P.E.R.C. NO. 90-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WESTFIELD,

Respondent,

-and-

Docket No. CI-H-89-51

MARK CIERPIAL,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants special permission to appeal a Hearing Examiner's denial of a motion to dismiss. The Town claims that the charging party has failed to set forth "a clear and concise statement of the facts constituting the alleged unfair practice." The Commission gives the charging party thirty days to amend his charge to meet its specificity requirements. If no amendment is filed, the charge will be dismissed.

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Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, Esqs. (Maurice J. Nelligan, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

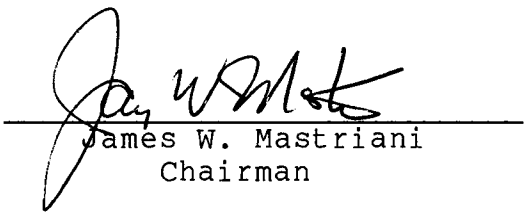
On June 7, 1989, the Town of Westfield requested special permission to appeal a Hearing Examiner's denial of a motion to dismiss. H.E. No. 89-38, 15 NJPER 350 (¶20157 1989). The Town claims that the charging party has failed to set forth "a clear and concise statement of the facts constituting the alleged unfair practice." N.J.A.C. 19:14-1.3.

The charge alleges that, at a PBA meeting, the charging party questioned the chief's motives and made degrading statements about the chief; that the charging party was terminated by the chief for allegedly falsifying an official report; that the chief, upon learning of the comments, stated, "Who is Cierpial to make these comments. I am going to get him"; and that others found guilty of falsifying reports have not been terminated.

The Town claims that "there is nothing on the face of the charge to indicate that the charging party's comments were related to anything within the realm of employment conditions." We agree and accordingly grant special permission to appeal. We are not convinced that the charging party's allegations as presented in the charge, even if true, would constitute an unfair practice. We believe that a Complaint should not have issued.

A respondent is entitled to know the particulars with which it is charged. The Director of Unfair Practices routinely informs charging parties that conclusory statements in a charge are insufficient for Complaint issuance and that absent an amendment, the charge will be deemed withdrawn. We will follow that practice here. Had the Director issued such a letter the charging party would have been given an opportunity to perfect his charge. Accordingly, we will give the charging party thirty days to amend his charge to meet our specificity requirements. If no amendment is filed, the charge will be dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Wenzler, Bertolino and Smith voted in favor of this decision. None opposed. Commissioner Ruggiero was not present.

DATED: Trenton, New Jersey
October 27, 1989
ISSUED: October 30, 1989

H.E. NO. 89-38

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

In the Matter of

TOWN OF WESTFIELD,

Respondent,

-and- Docket No. CI-H-89-51

MARK CIERPIAL,

Charging Party.

Appearances:

For the Respondent
Apruzzese, McDermott, Mastro & Murphy
(Maurice J. Nelligan, Esq.)

For the Charging Party
Oxfeld, Cohen, Blunda, Friedman, Levine & Brooks
(Sandy R. Oxfeld, Esq.)

HEARING EXAMINER'S DECISION
ON MOTION TO DISMISS

On December 22, 1988 Mark Cierpial ("Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging a violation of subsections 5.4 (a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. ("Act")[1/]. The Charging Party alleges that he was employed by the Town of Westfield ("Town") from

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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.

September 10, 1984 until October 4, 1988, when he was terminated by Chief Scutti, allegedly for falsifying an official report. The Charging Party asserts that, prior to his termination, on or about August 9, 1988, he questioned the motives of Chief Scutti and made statements "degrating" [sic] to the Chief. The Charging Party further charges that upon learning of the statements, he (the Chief) stated that he'd "get him" (Cierpial).

On January 5, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing. A conference was conducted on January 13, 1989, at which time the Town took the position that the Charge failed to state a claim upon which relief could be granted. Accordingly, on March 13, 1989, the Town filed a Motion to Dismiss the complaint and underlying Unfair Practice Charge pursuant to N.J.A.C. 19:14-4.2.

In a letter dated March 13, 1989, I indicated that under the rules, this Motion would be treated as a Motion for Summary Judgment. I have subsequently determined that the Town has properly filed a Motion to Dismiss. See e.g., City of Margate, H.E. No. 89-23, 15 NJPER 166 (¶20070 1989), in which the Hearing Examiner found:

> 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 failure to state a claim upon which relief can be granted. R 4:6-2(e). In effect, the despondent [sic] has submitted a Motion for Judgment on the pleadings. Comment R. 4:6-2(1988).

The Town's Motion to Dismiss was accompanied by a supporting legal argument stating that the particulars alleged in

the Charge do not state a claim upon which relief can be granted. The Town asserts that the Charging Party failed to set forth a clear and concise statement of the facts constituting the alleged unfair practice under N.J.A.C. 19:14-1.3(a)(3). Specifically, the Town argues that the Charge is fatally deficient in that it fails to include a "recitation of the activity engaged in by Cierpial which is protected by the Act." In support of its position, the Town relies upon Essex County College, P.E.R.C. 88-32, 13 NJPER 763 (¶18289 1987); and, City of Newark, 14 NJPER P.E.R.C. No. 88-133, 14 NJPER 429 (¶19175 1988).

In Essex County College, the Commission affirmed a Hearing Examiner's dismissal of a complaint alleging violations under subsections 5.4 (a)(1),(2),(3),(4).(5),(6) and (7) when the College terminated an employee allegedly because she complained that she did not receive her paycheck on time. The Commission held that the employees actions did not constitute protected activity.

In City of Newark, the Commission affirmed a Hearing Examiner's dismissal of a complaint charging violations under subsections 5.4(a)(1),(2),(3) and (5) of the Act. Following a full hearing and an application of the Bridgewater standard,[2/] the

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2/ Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, 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

Footnote Continued on Next Page

Hearing Examiner concluded that although the Charging Party was engaged in protected activity and the employer was aware of the protected activity, the employer's action would have been taken in the absence of the protected activity. Accordingly, the Hearing Examiner recommended dismissal of the Complaint, and the Commission affirmed the Hearing Examiner.

The instant matter must be viewed in a different context from that of City of Newark, where the Charging Party presented it's entire case at hearing prior to the dismissal of the complaint.

Although the Charging Party has not responded to the Town's Motion to Dismiss, he alleged information in his Charge which can be construed as an allegation of engagement in protected activity (PBA meeting). The Charge suggests by inference that the Town was aware of the Charging Party's protected activities; and, the Charge

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2/ Footnote Continued From Previous Page

circumstantial evidence showing that the employees 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.
If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the on the entire record, that the adverse action would have taken place absent the protected conduce. Id at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

further alleges by inference that the Charging Party's dismissal was motivated by the Town's hostility toward the Charging Parties activities.

The Town asserts that without specifically stating the subject of the PBA meeting at which the Charging Party is alleged to have made negative comments regarding the police chief, the Charging Party has failed to allege a claim upon which relief can be granted.

In considering a motion to dismiss a compliant for failure to state a claim upon 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. City of Margate, supra. See also 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 complaint should not be dismissed 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. Hosp., 153 N.J. Super 79, 82-83 (App. Div. 1977).

Here, it is conceivable that given the opportunity at the hearing Charging Party could show that his dismissal was motivated by negative comments made about the Chief during the course of a PBA meeting, and that the substance of the PBA meeting constituted protected activity.

Accordingly, under the applicable standard, it is impossible to determine, as a matter of law, that the Charging Party

was not engaged in protected activity and that the protected activity was not the motivating factor in his dismissal. Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987); Muniz v. United Hsps, etc., supra. Therefore, I am bound to deny the Town's Motion to Dismiss, at this point in the proceedings, and I leave the Charging Party to his proofs at a hearing to be conducted on the 19th day of July at the Commission's offices at 80 Mulberry Street, Room 202, Newark, NJ 07102.

Marc F. Stewart (ars)

Marc F. Stewart, Hearing Examiner

DATED: May 25, 1989

TRENTON, NEW JERSEY