

H.E. NO. 92-26

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

In the Matter of

BOROUGH OF ALLENHURST,

Respondent,

-and-

Docket No. CI-H-92-15

GREGORY F. TALLARICO,

Charging Party.

**SYNOPSIS**

In an Interlocutory Decision on Respondent's Motion to Dismiss prior to hearing, a Hearing Examiner of the Public Employment Relations Commission grants it in part and denies it in part. The problem presented by the individual charging party was (1) his lack of standing to allege a §5.4(a)(5) or an (a)(6) violation by the Borough and (2) additionally, a third amendment identified the Charging Party as a labor organization with no reference to the individual "CI." These two matters were dismissed but additional allegations of employer violation of §§5.4(a)(3) and (a)(4) of the Act were set down for hearing.

In the absence of a Request for Special Permission to Appeal, the case will proceed to hearing as ordered.

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Appearances:

For the Borough of Allenhurst, Stout & O'Hagan, attorneys  
(William J. O'Hagan, Jr., of counsel)

For the Charging Party, Joseph N. Dempsey, Esq.

**HEARING EXAMINER'S INTERLOCUTORY DECISION**  
**ON RESPONDENT'S MOTION TO DISMISS**

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on August 28, 1991 by Gregory F. Tallarico ("Charging Party" or "Tallarico") alleging that the Borough of Allenhurst ("Respondent" or "Borough") 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 Tallarico, who is employed in the Borough's Police Department is a member of PBA Local No. 57 ("PBA"), the recognized majority representative for officers of the Borough; on January 2, 1991, the Borough's Chief issued a memorandum assigning pagers to all members of the Department without negotiations with

the PBA; on July 26, 1991, Tallarico was notified of a three-day suspension due to a violation of the pager memorandum, an alleged violation of his terms and conditions of employment; until July 26th, there had been no negotiations regarding pagers or any other changes in rules and regulations or terms and conditions of employment; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(5) and (6) of the Act.<sup>1/</sup>

On November 4, 1991, Tallarico amended his Unfair Practice Charge, repeating the first paragraph of the original Charge, and alleging that he "defended" a disciplinary charge, which resulted in its dismissal except for a reprimand in his file; on October 22, 1991, he was called to the office of the Chief and was given a letter of reprimand and transferred from his position as a Detective, effective that date "and was to continue all duties assigned" but without hearing or prior notice, which action was allegedly undertaken "to chill his ardor as a member of the bargaining unit" because he had filed the prior original Unfair

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Practice Charge; all of which is alleged to be in violation of N.J.S.A. 34:13-5.4(a)(3) and (4) of the Act.<sup>2/</sup>

On December 2, 1991, Tallarico filed a second amendment to his original Unfair Practice Charge, again repeating the first paragraph of the original Charge and then alleging that on October 22, 1991, when he was called into the office of the Chief and relieved of his status as a Detective, all stipends were halted as of November 1st; on the latter date he notified the Chief in writing that he was filing a grievance regarding the actions of the Chief; on November 7th, the Chief notified Tallarico that he had not followed the grievance procedure and the Chief would, therefore, not process the grievance; the Chief did not identify the procedures that Tallarico had failed to follow; all of which is alleged to be violation of N.J.S.A. 34:13-5.4(a)(5) of the Act.<sup>3/</sup>

It appearing that the allegations in the original Unfair Practice Charge of August 28, 1991, supra, as amended twice on November 4th and December 2nd, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of

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2/ These subsections prohibit 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. (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.

3/ This subsection of the Act has previously been set forth in fn. 1, supra, and will not be repeated.

Hearing was issued on January 8, 1992. The Respondent filed its Answer on January 21, 1992, in which it incorporated past statements of its position in this matter under date of December 11, 1991.

Upon review of the Complaint and Answer, the Hearing Examiner initiated a conference call with counsel on January 21st, following which the Charging Party filed a third amendment to its Unfair Practice Charge. This amendment was docketed with the Commission on January 31, 1992, and repeated again the first paragraph of the original Charge. However, this amendment made no reference to Tallarico, since the Charging Party now was identified as "PBA Local 57" by Gary DiSalvo, its President. The third amendment alleged, *inter alia*, that the Respondent has failed to negotiate with the "majority representative" regarding the issuance of pagers nor has the Borough negotiated any change in its rules and regulations with respect thereto; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(5) and (6) of the Act.<sup>4/</sup>

Also, following the January 21st conference call, the Borough on February 10th filed a Motion to Dismiss the original Unfair Practice Charge and the three subsequent amendments. After receipt of the Borough's Motion, the Hearing Examiner received the various responses and cross-responses of the parties by March 25, 1992. In the meantime, the Hearing Examiner had decided to schedule oral argument on the Borough's Motion. Oral argument was heard at the Commission's offices in Newark, New Jersey, on March 25, 1992,

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<sup>4/</sup> These subsections of the Act have previously been set forth in fn. 1, supra, and will not be repeated.

at which time the parties appeared by counsel and argued on the record (1 Tr 48-73). The parties also waived any further written submissions. The matter was adjourned without date, pending a written decision by the Hearing Examiner (1 Tr 73, 74).

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Upon the parties' submissions to date, which constitute the interim record, including those facts elicited upon the record at the oral argument on March 25th, the Hearing Examiner makes the following:

**INTERIM FINDINGS**

1. The parties are, respectively, a public employer and a public employee under the Act, as amended, and are subject to its provisions.

2. The original Unfair Practice Charge of August 28, 1991, is defective under the Act since Tallarico, as an individual employee, has alleged a violation of §§5.4(a)(5) and (6) of the Act by virtue of the Chief's pager memo of January 2, 1991 [an event out of time under §5(c) - the six-month limitation], followed by notice of suspension on July 26th [an arguable §5.4(a)(3) violation], and then an allegation of no collective negotiations through July 26, 1991. Under Commission precedent, Tallarico lacks standing to allege a violation of §5.4(a)(5) and (6) of the Act.<sup>5/</sup> [1 Tr. 5-7].

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5/ See Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984) and Cherry Hill Tp., D.U.P. No. 81-18, 7 NJPER 286 (¶12128 1981).

3. In the first amendment to the original Unfair Practice Charge, docketed November 4, 1991, the allegations are predicated upon alleged violations by the Borough of Tallarico's rights under §§5.4(a)(3) and (4) of the Act. Here Tallarico alleges that after his disciplinary hearing, only a reprimand was placed in his file and that on October 22nd he was transferred by the Chief from his position as a Detective, without notice or a hearing, and that this had a "chilling" effect on a bargaining unit member in violation of §§5.4(a)(3) and (4) of the Act. He alleges further that the above action by the Chief was taken because he had filed his original Unfair Practice Charge. On its face this first amendment to the original Unfair Practice Charge survives the Borough's Motion. It is a proper "amendment" to the original Unfair Practice Charge since it is timely under §5.4(c) of the Act and is in no way flawed by the fact that the original Unfair Practice Charge of August 28, 1991, was defective because Tallarico had no standing to allege a violation by the Borough of §§5.4(a)(5) and (6) of the Act, supra. In other words, a valid amendment can legally and properly attach to a prior procedurally defective unfair practice charge so long as the allegations are timely under §5(c). [1 Tr 7-23].

4. The second amended Unfair Practice Charge of December 2, 1991, is defective for the same reasons as the original Unfair Practice Charge (¶2, supra) in that Tallarico has made allegations that the Borough violated §5.4(a)(5) of the Act. The legal deficiencies are the same as those appearing in the original

Unfair Practice Charge. However, because the events which appear in the second amendment are timely under §5(c) of the Act, and are inextricably related to those in the first amendment, they may be litigated together as alleged violations of §§5.4(a)(3) and (4) of the Act. [1 Tr 23, 24].

5. Finally, the third amended Unfair Practice Charge of January 31, 1992, alleging violations by the Borough of §§5.4(a)(5) and (6) of the Act is defective to the extent that it has been improperly filed in this proceeding. Here we have an "amendment" to the original Unfair Practice Charge where the original Charging Party, Tallarico, is inexplicably absent. This third amendment of January 31st is captioned solely in the name of "PBA" and its President, Gary DiSalvo. The Borough is alleged to have violated §§5.4(a)(5) and (6) of the Act because it failed to negotiate terms and conditions of employment with respect to the issuance of pagers. The procedural problem presented is that this case was originally docketed as a charge by an individual employee and was given a "CI" designation under the Commission's procedures. The action of the Charging Party in substituting "PBA Local 57" for "Tallarico" without so much as a by your leave operates to circumvent such Commission procedures as an exploratory conference, which normally occurs after the filing and docketing of an unfair practice charge such as the instant "third amendment." The Hearing Examiner has made no determination whatever as to the legal



sufficiency of the allegations in the third amendment to the original Unfair Practice Charge. Rather, he will grant the Motion to Dismiss it without prejudice to its timely refiling by counsel for the "Charging Party" with the Commission. Any such filing shall carry the original docketing date of January 31, 1992 (1 Tr 38, 41).<sup>6/</sup> [Generally, 1 Tr 28-45].

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Based upon the above Interim Findings of the Hearing Examiner, the following Interlocutory Order is entered in this proceeding:

**INTERLOCUTORY ORDER**

1. The Motion to Dismiss Tallarico's allegations in the original Unfair Practice Charge, docketed August 28, 1991, is granted for the reason that the Charging Party is an individual who lacks standing to allege that the Respondent violated §§5.4(a)(5) and (6) of the Act.

2. The Motion to Dismiss the first amendment to the original Unfair Practice Charge, docketed November 4, 1991, is denied for the reason that Tallarico, as an individual Charging Party, has alleged facts sufficient to require a hearing as to whether the Respondent has violated §§5.4(a)(3) and (4) of the Act.

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<sup>6/</sup> Counsel for the Charging Party did not appear to be in disagreement with the result reached by the Hearing Examiner (1 Tr 44, 45).

Additionally, the denial of the Motion to Dismiss this amendment allows for a hearing on Tallarico's three-day suspension of July 26, 1991, alleged in the original Unfair Practice Charge, since it is timely under §5.4(c) of the Act, being less than six months from the date of the first amendment of November 4, 1991 and it falls within the ambit of the Respondent's alleged violation of §5.4(a)(3) and (4) of the Act.

3. The Motion to Dismiss the second amendment to the original Unfair Practice Charge, docketed December 2, 1991, is granted in part and denied in part. The Charging Party, Tallarico, plainly lacks standing to allege that the Respondent violated §5.4(a)(5) of the Act, supra. However, the subject matter of the second amendment's allegations, particularly the events of October 22, November 1 and November 7, 1991, appear to flow from and are intricately related to the allegations in the first amendment to the original Unfair Practice Charge, supra, which are themselves timely within §5(c). Thus, these allegations may be litigated under a prior alleged subsection of the Act, namely, §5.4(a)(3), which was pleaded in the first amendment to the original Unfair Practice Charge.

4. The Motion to Dismiss the third amendment to the original Unfair Practice Charge, docketed January 31, 1992, is granted, but, however, the "Charging Party" named therein as "PBA Local 57" is hereby given leave without prejudice to refile the said third amendment with the Commission retaining the original docketing

date of January 31, 1992, after which the Charge will be processed by the Commission pursuant to its Rules.

5. A hearing on the outstanding allegations in the several amended Unfair Practice Charges, supra, is hereby preemptorily scheduled as follows:

**NOTICE OF HEARING**

The Hearing Examiner sets the following dates for hearing of the above-described outstanding matters at the Commission's offices at 153 Halsey Street, Newark, New Jersey:

**MAY 20, JUNE 2 and 15, 1992.**



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Alan R. Howe  
Hearing Examiner

Dated: April 20, 1992  
Trenton, New Jersey