

H.E. NO. 89-23

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

In the Matter of

CITY OF MARGATE,

Respondent,

-and-

Docket No. CI-89-28

JOSEPH MARTINELLI,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner grants in part and denies in part Respondent's Motion to Dismiss. The Hearing Examiner treated the motion as one for judgment on the pleadings, based upon a failure to state a claim upon which relief can be granted, and concluded that the issue for decision is the legal sufficiency of the facts alleged by the charging party. R.4:6-2(e).

The charging party alleges that he was discharged in retaliation for having engaged in protected activities. The City, generally denying the allegations, moved to dismiss on three grounds: (1) The charging party named the Commissioner of Public Safety, City of Margate as Respondent; however, the City (not the Commissioner of Public Safety) discharged charging party; thus charging party failed to state a complete claim of violation against the Commissioner of Public Safety; (2) Charging party alleged no facts to support violations of subsections 5.4(a)(2), (4) or (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"); and (3) Even assuming arguendo that all of charging party's allegations are true, the City argues that no violation of subsection 5.4(a)(1) and/or (3) is stated against the City because charging party did not allege that the City was hostile toward charging party's protected activities; the City further argued that charging party's allegations show no connection between anti-union motivation and the discharge and that it had a legitimate business reason for the discharge.

The Hearing Examiner found that the charge was filed against the City of Margate and its agent, the Commissioner of Public Safety; that because the Commissioner of Public Safety is an agent of the City of Margate, the Commissioner's alleged hostility toward charging party's protected activities is attributed to the City; that the charging party need not show a specific connection between union animus and the discharge at this stage and that a connection is implied in the alleged facts; that accepting charging party's allegations as admitted, the Complaint states a valid claim against the City and the Commissioner of Public Safety -- specifically, violations of subsections 5.4(a)(1), (3) and (4); and accordingly, the complaint is sufficient to withstand Respondent's motion to dismiss.

The Hearing Examiner further concluded that the complaint does not contain allegations which indicate that the City violated subsections 5.4(a)(2) and (7); accordingly, the Motion to Dismiss the alleged subsections 5.4(a)(2) and (7) violations is granted.

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Appearances:

For the Respondent
Martin Pachman, Esq.
(Evelyn Caterson, of counsel)

For the Charging Party
Thomas Gallagher, Esq.

DECISION AND ORDER ON MOTION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 5, 1988, by Joseph Martinelli ("charging party" or "Martinelli")^{1/} alleging that the City of Margate ("City" or "Respondent") violated subsections 5.4(a)(1), (2), (3), (4) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

^{1/} This charge was originally docketed as having been filed by the Margate Lifeguards' Association (docket no. CO-89-79). Subsequently, it was redocketed as being filed by Joseph Martinelli (docket no. CI-89-28).

("Act").^{2/} Charging party alleges that he was discharged as a result of having engaged in protected activities.

A Complaint and Notice of Hearing was issued on December 7, 1988. On December 21, 1988, the City filed its Answer, generally denying that it had violated the Act and setting forth affirmative defenses. On January 19, 1989, the City filed a Motion to Dismiss Complaint. On January 24, 1989, the charging party filed an answering letter brief opposing the City's Motion to Dismiss.

In the charge, Martinelli alleges that: he was a 21 year veteran of the Margate City Beach Patrol; he was active in the organization and administration of the Margate City Lifeguards' Association ("Association"), the majority representative of lifeguards employed by the City, from April 1985 - October 1988; in 1985, he was a plaintiff in a suit against the City seeking pension rights for lifeguards; in 1986, he was involved in the Association's processing of an unfair practice charge before the Commission; in September 1986, he testified in an age discrimination/discharge

^{2/} 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (7) Violating any of the rules and regulations established by the commission."

lawsuit against the City on behalf of W. Thomas, a former Margate City Beach Patrol lifeguard lieutenant; Mr. Thomas was also a plaintiff in the 1985 pension suit against the City; Margate Commissioner Sigmund Rimm was "openly hostile" to Martinelli due to his union activities; the 1986 unfair practice charge complained, in part, of Rimm's unfair treatment of Martinelli; on March 12, 1987, the City charged Martinelli with disciplinary infractions and suspended him without pay; after a disciplinary hearing and receipt of an internal hearing officer's report in which Martinelli was found guilty of the disciplinary charges, the City discharged Martinelli on June 9, 1988, effective retroactively to March 12, 1987; Martinelli's discharge was motivated by anti-union animus; the charges against Martinelli were "trumped-up by the City after [he] engaged in protected activity;" the City's charges against Martinelli are based on conduct which has been a past practice for the Margate City Beach Patrol.

In its Answer, the City admits that: Martinelli was employed as a member of the Margate City Beach Patrol for a total of 21 years; he was a plaintiff in a suit against the City seeking lifeguards' pension rights; Mr. Thomas was also a plaintiff in the pension rights suit; on March 12, 1987, Martinelli was served with disciplinary charges; after a hearing and receipt of a hearing officer's report finding Martinelli guilty of the disciplinary charges, the City discharged Martinelli. The City neither admits nor denies that: Martinelli was active in the Margate City

Lifeguards' Association; Martinelli testified on behalf of Mr. Thomas in Thomas' discrimination/discharge suit against the City. The City denies that: Rimm was openly hostile toward Martinelli; the Association filed an unfair practice charge against the City in June 1986, part of which addressed Rimm's unfair treatment of Martinelli; Martinelli's discharge was motivated by union animus; the charges against Martinelli were manufactured by the City after Martinelli had engaged in protected activity; and the City's charges against Martinelli were based on conduct which has been a past practice for the Margate City Beach Patrol.

The City offers two affirmative defenses: charging party failed to state a claim against the Margate Commissioner of Public Safety upon which relief can be granted; and charging party failed to allege facts which constitute a violation of the Act on which relief can be granted.

The City's Motion to Dismiss was accompanied by a brief with attachments [(a) City of Margate Resolution, dated March 12, 1987; (b) charges specified against J. Martinelli; and (c) a hearing officer's report on the disciplinary charges against Martinelli]. The City moves for dismissal on three bases, as follows.

I. The City argues that the charge names only one Respondent -- the City of Margate Commissioner of Public Safety -- but that the charge does not allege that the Commissioner of Public Safety ever acted independently or singly as a Commissioner in relation to the alleged acts complained of in the charge. The City

contends that its actions in relation to Martinelli's employment were taken by all of the Commissioners as a whole. Thus, the City argues that because there is no allegation of any conduct on the part of the Commissioner of Public Safety -- other than his being one of the members of the governing body alleged to have violated the Act -- which constitutes a violation, the charging party has failed to state a cause of action on which relief can be granted. Accordingly, the City requests that the Complaint against the Commissioner of Public Safety be dismissed.

II. The City next argues that Martinelli alleged no facts which show that it violated N.J.S.A. 34:13A-5.4(a)(2), (4) or (7). The City argues that the facts alleged do not constitute a domination of or interference with an employee organization by the City in violation of subsection 5.4(a)(2). The City also argues that there are no facts alleged which constitute a violation of any rule or regulation of the Commission, in violation of subsection 5.4(a)(7). Finally, the City contends that the charging party has not alleged facts which constitute a discrimination against him because he has "signed or filed an affidavit, petition or complaint or given any information or testimony under this act." N.J.S.A. 34:13A-5.4(a)(4). The City suggests that charging party's only role in the 1986 PERC matter was to withdraw the charge.

III. The City's final argument for dismissal is that even assuming all of the facts alleged in the charge are true, no violation of subsections 5.4(a)(1) and (3) may be found. The City

contends that the charge does not state a prima facie case of an (a)(1) and (3) violation -- i.e., that the employee engaged in protected activity, that the employer knew of this activity and that the employer was hostile toward the exercise of the employee's protected rights. The City contends that the only alleged hostility toward protected rights was that of Commissioner of Public Safety Rimm and that because it was the City who discharged Martinelli, charging party has not stated a prima facie case. The City also argues that the charge alleges no nexus between anti-union motivation and the discharge. Finally, the City argues that it had a legitimate business justification to discharge Martinelli.

In its reply to the City's motion, charging party argues that Martinelli was discharged because of his protected activities. Martinelli further contends that the disciplinary charges brought against him were based upon conduct which was a past practice for Margate City Beach Patrol employees. Accordingly, charging party requests that the Motion to Dismiss be denied.

ANALYSIS

The City's Motion to Dismiss is in the nature of a motion to dismiss complaint, N.J.A.C. 19:14-4.7, and is similar to a motion to dismiss based upon a failure to state a claim upon which relief can be granted. R.4:6-2(e). In effect, the Respondent has submitted a motion for judgment on the pleadings. Comment R.4:6-2 (1988).

In Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987), the court stated:

On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.

Reider, at 552.

Thus, in considering a motion to dismiss complaint for failure to state a claim on which relief can be granted, the allegations of the complaint must be taken as true and the benefit of all favorable inferences from the allegations must be accorded to the complainant. Wuethrich v. Delia, 134 N.J. Super 400 (Law Div. 1975), aff'd 155 N.J. Super 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978).

A motion for judgment on the pleadings is distinguishable from a summary judgment proceeding: a motion for judgment on pleadings raises only issues of law, while admitting all of the opponent's well-pleaded facts; a party seeking a motion for summary judgment claims there is no genuine issue of material fact and it is

entitled to judgment on the undisputed facts and applicable law. Heljan Management Corp. v. Dileo, 55 N.J. Super 307 (App. Div. 1959); Baldwin Const. Co. v. Essex Cty. Bd. of Taxation, 24 N.J. Super 253 (Law Div. 1952).

In Hackensack Water Co. v. No. Bergen Tp., 103 F.Supp 133 (D.N.J. 1952), aff'd. 200 F.2nd 313 (3rd Cir. 1952), on defendant's motion for judgment on the pleadings -- based upon lack of jurisdiction and failure to state a claim on which relief could be granted -- the court said it would consider matters outside the pleadings only where such matters were undisputed.

If matters outside the pleadings are considered, the motion is treated as one for summary judgment. Enourato v. N.J. Building Auth., 182 N.J. Super 58, 64-65 (App. Div. 1981), aff;d 90 N.J. 396 (1982). R.4:6-2, 4:46-1. In P. & J Auto Body v. Miller, 72 N.J. Super 207 (App. Div. 1962), the court stated:

While the court has the power to enlarge the scope of said motion and treat the same as "one for summary judgment," this may be done only if on said motion "matters outside the pleading are presented." However, such matters must be presented by depositions, admissions or affidavits. They cannot be raised, without verification, in oral arguments of counsel or in briefs filed with the court.

P. & J. Auto Body, at 211. See also Comment, R. 4:6-2.

In considering Respondent's motion to dismiss, I deem all facts alleged in the complaint to be admitted and accord the charging party the benefit of all favorable inferences which may be drawn from those allegations. Reider. I have considered

Respondent's arguments for dismissal but not factual assertions outside the pleadings. P & J Auto Body. The inquiry at this stage is to the legal sufficiency of the facts alleged by the charging party. Reider.

I. Martinelli filed a standard Commission charge form in this matter. That document states, in part, as follows:

**2. PUBLIC EMPLOYER AND/OR EMPLOYEE ORGANIZATION
AGAINST WHOM CHARGE IS MADE**

a. Full Name (if employee organization, give full name, including local, name and address)

City of Margate, Commissioner of Public Safety

b. Address (Street and Number, City, State and Zip Code)

Municipal Bldg., Washington & Ventnor Avenues,
Margate, NJ 08402

c. Telephone Number: (609) 822-2605

d. Name and Title of Representative to contact:

David Fitzsimmons, Esquire

e. Telephone Number: (609) 822-2605

f. County: (blank)

In paragraphs 2, 3 and 4 of the charge, charging party refers to Commissioner of Public Safety Sigmund Rimm. (Rimm was openly hostile to Martinelli; part of the Association's 1986 charge against the City concerned Rimm's unfair treatment of Martinelli; and Rimm fired former lifeguard lieutenant W. Thomas). The rest of the allegations of the charge are made against the City of Margate and/or the Commissioners of the City of Margate.

The address stated on line 2b is the address of the City of Margate Municipal Clerk's office. The attachments to the charge are all documents from Robert Gilchrist, City Clerk of the City of Margate.

Based upon an overall reading of the charge document -- part 2, the charge text and the attachments -- I find that the charge is brought against the City of Margate and the City of Margate Commissioner of Public Safety, as an agent of the City of Margate. The charge is not brought against Sigmund Rimm as a private individual.

The charge further alleges that Martinelli was discharged due to his exercise of protected activity. Rimm's alleged actions appear integral to the charge -- in that he was hostile toward Martinelli's protected activities and that he was involved in decisions concerning the investigation and processing of the City's disciplinary charges against Martinelli and the decision to terminate him. The allegations of Rimm's hostility and subsequent participation in decisions concerning Martinelli's employment could form the basis of an unfair practice finding against the City and/or the Commissioner of Public Safety as an agent of the public employer. Regardless of the specific role in which Rimm was acting in these circumstances, whether as a member of the governing body -- the Commissioners of the City of Margate -- or as the Commissioner of Public Safety acting at the behest of the governing body or within his authority as the Commissioner of Public Safety or outside

that authority, unless otherwise demonstrated by the City, Rimm's actions were the City's actions: Rimm is an agent of the City. It is their (Rimm's and the City's) collective conduct which is alleged to have violated the Act. The charging party must be permitted to litigate the charge as framed against the City and this agent. Accordingly, the request to dismiss the Complaint against the Commissioner of Public Safety is denied.

II. Charging party alleges that he was involved in the processing of an unfair practice charge before the Commission.^{3/} The Respondent admits that Martinelli was involved in the processing of that charge -- specifically, that Martinelli signed the Settlement Agreement withdrawing the charge on behalf of the Association.

In the instant matter, Martinelli alleges that the City discriminated against him for exercising rights protected by the Act.

N.J.S.A. 34:13A-5.4(a)(4) states:

Public employees, their representatives or agents are prohibited from: (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.

Based upon the allegations of the charge, charging party has alleged facts which support a subsection (a)(4) violation -- that he had participated in the processing of an unfair practice

^{3/} I take administrative notice of the filing of unfair practice charge docket no. CO-87-64. Evid.R. 9(2)(b).

charge and that the City discriminated against him for having engaged in such protected activity (processing a charge). Accordingly, Respondent's request to dismiss that part of the charge which alleges a subsection (a)(4) violation is denied.

The charge does not contain allegations that indicate a domination of or interference with an employee organization. Further, the charge does not allege that the City violated any specific rule or regulation of the Commission. Accordingly, the Respondent's motion to dismiss the alleged subsection (a)(2) and (a)(7) violations of the Act is granted.

III. I reject the City's argument that charging party has failed to state a "prima facie" (a)(1)/(a)(3) case. The City contends that charging party never alleged that the City, as opposed to Rimm, was hostile to his protected activities. Martinelli alleged that Commissioner of Public Safety Sigmund Rimm was hostile to his exercise of protected rights. At least for purposes of deciding this motion, Commissioner of Public Safety Rimm is an agent of the public employer. In this context, his (Rimm's) actions -- specifically, his alleged hostility toward Martinelli -- are attributed to the City. Accordingly, the allegations of the complaint state an (a)(1)/(a)(3) violation and are sufficient to withstand Respondent's motion to dismiss.

Respondent argues prematurely that charging party has not shown any connection between the employer's alleged union animus and its discharge of Martinelli. At this stage of the proceeding,

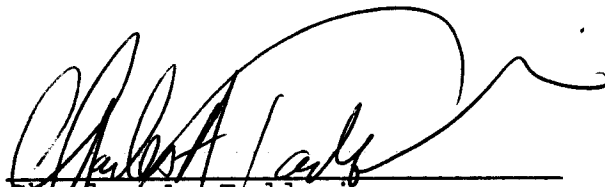
charging party need not "show" a specific connection. The charge must state allegations containing the elements of an (a)(1)/(a)(3) violation sufficient to withstand Respondent's motion; it does -- charging party states he was discharged because of his protected activity. Moreover, reading the complaint allegations in the manner most favorable to the charging party, an animus-discharge connection is implied. Reider; Muniz v. United Hsps. Med. Ctr. Pres. Hosp., 153 N.J. Super 79 (App. Div. 1977).

Finally, the City argues that it had a legitimate business reason for the discharge -- Martinelli's alleged acceptance of payment for time not worked and departure from his post before the end of his shift. Charging party alleges that the disciplinary charges which the City brought against him and proffered for his discharge were manufactured by the City after Charging Party had engaged in protected activity. Further, charging party alleges that the disciplinary charges concerned conduct which had become a past practice for Margate City Beach Patrol employees. Treating all of the facts alleged in the complaint as admitted and according charging party all legitimate inferences which can be drawn therefrom, I conclude that the complaint is sufficient to withstand Respondent's motion to dismiss. Reider; Muniz.

ORDER

Accordingly, based upon consideration of the pleadings, Respondent's Motion to Dismiss and charging party's response, it is

ORDERED: that Respondent's Motion to Dismiss the alleged subsection (a)(2) and (a)(7) violations is granted; that Respondent's Motion to Dismiss the charges against the Margate City Commissioner of Public Safety and the subsection (a)(1), (3) and (4) violations is denied.



Charles A. Tadduni
Hearing Examiner

DATED: February 10, 1989
Trenton, New Jersey