

P.E.R.C. NO. 86-122

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
TOWNSHIP OF WARREN,

Respondent,

-and-

Docket No. CI-86-7-83

THOMAS F. BOWNE,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority delegated by the full Commission and in the absence of exceptions, dismisses a Complaint based on an unfair practice charge filed by Thomas F. Bowne against the Township of Warren. The charge alleged the Township violated the New Jersey Employer-Employee Relations Act when, allegedly in retaliation against Bowne's exercise of protected activities, it did not promote him. The Chairman, in agreement with a Commission Hearing Examiner, concludes that Bowne did not prove his allegations by a preponderance of the evidence.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy,
Esqs. (Robert T. Clark, Of Counsel)

For the Charging Party, Thomas F. Bowne, Pro Se

DECISION AND ORDER

On August 22, and October 30, 1985, Thomas F. Bowne ("Bowne") filed an unfair practice charge, and amended charge, against the Township of Warren ("Township"). The charge, as amended, alleges the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(3) and (5) when it did not promote Bowne, a sergeant employed by the Township Police Department, to lieutenant and violated the parties' contractual grievance procedure. This decision was allegedly made in retaliation against Bowne's exercise of protected activities.

On December 2, 1985, a complaint and notice of hearing issued. The Township then filed its answer. It admitted that Bowne was not promoted to lieutenant, but denied that it was in

retaliation against his protected activities. It also denied violating the parties' grievance procedure.

On January 28 and February 10, 1986, Hearing Examiner Alan R. Howe conducted hearings. Bowne examined witnesses and introduced exhibits. At the conclusion of the hearing, the Township made a motion to dismiss the Complaint. The Hearing Examiner, at the hearing, granted the motion to dismiss the subsection (a)(5) allegation since Bowne lacked standing since he did not allege that the PBA had breached its duty of fair representation to him. New Jersey Turnpike Authority (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980). On February 20, 1986, the Hearing Examiner dismissed the remaining (a)(3) allegation since he determined that the charging party had not established a prima facie case under In re Bridgewater Tp., 95 N.J. 235 (1984).

The Hearing Examiner served his report on the parties and informed them that exceptions were due by March 5, 1986. On March 4, 1986, Bowne was granted an extension until April 5, 1986 to file exceptions. No exceptions were filed, however.

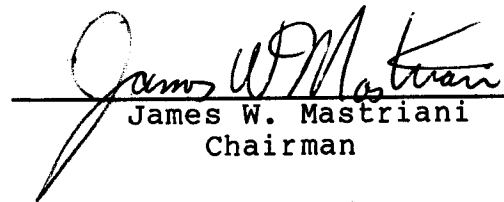
I have reviewed the record. The Hearing Examiner's findings of fact (3-8) are accurate. I adopt and incorporate them here. In the absence of exceptions, and under all the circumstances of this case, I agree that the Hearing Examiner properly granted the motion to dismiss at the conclusion of the charging party's case. In particular (and viewing the evidence most favorably to the charging party), I conclude that the charging party did not present

evidence sufficient to warrant even an inference that the employer was hostile to Bowne's protected activity of voting against the Township's final offer in negotiations at the ratification meeting. Accordingly, Bowne failed to establish a prima facie case under Bridgewater.

Acting pursuant to authority delegated to me by the full Commission, I dismiss the Complaint.

ORDER

The Complaint is dismissed.


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 29, 1986

H.E. NO. 86-41

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

In the Matter of

TOWNSHIP OF WARREN,

Respondent,

-and-

Docket No. CI-86-7-83

THOMAS F. BOWNE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission grant the Respondent Township's Motion to Dismiss since it did not violate §5.4(a)(3) or (5) of the New Jersey Employer-Employee Relations Act when it failed to promote the Charging Party from the rank of sergeant to the rank of lieutenant in its Police Department in July 1985, preferring instead to promote a sergeant with a higher test score than that of the Charging Party. The Charging Party established only minimal protected activity and failed completely to prove by even a "scintilla" of the evidence that the Township was hostile towards his protected activity or manifested any anti-union animus towards him: See Bridgewater Twp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984).

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.

H.E. NO. 86-41

STATE OF NEW JERSEY
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In the Matter of

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Appearances:

For the Respondent

Apruzzese, McDermott, Mastro & Murphy, Esqs.
(Robert T. Clarke, Esq.)

For the Charging Party

Thomas F. Bowne--pro se

HEARING EXAMINER'S DECISION AND ORDER
ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 22, 1985, and amended on October 30, 1985, by Thomas F. Bowne (hereinafter the "Charging Party" or "Bowne") alleging that the Township of Warren (hereinafter the "Respondent" or the "Township") 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. (hereinafter the "Act"). Bowne alleges that sometime between May and July, 1984, the Township Committee conducted an interview

for the purpose of promoting a sergeant to the rank of lieutenant but no promotion was made due to a tie vote of the Committee; and thereafter on March 7, 1985, the Township Committee by a majority vote promoted the same sergeant to lieutenant without following a procedural requirement that there be a recommendation by the Chief of Police; thereafter the Chief of Police brought suit against the Township, which resulted in a reversal of the Township Committee's decision to promote the sergeant who was returned to his prior rank; on July 19, 1985, the Chief of Police submitted a recommendation to the Township Committee that the Charging Party be promoted to the rank of lieutenant, but contrary to the recommendation of the Chief of Police, the Township Committee on July 25, 1985, promoted the original sergeant to lieutenant and on August 2, 1985, the Charging Party filed a grievance, claiming that the collective negotiations agreement between the Township and PBA Local No. 235 had been violated, which grievance was acknowledged by the Township but never answered; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(3) and (5) of the Act^{1/}

1/ 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; and (5) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

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 issued on December 2, 1985. Pursuant to the Complaint and Notice of Hearing, hearings were held on January 28 and February 10, 1986, in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case, the Respondent made a Motion to Dismiss on the record on February 10, 1986. After hearing the oral argument of the parties, the Hearing Examiner adjourned the hearing without date pending the instant decision on the Respondent's Motion to Dismiss. This decision follows.

* * * *

Upon the record made by the Charging Party only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Township of Warren is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. Thomas F. Bowne is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
3. Bowne was hired by the Township as a Patrolman in the Police Department in 1973. Bowne has been a Patrol Sergeant since 1980.
4. The operative collective negotiations agreement between the Township and PBA Local No. 235 was effective during the

term January 1, 1984 through December 31, 1985 (J-1). This agreement provides in Article XI, Promotions and Transfers, that promotions shall be filled by utilizing written and oral testing as approved by the Township Committee (Article XI, §1); that the requirements for promotion to the rank of lieutenant are one year of service in the rank of sergeant, the recommendation of the Chief of Police, satisfactory completion of written and oral examinations and 60 college credits in courses approved by the Chief of Police (Article XI, §3). Section 4 of Article XI provides for the posting of vacancies on the bulletin board and the procedure for making application for any such vacancy.

5. Although the minutes of the Township Committee of October 13, 1983, were not received in evidence (R-1 for identification), there was considerable testimony by Clifford Montross, a member of the Township Committee for three years between 1982 and 1984, which established that in October 1983, the ranking for promotion to lieutenant, based on testing scores, indicated that Michael Lach had a score of 78.694; that Daniel Hynes had a score of 78.292; and that Bowne had a score of 76.092. In the ranking for promotion to sergeant, Patrolman Walter Doney had a score of 81.34, followed by four other Patrolmen who had lesser scores. At its October 13, 1983 meeting, the Township Committee reviewed the personnel files of all of the candidates on the promotional lists for lieutenant and sergeant and thereafter voted to promote Michael Lach to Lieutenant, based on his having the highest test score, and

Walter Doney was promoted to Sergeant, also based on his having the highest test score. The Township Committee on October 13, 1983, also voted to maintain the promotional lists for promotions to lieutenant and sergeant until December 31, 1985.

6. The collective negotiations agreement (J-1) was executed on June 28, 1984. Dennis L. Hart, a Patrolman since March 10, 1980 and a PBA State Delegate in 1984, was a member of the PBA's negotiating team during the negotiations for J-1. Also, on the negotiating team was Sgt. Daniel Hynes and Patrolman William Stahl. As of May 1984, the Township had offered increases of 6% and 6% for a two-year agreement but the PBA was seeking 7% and 7% or 8% and 8%. At a PBA ratification meeting on May 17, 1984, Sgt. Hynes voted in favor of the Township's offer of 6% and 6%; Bowne was the only member of the unit who voted against the Township's offer of 6% and 6%. There were 14 members of the negotiations unit at the meeting and, thus, the vote in favor of the Township's offer of 6% and 6% was 13-1. Hart testified that the Township would "probably" have known how the votes were cast since it was "not a big secret." Stahl, who was one of the top three on the list for promotion to Sergeant, has not been promoted to Sergeant since May 1984. Bowne testified that the protected activity in which he engaged in this case was his having voted against the Township's offer, supra.

7. On June 28, 1984, the Township Committee met in executive session. All five members of the Committee were present. The Committee interviewed Sgt. Hynes as a candidate for promotion to

lieutenant, including a review of his personnel file. The Chief of Police, Martin J. Kane, opposed any promotion to lieutenant, stating that he needed another sergeant instead. On the vote to promote Hynes to lieutenant, the Committee deadlocked 2-2 and no promotion was made. The minutes were received in evidence as Exhibit CP-1.

8. At the executive session of the Township Committee on February 28, 1985, the attorney for the Township, in addressing remarks to the Committee regarding promotions, stated that if the Committee decided to make a promotion with no recommendation by the Chief of Police, as required by the collective negotiations agreement, then that was a matter which potentially could be grieved by the PBA (CP-14).

9. At a meeting of the Township Committee on March 7, 1985, Chief Kane submitted a written statement, in which he renewed his objection to the promotion of a sergeant to lieutenant, urging again the need for an additional sergeant (CP-2). Nevertheless, the Township Committee voted to promote Sgt. Hynes to Lieutenant.

10. On March 8, 1985, Bowne filed a grievance objecting to the promotion of Hynes to Lieutenant on the grounds that it violated Article XI of the collective negotiations agreement, supra (CP-3). The Township never responded to Bowne's grievance.

11. Chief Kane filed a lawsuit against the Township in the Superior Court, which alleged that the Township had failed to obtain the recommendation of the Chief of Police for the promotion of Sgt. Hynes, and on May 14, 1985, Judge Michael R. Imbriani declared the

promotion of Sgt. Hynes to the rank of Lieutenant null and void on the ground that the Township had failed to abide by its own personnel policy requiring that it obtain a recommendation from the Chief of Police (CP-4).

12. On July 3, 1985, the Township Committee by Resolution No. 137 mandated that the Chief of Police make a recommendation relative to the promotion to a Lieutenant from the ranks of the Police Department (CP-5).

13. On July 19, 1985, the Chief of Police recommended Bowne for promotion to lieutenant (CP-6).

14. On July 25, 1985, the Township's Administrator, Morrison Shuster, invited Bowne, Hynes and one Sgt. Laurence Hess to a work session meeting of the Township Committee with respect to discussion for appointment to lieutenant (CP-7). The minutes of the executive session of the Township Committee on that date disclose, inter alia, that Chief Kane had recommended Bowne for promotion to lieutenant and that Chief Kane amplified his reasons for recommending Bowne over Hynes, listing dedication, the way he spent his time and overall job performance (CP-8). Chief Kane referred to reprimands given to Sgt. Hynes. The Township Committee voted unanimously (with four members present) to promote Sgt. Hynes to Lieutenant at its August 1st open meeting. On August 1, 1985, the Township Committee adopted Resolution No. 156, which formally promoted Sgt. Hynes to the rank of Lieutenant (CP-9).

15. On August 2, 1985, Bowne filed a grievance, in which he protested the promotion of Sgt. Hynes to the rank of Lieutenant, claiming a violation of the collective negotiations agreement, supra (CP-10).

16. On the same date, Shuster sent a memorandum to Chief Kane acknowledging Bowne's grievance and stating that it would be heard by the Township Committee at the "very earliest date" (CP-11). On August 21, 1985 Shuster sent a memo to Kane with a copy to Bowne, which stated that Bowne's grievance "will be heard" by the Township Committee on August 29, 1985 (CP-12).

17. Bowne, who had been out due to illness until August 27, 1985, advised Shuster that he would be unable to attend the Township Committee meeting on August 29th (CP-13).

DISCUSSION AND ANALYSIS

The Applicable Standard On A Motion To Dismiss

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) restated the standard that it utilizes on motions to dismiss at the conclusion of the charging party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent beyond a scintilla, of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be

necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party the motion to dismiss must be denied.

The instant case has within it necessarily the analysis enunciated by the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), which must be considered in disposing of the Respondent's Motion to Dismiss at the conclusion of the Charging Party's case. This bears upon the allegation by the Charging Party of a violation by the Respondent of §5.4(a)(3) of the Act.^{2/}

In Bridgewater the Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases where the following requisites are utilized in assessing employer motivation: (1) the charging party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline (here the failure to promote to lieutenant); and (2) once this is established, the employer has the burden of demonstrating by a

^{2/} The Hearing Examiner at the conclusion of the hearing, granted the motion by the Respondent to dismiss the allegation by the Charging Party that the Respondent had violated §5.4(a)(5) of the Act on the ground that Bowne has no standing to allege a violation of this subsection in the absence of having established that his collective negotiations representative (PBA) had breached its duty of fair representation as to him: N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (1980).

preponderance of the evidence that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Court in Bridgewater further refined the test, supra, by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity, i.e., manifested anti-union animus (95 N.J. at 246).

The Respondent's Motion To Dismiss
Is Granted Since The Charging Party
Has Failed To Adduce Even A Scintilla
Of Evidence That §5.4(a)(3) Of The Act
Was Violated By The Respondent's
Failure To Have Promoted Bowne To
The Rank of Lieutenant.

The Hearing Examiner is persuaded that when the testimony and documentary evidence adduced by the Charging Party is viewed most favorably to him, he has failed to prove by even a scintilla of evidence that he engaged in protected activity during the relevant time periods in question. Further, even if it is assumed that Bowne engaged in protected activity when he was the sole dissenter at the ratification meeting of May 17, 1984, and assuming further that the Township either knew or should have known of this activity of Bowne, Bowne has failed to prove even by a scintilla of evidence that the Township was hostile to his exercise of the foregoing assumed protected activity nor is there a scintilla of evidence that the Township manifested any anti-union animus toward Bowne.

The Respondent is correct in arguing that the filing of the two grievances by Bowne in no way implicated protected activity as

to which the Township retaliated since each grievance was filed "after the fact." In other words, the grievance of March 8, 1985 (CP-3) was in response to the Township Committee's action of March 7, 1985, promoting Sgt. Hynes to Lieutenant. Thus, it could not be argued that the Township promoted Hynes over Bowne because Bowne had previously filed a grievance. So, too, does the same situation obtain in the case of Bowne's grievance of August 2, 1985 (CP-10), which followed the action of the Township Committee in promoting Sgt. Hynes to Lieutenant on August 1, 1985 (CP-9).

Thus, the only conceivable claim by Bowne to the exercise of protected activity was his sole dissent at the ratification meeting on May 17, 1984. Although the Hearing Examiner has some doubt as to whether the Township had actual knowledge of Bowne's dissenting vote, the testimony of Patrolman Hart that the Township would "probably" have known of the vote at the ratification meeting clearly meets the "scintilla" standard and, thus, the Hearing Examiner finds that the Township had actual knowledge of Bowne's dissenting vote.

Proceeding on the basis that Bowne's sole dissenting vote at the May 17, 1984, ratification meeting constituted protected activity and, additionally, that the Township had knowledge of this fact, the Hearing Examiner must deal next with the question of hostility, i.e., anti-union animus on the part of the Township toward Bowne. The Hearing Examiner here concludes that Bowne has failed to adduce even a "scintilla" of evidence that the Township


manifested any hostility or anti-union animus toward him. The record is totally barren in this respect. There was just no evidence adduced by Bowne which in any way suggests a manifestation of hostility or anti-union animus by the Township toward him. Thus, Bowne has failed to meet a most critical aspect of the Bridgewater test, supra, which requires that the Complaint as to a §5.4(a)(3) violation be dismissed.

* * * *

Upon the testimony and documentary evidence adduced in this proceeding by the Charging Party, the Hearing Examiner makes the following:

RECOMMENDED ORDER

The Hearing Examiner finds and concludes that the Respondent did not violate N.J.S.A. 34:13A-5.4(a)(3) or (5) and hereby grants the Respondent's Motion to Dismiss. The Complaint is dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: February 20, 1986
Trenton, New Jersey