P.E.R.C. NO. 80-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY,

Respondent,

-and- Docket No. CI-79-51-11

THOMAS J. COGAN,

Charging Party.

SYNOPSIS

In the absence of exceptions, the Commission adopts the Hearing Examiner's recommendation that a complaint against the Authority be dismissed. The Charging Party failed to prove that his removal as supervisor of valet parking and his failure to be appointed as supervisor of valet parking for the Pegasus Restaurant, when it opened, was motivated by a desire to encourage or discourage the employee in the exercise of guaranteed rights or that it had that effect. The Authority's conduct was fully justified on the basis of legitimate and substantial business considerations.

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Charging Party.

Appearances:
For the Respondent, William J. Ward, Esquire

For the Charging Party, Zolkin & Smith, Esqs.
(Mr. W. Randolph Smith)

DECISION AND ORDER

On March 23, 1979, an Unfair Practice Charge was filed with the Public Employment Relations Commission by Thomas J. Cogan alleging that the New Jersey Sports and Exposition Authority (the "Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), N.J.S.A. 34:13A-1 et seq. Specifically, he alleged that after complaining about his removal as supervisor of valet parking, he was not appointed as supervisor of valet parking for the Pegasus Restaurant when it opened. This action was alleged to be violative of N.J.S.A. 34:13A-5.4(a)(1) and (3).

Pursuant to a Complaint and Notice of Hearing which was issued on August 27, 1979, a hearing was held on October 25, 1979 before Commission Hearing Examiner Alan R. Howe at which time all parties were given an opportunity to present evidence, to examine

and cross-examine witnesses and to argue orally. The parties did argue orally and waived the filing of post-hearing briefs. The Hearing Examiner issued his Recommended Report and Decision on October 30, 1979, H.E. No. 80-17, 5 NJPER ___ (¶___ 1979), a copy of which is attached to this Decision and Order and made a part hereof. The report was served upon the parties and the case was transferred to the Commission. See N.J.A.C. 19:14-7.1. Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.3 which, in part, provides that any exception which is not specifically urged shall be deemed to have been waived.

The Hearing Examiner recommended the dismissal of both aspects of the Complaint. He found that the charging party failed to prove by a preponderance of the evidence that any conduct of the Authority's representatives was motivated in whole or in part by a desire to encourage or discourage Cogan in the exercise of guaranteed rights or that it had that effect. He concluded that the Authority's agents fully justified their conduct with respect to the removal of Cogan as the supervisor of valet parking and that there was simply not a need for a parking supervisor at the Pegasus valet parking lot. The Hearing Examiner concluded that there was only the remotest causal connection between the complaint which Cogan cited as the cause for his removal as valet parking supervisor and the subsequent events but that these subsequent events were clearly justified by the respondent on the basis of

legitimate and substantial business considerations.[1/]

The Commission, having reviewed the entire record and noting particularly the absence of exceptions, hereby adopts the findings of fact and conclusions of law contained within the Hearing Examiner's Recommended Report and Decision. Therefore, the Unfair Practice Charge will be dismissed.

ORDER

For the foregoing reasons and upon the entire record herein, IT IS HEREBY ORDERED that the Unfair Practice Charge be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Hipp, Newbaker and Parcells voted for this decision. None opposed.

DATED: Trenton, New Jersey
December 4, 1979
ISSUED: December 5, 1979

1/ We take this opportunity to restate our standard for finding an independent (a)(1) violation as initially set forth in In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978). We shall delete the reference to a "reasonable" employee so that the standard is as follows: It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. See Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657, 2659 (1965). This has no bearing on the instant case nor is it intended to do more than conform our standard in such cases to that utilized by the N.L.R.B.

H.E. NO. 80-17

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

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY,

Respondent,

- and -

Docket No. CI-79-51-11

THOMAS J. COGAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by Cogan, a management employee with the title of Parking Supervisor, on the ground that Cogan failed to prove by a preponderance of the evidence that actions of the representatives of the Authority were motivated in whole or in part by anti-union animus. Further, the Hearing Examiner found that Cogan failed to prove an independent violation of the Act, without regard to motivation, by conduct that would tend to interfere with, restrain or coerce Cogan in the exercise of his rights guaranteed by the New Jersey Employer-Employee Relations Act.

Cogan was hired as a Parking Supervisor in August 1976 and worked on the valet parking lot at the Meadowlands Race Track until October 2, 1978 when he was transferred to the "flat lots." This decision by the Authority was based upon a judgment that a co-employee had greater experience in valet parking and that the Authority needed a Parking Supervisor at the "flat lots" where none had previously been utilized. Further, Cogan claimed that he was denied an opportunity to work as a Parking Supervisor at the Pegasus Restaurant when it opened in March 1979 and this denial was based upon the fact that he had complained to management about his transfer in October 1978. The Hearing Examiner found that the Authority established sufficient business justification for its decision not to utilize Cogan or anyone else as a Parking Supervisor at the Pegasus valet parking lot. Thus, the Authority's actions were exonerated by the Hearing Examiner.

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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THOMAS J. COGAN,

Charging Party.

Appearances:

For the New Jersey Sports & Exposition Authority
William J. Ward, Esq.

For Thomas J. Cogan
Zolkin & Smith, Esqs.
(W. Randolph Smith, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 23, 1979, and amended on June 29, 1979, by Thomas J. Cogan (hereinafter the "Charging Party" or "Cogan") alleging that the New Jersey Sports & Exposition Authority (hereinafter the "Respondent" or the "Authority") 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 James Ryder on behalf of the Authority had on October 2, 1978 removed Cogan from his position of Supervisor of valet parking and, notwithstanding that Ryder promised Cogan that he would be appointed a valet parking Supervisor for the Pegasus Restaurant when it opened, Ryder thereafter refused to so appoint Cogan after Cogan made a complaint regarding Ryder to Robert Quigley, the Supervisor of Personnel for the Authority, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. 1/

1/ These Subsections prohibit 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.
(continued next page)

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 27, 1979. Pursuant to the Complaint and Notice of Hearing, a hearing was held on October 25, 1979 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument 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

1. The New Jersey Sports & Exposition Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Thomas J. Cogan is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Cogan was hired by the Aughority on August 16, 1976 as a Parking Supervisor. 2/ Prior to being employed by the Authority, Cogan had been employed for 23 years as a Parking Manager for Meyers Bros. in New York City.

4. Hugh Russell was hired by the Authority as a Parking Supervisor on August 29, 1976. By way of prior experience, Russell had worked in various parking positions at many race tracks for upwards of 20 years and had valet parking experience.

5. From their respective dates of hire, Cogan and Russell worked as Parking Supervisors on the valet parking lot for the Meadowlands Race Track.

1/ (continued)
"(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."

2/ Although Cogan testified that he was specifically hired for "valet" parking, the Authority's employment records indicate only that he was hired as a "Parking Supervisor" (see R-1 and R-2).

Their responsibility was to supervise the "runners" and handle the parking tickets and daily receipts. This situation continued until October 2, 1978 when Cogan was informed by James F. Ryder and Benjamin V. Roselli, the Authority's Co-Parking Directors, that he, Cogan, was being transferred to the "flat lots" where there had not previously been a Parking Supervisor. When Cogan pressed Ryder and Roselli for an explanation, Ryder said that he favored retaining Russell for valet parking because of his vastly greater experience when compared to Cogan. It is undisputed that there were no complaints about Cogan's job performance since his date of hire. 3/

6. Ryder testified credibly that he had discussed the need for a Parking Supervisor on the "flat lots" with Quigley 3a/ and it was decided that there was such a need. It was in this context that Ryder made his decision to transfer Cogan to the "flat lots" and keep Russell on the valet lot based on Russell's prior race track valet experience.

7. Several days after his transfer to the flat lots, Cogan went to Robert J. Quigley, the General Manager of the Authority, and asked him why he had been "removed" from valet parking. According to Cogan, Quigley said that he had nothing to do with "internal affairs" and that such matters were up to Ryder. Quigley further said that Cogan should "hold off until Pegasus opens." 4/ Quigley did not testify and thus Cogan's version of the conversation with Quigley stands undisputed.

8. The day that the Pegasus Restaurant opened in March 1979 Cogan went to Ryder, who allegedly said that Cogan was "not going to Pegasus because you made a complaint against me," which Cogan inferred was a reference to his conversation with Quigley in October 1978, supra. Ryder flatly denied making the foregoing statement to Cogan. 5/

9. Ryder testified without contradiction that the parking projection for Pegasus prior to its opening was that approximately 525 cars per night would be valet-parked, which would have involved about 15 "runners" and would in all likelihood have warranted a "Parking Supervisor" such as Cogan. As it turned out, after

3/ There was no change in Cogan's annual salary as a result of the transfer, but the transfer did result in the loss of an undisclosed amount of money in tips. There are no tips on the "flat lots."

3a/See Finding of Fact No. 7, infra.

4/ Pegasus is a restaurant at the Meadowlands which eventually opened in March 1979.

5/ The credibility resolution on this point will be made hereinafter. It is noted here that Ryder at some point told Cogan that he would be "considered" for Pegasus when it opened.

the opening of Pegasus in March 1979, the number of cars valet-parked per night was substantially lower than estimated and has averaged about 275 to 280 cars per night. Ryder had originally hired nine "runners" and then cut that number back to six based on the actual valet parking workload. Ryder testified credibly that there was no need for the Authority to utilize a Parking Supervisor for six runners.

10. Based in part on Findings of Fact Nos. 6 and 9, supra, the Hearing Examiner credits Ryder's denial that he told Cogan that he, Cogan, would not get the Pegasus job because Cogan had made a complaint to Quigley. Ryder impressed the Hearing Examiner as a credible witness who had no motive or apparent reason to deny Cogan a spot at Pegasus because of anything that Cogan said to Quigley. Ryder's analysis of the Pegasus situation is completely credible and it would appear to the Hearing Examiner that, based on the nightly parking activity, there has been no need for a Parking Supervisor such as Cogan. The situation might have been viewed differently if Ryder had transferred or hired another Parking Supervisor for Pegasus and had passed over Cogan.

11. Cogan, as a Parking Supervisor, is a member of the management of the Authority and is not in any collective negotiations unit.

12. Cogan is still employed as a Parking Supervisor on the "flat lots."

THE ISSUE

Did the Respondent Authority violate the Act when Ryder transferred Cogan on October 2, 1978 from the valet parking lot to the "flat lots" and thereafter failed to place Cogan at the Pegasus valet parking lot when it opened in March 1979?

DISCUSSION AND ANALYSIS

The Respondent Authority Did Not Violate The Act By Its Conduct Herein

In alleging a violation of Subsection (a)(3) of the Act, the Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that any conduct of the Respondent's representatives and agents was "...motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect (inherently destructive) of so encouraging or discouraging employees in the exercise of those rights...": Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71, 72 (1977). See also, City of Hackensack, P.E.R.C. No. 77-49,

3 NJPER 143, 144 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), pet. certif. granted 78 N.J. 404 (1978).

In so finding and concluding, the Hearing Examiner has carefully considered the Charging Party's proofs, together with the Respondent's proofs, and is fully persuaded that Ryder displayed no animus or retaliatory motivation against Cogan in his initial decision to transfer Cogan to the "flat lots" in October 1978 and his later failure to place Cogan on the Pegasus valet parking lot in March 1979. As the Findings of Fact, supra, amply demonstrate, Ryder fully justified his conduct in these instances. Ryder judged Russell the more experienced of the two Parking Supervisors, which is supported by the record, when Ryder transferred Cogan to the "flat lots." Also, Ryder demonstrated through his testimony that there was not and never has been the need for a Parking Supervisor at the Pegasus valet parking lot.

The Hearing Examiner now turns to the question of whether or not the Charging Party has proven an independent Subsection (a)(1) violation of the Act. The Commission's standard for such a violation is found in the case of New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (1978) where the Commission said:

> "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce a reasonable [6/] employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial 'business' justification..." (4 NJPER at 422) [7/] (Emphasis supplied).

Having found no anti-union bias or animus proved by the Charging Party, the Hearing Examiner now looks to whether or not there was any conduct by the Authority which "tended" to interfere with, restrain or coerce Cogan in the exercise of rights guaranteed to him by the Act. Even under this standard, the Hearing Examiner

6/ The Hearing Examiner once again (see H.E. No. 79-29, f.n. 41 and H.E. No. 80-11, f.n. 28) respectfully suggests that the Commission delete the word "reasonable" from its Subsection (a)(1) standard inasmuch as there is no NLRB or federal court precedent for such a qualification: see Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657, 2659 (1965). The Commission is constrained to follow NLRB precedent where "appropriate": Lullo v. International Association of Fire Fighters, 55 N.J. 409 (1970) and Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, 78 N.J. 1, 9 (1978).

7/ The Commission has continued to apply this standard in Rutgers, The State University, P.E.R.C. No. 79-89, 5 NJPER 226, 228 (1979), Borough of Pine Hill Board of Education, P.E.R.C. No. 79-98, 5 NJPER 237, 239 (1979) and Cape May City Board of Education, P.E.R.C. No. 80-37, 5 NJPER 411, 412 (1979).

finds and concludes that Cogan has failed to show any causal connection between any protected activity in which he engaged and the conduct of Ryder in October 1978 and in March 1979. In so finding and concluding, the Hearing Examiner has taken cognizance of the fact that Cogan made a "complaint" to Quigley in October 1978, which Cogan claimed Ryder referred to in March when he refused Cogan's request for the Pegasus valet parking lot position.

The Hearing Examiner concludes that the Charging Party has only remotely proved a causal connection between any complaint which Cogan made to Quigley in October 1978 and Ryder's actions in March 1979. Even if a causal connection was established, the Hearing Examiner finds that the Respondent has herein proven a "legitimate and substantial 'business' justification" within the meaning of New Jersey College of Medicine and Dentistry, supra. This justification is established by Ryder's testimony regarding his decision not to utilize the services of a Parking Supervisor at Pegasus because the parking activity there did not warrant one, either at the opening of Pegasus in March 1979, or at any time since then. Having so found a business justification for its actions, the Authority did not independently violate Subsection (a)(1) of the Act.

Based on the foregoing, the Hearing Examiner must recommend dismissal of the Complaint in its entirety.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by its conduct herein with respect to Cogan.

RECOMMENDED ORDER

The Respondent Authority not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

Alan R. Howe

DATED: October 30, 1979
Trenton, New Jersey

Alan R. Howe
Hearing Examiner