeting where, when he "slid" the "call out" list to Noyes, he said "...Does this satisfy you?..." (1 Tr 28).

This Hearing Examiner had occasion to grant a Motion to Dismiss, based on the absence of even a scintilla of evidence of hostility or anti-union animus, in the case of Lyndhurst Bd. of Ed., H.E. No. 87-56, 13 NJPER 285 (¶18119 1987), which was adopted by the Commission in P.E.R.C. No. 87-139, 13 NJPER 482 (¶18117 1987). For essentially the same reasons, the Hearing Examiner is compelled to conclude that the Charging Party herein has failed to adduce even a "scintilla" of evidence of hostility toward the exercise of protected activities by Noyes and, thus, he must recommend that the allegations that the Respondent violated §§5.4(a)(1), (3)-(5) of the Act must be dismissed.

* * * *

Accordingly, upon the foregoing, and upon the testimony and documentary evidence adduced in this proceeding by the Charging Party only, the Hearing Examiner makes the following:

RECOMMENDED ORDER

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (4) or (5) and the Respondent's Motion to Dismiss is hereby granted. The Complaint is, therefore, dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: September 1, 1988
Trenton, New Jersey