

D.U.P. NO. 78-13

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

In the Matter of

BOROUGH OF AVALON,

Respondent,

-and-

DOCKET NO. CI-77-14

CHARLES SPENCER DAVISON,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint with respect to an Unfair Practice Charge filed by an employee alleging that the employer has violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (4). The employee alleged that he was discriminated against due to testimony given by him in Municipal Court. The Charge does not state that the employer has discriminated against the Charging Party with an intent to encourage or discourage him in the exercise of protected rights. As to the alleged §(a)(4) violation, Charge fails to allege that the testimony given by the Charging Party was given under the Act.

STATE OF NEW JERSEY
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In Matter of

BOROUGH OF AVALON,

Respondent,

-and-

DOCKET NO. CI-77-44

CHARLES SPENCER DAVISON,

Charging Party.

Appearances:

For the Respondent
Gerald L. Dorf, P. A.
(David A. Wallace, of Counsel)

For the Charging Party
Perskie & Callinan
(Kenneth E. Calloway, of Counsel)

DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on March 4, 1977, by Charles Spencer Davison (the "Charging Party") against the Borough of Avalon (the "Borough") alleging that the Borough was in violation of several of the unfair practice provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended (the "Act"), specifically N.J.S.A. 34:13A-

5.4(a)(1), (3) and (4). 1/

The instant Charge relates to certain claimed disciplinary action, in the form of a written reprimand, taken against the Charging Party due to certain testimony given by the Charging Party in court. The operative paragraph in the Unfair Practice Charge is Paragraph 8 which states "The Petitioner alleges that the basis for this review is that no formal charges were ever filed or preferred against the petitioner, the action of Commissioner Riggall amounts to an obstruction of justice by preventing officers from testifying in court, no rules, regulations or operating procedures have allegedly been violated by petitioner, the action of the Commissioner and Chief of Police prohibits, restricts and prevents the officers and particularly petitioner from acting in accordance with the law directing officers and/or prosecutors from divulging exculpatory evidence to the court and defendants." [sic].

N.J.S.A. 34:13A-5.4(c) sets forth, in pertinent part, that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority

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 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."

to issue a complaint stating the unfair practice charge. ^{2/} The Commission has delegated its authority to issue complaints to the undersigned and has established a standard upon which an unfair practice complaint may be issued. This standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act. ^{3/} The Commission's rules also provide that the undersigned may decline to issue a complaint. ^{4/}

For the reasons stated below, the undersigned has determined that the Commission's complaint issuance standards have not been met.

As noted above, the Charging Party alleges a violation of Section 5.4(a)(3) of the Act. However, the Charging Party does not state that the Respondent has discriminated against him in regard to hire, tenure, or as to a term and condition of employment with an intent to encourage or discourage him in the exercise of protected rights under the Act. ^{5/} The assertion of facts alleging

^{2/} N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice...Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice and including a notice of hearing containing the date and place of hearing before the commission or any named designated agent thereof..."

^{3/} N.J.A.C. 19:14-2.1.

^{4/} N.J.A.C. 19:14-2.3.

^{5/} N.J.S.A. 34:13A-5.3 provides: "Except as hereinafter provided public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..."

such a claim is necessary to support a §(a)(3) allegation. See In re Borough of Palisades Park, D.U.P. No. 78-1, 3 NJPER 238 (1977).

On April 27, 1978, the undersigned requested from the Charging Party a statement of position or an assertion of facts which would establish a nexus between the alleged conduct and the commission of an unfair practice. On May 16, 1978, the Charging Party filed a response which states in part:

"At the outset, let me say that the violations alleged are not in any way connected with union activities, an attempt by the Borough to stifle or otherwise prevent the formation of a union or collective bargaining unit, or in any other manner an attempt to prevent the formation of any union or other collective bargaining unit."

The Charging Party contends that the Declaration of Policy in the Act, N.J.S.A. 34:13A-2, encompasses this situation since it involves employer and employee strife. The Charging Party claims that the Commission's jurisdiction in unfair practice proceedings is not limited to those set forth in N.J.S.A. 34:13A-5.3.

The undersigned cannot agree with this excessively broad approach. N.J.S.A. 34:13A-5.4(c) is clear and reads, in part,

"The Commission shall have the exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsection a and b above (emphasis added).

The Commission, in unfair practice proceedings is limited to the unfair practices enumerated in §5.4(a) and (b). Not all employer-employee strife is encompassed under the Act. For example, discrimination against an employee based on either age, sex, race, creed, or color are instances of employer-employee strife, but these forms of discrimination are not within the ambit of the Act, and certainly, while the elimination of employer-employee strife is a goal that none may seriously impugn, the strife that is actionable as an unfair practice arises from the specific violation of substantive rights protected under the Act. Therefore, since the Charging Party has not alleged that the Borough discharged, or otherwise discriminated against him because of his involvement in, or his refusal to become involved in protected activity, the allegations do not constitute an unfair practice within the meaning of the Act and the undersigned is constrained from issuing a complaint.

As to the alleged violation of §(a)(4), the Charging Party has failed to make allegations that he "signed or filed an affidavit, petition or complaint or gave any information or testimony under this Act." The Charging Party maintains that to limit this subsection to testimony under the Act would be an unrealistic interpretation. The undersigned cannot agree. It is clear that the giving of testimony must be under the Act. There is no doubt that the giving of testimony by a police officer is an integral part of his duties; however, this Act does not provide protection for testimony under all circumstances, but only testimony given under circumstances delineated under the Act.

As to the alleged violation of §(a)(1), the Charging Party has failed to allege that he was exercising or desirous of exercising rights guaranteed under §5.3 of the Act. This is a necessary element in an allegation of a violation of this subsection inasmuch as in the absence thereof an employer may not be found to have interfered with, restrained or coerced employees in the exercise of protected rights. With respect to the §(a)(1) allegation, the Charging Party has failed to make allegations which may constitute an unfair practice.

Accordingly, for the reasons stated above, the undersigned declines to issue a Complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Carl Kurtzman, Director

DATED: June 22, 1978
Trenton, New Jersey