

D.U.P. NO. 2012-12

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TOWNSHIP OF SOUTH HACKENSACK

Respondent,

-and-

Docket No. CO-2011-484

IBT LOCAL 11,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by IBT Local 11 against the Township of South Hackensack. The charge alleges that the Township violated 5.4a(1), (3) and (5) of the Act when it discharged former Township employee Joseph Maglio because of his membership in and activities on behalf of Local 11 and failed to pay him for his accrued paid time-off. The charge also alleges that the Township repudiated the parties' collective negotiations agreement, ". . . with regard to discipline and discharge," and unilaterally implemented a new policy about payment for accrued paid time off at separation of employment. The charge further alleges that the Township's discharge of Maglio has intimidated employees in the exercise of their protected rights.

The Director found that the 5.4a(3) allegation was not pled with the specificity required by N.J.A.C. 19:14-1.3(a)(3). With regard to the 5.4a(5) allegation, the Director found that Local 11 did not cite any contractual provision that the Township allegedly repudiated. The Director also found that Local 11 provided no facts about the Township's policy regarding payment for accrued paid time-off at separation of employment or its application before or after the alleged unilateral change.

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Appearances:

For the Respondent  
John J. D'Anton, Esq.

For the Charging Party  
Kroll Heineman Carton  
(Curtiss T. Jameson, of counsel)

**REFUSAL TO ISSUE COMPLAINT OR DECISION**

On June 16, 2011, the International Brotherhood of Teamsters Local 11 (Local 11) filed an unfair practice charge against the Township of South Hackensack (Township). The charge alleges that on March 21, 2011, the Township violated 5.4a(1), (3), and (5)<sup>1/</sup>

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<sup>1/</sup> These provisions 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  
(continued...)

of the New Jersey Employer-Employee Relations Act (Act) when it discharged former Township employee Joseph Maglio because of his membership in and activities on behalf of Local 11 and failed to pay him for his accrued paid time-off. The charge also alleges that the Township repudiated the parties' collective negotiations agreement, ". . . with regard to discipline and discharge," and unilaterally implemented a new policy about payment for accrued paid time off at separation of employment. The charge also alleges that the Township's discharge of Maglio has intimidated employees in the exercise of their protected rights.

The Township denies the allegations and asserts that it lawfully terminated Maglio for poor work performance and excessive absenteeism.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the Respondent.

N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I will decline to issue a complaint.

N.J.A.C. 19:14-2.3. On January 23, 2012, I wrote a letter to the parties, advising that I was not inclined to issue a complaint in this matter and setting forth the reasons for that conclusion.

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1/ (...continued)  
in that unit, or refusing to process grievances presented by the majority representative."

The parties were provided an opportunity to respond. Neither party filed a response. The following facts appear.

Local 11 represents a negotiations unit of all regularly employed nonsupervisory department of public works employees of the Township. The parties' negotiated grievance procedure does not provide for binding arbitration.

Maglio began his employment with the Township in 1988. He was most recently employed as a laborer. On February 21, 2011, he assertedly was away from the Township and failed to respond to Township phone calls seeking his assistance in a snow emergency that day. On April 14, 2011, the Township terminated Maglio retroactively to March 31, 2011.

The Township also cites instances in Maglio's employment demonstrating a pattern of "neglect of duty," "lack of veracity," and "conduct unbecoming a public employee." For example, under "neglect of duty," the Township cites Maglio's use of 365.5 paid sick days over 22 years of employment, not including other days on which he called out sick and was not compensated. The Township cites Maglio's alleged failure and/or refusal to report to work after emergency calls on May 19, 2000 and on April 15, 2007, transgressions for which he was suspended. The Township cites Maglio's failure of an alcohol test administered at work on March 18, 2002, for which he was suspended five days; his plea to a DWI charge in December, 2009 and subsequent loss of his

commercial driver's license (necessary to perform his job duties), for which he was suspended two months; and a physical altercation with another employee on May 14, 2001, for which he was penalized three vacation days. Finally, the Township cites Maglio's submission of a voucher for payment of stand-by time for May 15, 2010, despite failing to respond to a call he received that day, and his application for unemployment compensation benefits during his 2009 two-month suspension.

#### ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

N.J.A.C. 19:14-1.3(a)(3) requires that a charge set forth:

A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the date and place the alleged acts occurred, the names of the persons alleged to have committed such acts, the

subsection(s) of the Act alleged to have been violated, and the relief sought.

Local 11 has not met this administrative requirement. It has not set forth any circumstances of Maglio's "membership" in Local 11, nor has it alleged any facts describing Maglio's "activities on behalf of Local 11" which motivated the Township's conduct. I dismiss the 5.4a(3) allegation.

I also dismiss the 5.4a(5) allegation that the Township repudiated the parties' agreement ". . . with regard to discipline and discharge." Local 11 has not cited any contractual provision that the Township allegedly repudiated. Local 11 also alleges that the Township unilaterally implemented a new policy concerning payment for accrued paid time-off at separation of employment but has not provided any facts about the policy or its application before or after the alleged unilateral change.

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exhibition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint or coercion is unnecessary. The tendency to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, a party asserting an independent violation of 5.4a(1) must

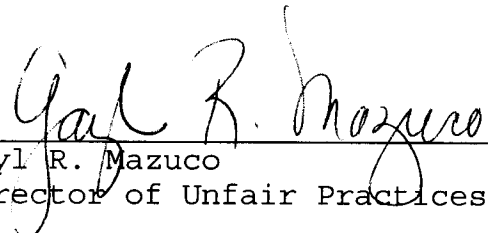
establish that the employer engaged in some action that would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.

In some circumstances, the discharge of an employee could have the tendency to intimidate employees in the exercise of their protected rights. If it does, the Commission must then determine whether the employer has a legitimate operational justification. If the employer does have such a justification, we will weigh the tendency of the employer's conduct to interfere with employee rights against the employer's need to act.

Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998).

Local 11 has not alleged any facts -- other than Maglio's discharge -- which indicate that that employment action could have a tendency to interfere with employee rights. The Township has set forth facts about Maglio's employment history indicating both an operational justification for its action and a need to act.

The charge is dismissed.

  
Gayl R. Mazuco  
Director of Unfair Practices

DATED: February 15, 2012  
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by February 27, 2012.