

H.E. NO. 93-6

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

A Hearing Examiner, in granting a Motion to Dismiss at the conclusion of the Charging Party's case, recommends that the Public Employment Relations Commission find that the Respondent Borough did not violate Sections 5.4(a)(3) or (4) of the New Jersey Employer-Employee Relations Act when the Respondent's Mayor and its Chief of Police disciplined the Charging Party for cause. Although Tallarico had engaged in protected activities on behalf of himself and PBA Local No. 57, of which the Respondent was aware, he failed to adduce even a "scintilla" of evidence that the Borough had been hostile toward his exercise of protected activities. These included the filing of a grievance and his participation in collective negotiations. The discipline was imposed upon him in the total absence of any evidence of retaliatory motivation: Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) and Hunterdon Cty. Bd. of Chosen Freeholders, P.E.R.C. Nos. 87-35 and 87-150; 12 NJPER 768, 771 (¶17293 1986) & 13 NJPER 506, 507 (¶18188 1987).

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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 RECOMMENDED DECISION
AND ORDER 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.^{1/}

On April 20, 1992, I issued an Interlocutory Decision on Respondent's Motion to Dismiss Tallarico's Unfair Practice Charge of August 28th (H.E. No. 92-26), in which I granted its Motion for lack of standing. Thus, Tallarico's allegation that the Respondent violated Section 5.4(a)(5) and (6) of the Act was dismissed and is not before me in this proceeding.

On November 4, 1991, Tallarico first 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

^{1/} 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."

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 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.^{2/}

The Respondent's Motion to Dismiss also attacked the allegations in the amended Unfair Practice Charge of November 4th. However, the Motion was denied for the reasons stated in H.E. No. 92-26. Thus, a hearing was to be scheduled on Tallarico's allegation that his three-day suspension of July 26, 1991, was in violation of Section 5.4(a)(3) and (4) of the Act, supra.

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, he was called into the office of the Chief and was relieved of his status as a Detective with all stipends 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

^{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.

followed the grievance procedure and that the Chief would 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.^{3/}

I granted in part and denied in part the Respondent's Motion to Dismiss the second amendment of December 2nd, supra, to the original Unfair Practice Charge for the reasons stated in H.E. No. 92-26, i.e., Tallarico plainly lacked standing to allege that the Respondent violated Section 5.4(a)(5) of the Act. However, the subject matter of this second amendment also contained allegations regarding events, which occurred on October 22, November 1 and November 7, 1991. Since these allegations appeared to relate to earlier allegations in the first amendment of November 4th and, further, since the allegations of December 2nd appeared to be timely under Section 5.4(c) of the Act, I did not dismiss them and they are among the matters to be determined in this proceeding.

A Complaint and Notice of Hearing issued on January 8, 1992. Since certain of the allegations contained in the Complaint had been dismissed prior to hearing by reason of my Interlocutory Decision of April 20, 1992 (H.E. No. 92-26), the hearing, which was held on May 20, 1992, in Newark, New Jersey, was concerned only with those matters still outstanding, supra. At the hearing, the Charging Party was given an opportunity to examine witnesses and

^{3/} The provisions of this subsection of the Act have previously been set forth in fn. 1, supra, and will not be repeated.

present relevant evidence. The Charging Party rested upon the testimony of Tallarico together with certain documentary exhibits (Tr 166). At the conclusion of the Charging Party's case, the Respondent moved to dismiss and argued upon the record (Tr 166-180), following which the Charging Party replied briefly (Tr 180, 181). I reserved decision on the record and this written decision follows.

* * * *

Upon the record made by the Charging Party only, I make the following:

FINDINGS OF FACT

1. The Borough of Allenhurst is a public employer within the meaning of the Act, as amended, and Gregory F. Tallarico is a public employee within the meaning of the same Act.

2. Tallarico has been employed in the Borough's Police Department for 14-1/2 years and, until the matters giving rise to this proceeding, he was a patrolman who had also been assigned investigator duties. He is a past president of the PBA and was involved in the negotiations for the current collective negotiations agreement between the parties (January 1, 1991 through December 31, 1992)[CP-4]. [Tr 19, 20, 34-36, 89, 90].

3. As part of Tallarico's investigator function, he was placed on a 24-hour on-call schedule, beginning December 19, 1990. To provide the requisite coverage, Tallarico was placed in tandem with another patrolman/investigator, Peter Noble. This tandem scheduling allowed for Department coverage on a 24-hour basis over

the calendar year. [CP-2; Tr 23-26, 28, 93, 94]. In order to further enhance 24-hour coverage for the entire Police Department, the Chief, Frank L. TenBroeck, III, issued a memorandum to the entire Department on January 2, 1991, in which he stated that all regular officers would have pagers assigned to them and that they "...will be available via pager..." on a 24-hour basis. [CP-3; Tr 29, 30, 33].

4. Tallarico's performance record during 1991 and through April 1992, has been uneven. He did receive a favorable Performance Evaluation Report on August 14, 1990, and a commendation on November 7, 1991, the latter for having successfully lifted finger prints at the scene of a burglary. [CP-1; CP-9; Tr 21, 22, 91-93; Tr 73, 74, 99].

5. On July 26, 1991, the Borough's Mayor, Joseph H. Coyne, sent a memorandum to Tallarico with respect to disciplinary action, based upon two incidents of alleged neglect of duty on July 17th and July 20th. The thrust of each incident was that Tallarico failed to respond to pager requests that he telephone Police Headquarters. The Mayor suspended Tallarico on July 26th for three days without pay but, in lieu thereof, the Mayor forfeited 24 hours of Tallarico's compensatory time so as not to interfere with the operation of the Police Department. [CP-5; Tr 51, 52]. Tallarico refused to accept the discipline and engaged an attorney to represent him at a hearing, which was held on September 5, 1991 (Tr 53; CP-6). Following this hearing, which was conducted by Mayor

Coyne, the Mayor issued a decision on September 24, 1991, in which he exonerated Tallarico of neglect of duty for the first day, July 17th, but found neglect of duty only as to Tallarico's conduct on the second day, July 20th. The discipline imposed was reduced to a reprimand rather than the imposition of the three-day suspension originally imposed. [CP-6; Tr 54, 60, 61].^{4/}

6. On October 21, 1991, Tallarico's supervisor, Sgt. William H. Duerr, Jr., issued a Performance Notice, claiming that Tallarico used poor judgment in not immediately advising him of a burglary upon Tallarico's arrival at Headquarters on October 19th. Tallarico admitted to not having done so until after the expiration of his two days off. [CP-8; Tr 64, 65, 97-99].

7. On October 22, 1991, the Chief issued a Performance Notice to Tallarico, in which he stated that he had been advised by members of the Department that he, Tallarico, was "...creating discord among members..." Tallarico acknowledged that although his relationship with certain members of the Department, including supervisors, was not "strained," he did not engage in free discussion with "some of them" and, further, that some of the officers were not even talking to him and were trying to avoid him. [CP-7; Tr 63, 94-97].

^{4/} I note that the original Unfair Practice Charge was filed by Tallarico on August 28, 1991, and that the Mayor's initial memorandum of disciplinary action issued on July 26, 1991. The hearing having been held on September 5th, to inquire into events which occurred on July 17th and July 20th, I find no causal connection between Tallarico's filing of his original Charge on August 28th and the Mayor's final decision of September 24, 1991.

8. Following the issuance of the Performance Notices of October 21st and October 22nd (CP-7 & CP-8, supra), Tallarico was called to a meeting with the Chief on October 22, 1991, where Sgts. Robert Richter and Duerr were present (Tr 65, 66). According to Tallarico, the Chief stated that he had had "...a bad attitude for years..." and that the Chief then requested that he turn in his "detective's badge and my identification," referring to his "I.D." card. When Tallarico asked why this action was being taken, the Chief said that he had handled a burglary investigation poorly, referring to the Performance Notice of October 21st, issued by Duerr. [CP-8, supra; Tr 66-68]. Also, when the Chief requested the surrender of Tallarico's "identification," he stated that Tallarico was being "reassigned" because of the poor handling of the burglary (Tr 68).^{5/}

9. On November 1, 1991, Tallarico filed a grievance with the Chief regarding the "duty assignments" that had been taken from him and the accompanying reduction in his pay, all of which had followed his having had to surrender his detective badge and his police "I.D." on October 22nd (CP-16; Tr 86, 109-111).^{6/}

^{5/} Tallarico later expressed doubt as to whether or not he had surrendered his badge and "I.D." to the Chief at the October 22nd meeting (Tr 70).

^{6/} I give no weight to the trifling suggestion of the Respondent that Tallarico failed to comply with the grievance procedure by presenting his grievance to the Chief in written rather than oral form as is strictly provided for in Article XIV, "Grievance Procedure," §B - Step One. [CP-4, p. 19].

10. On November 7, 1991, the Chief responded to Tallarico's November 1st grievance, in which he took the position that Tallarico had failed to follow the grievance procedure, presumably the requirement of an "oral" meeting with the Chief prior to the filing of a written grievance, thereby deeming the matter "settled" with no answer required of him (CP-17; Tr 87, 88, 111, 112).

11. Between November 9, 1991 and April 9, 1992, five Performance Notices were issued to Tallarico, the latter three being of marginal relevance since they were issued between March 28th and April 9th, well after the events alleged as violations of the Act in the original Unfair Practice Charge as amended (compare CP-10 & CP-11 with CP-12, CP-13 & CP-15) [Tr 81-85, 102-108]. However, Exhibits CP-10 and CP-11, issued respectively on November 9 and November 14, 1991, are relevant in that they both pertain to derelictions by Tallarico in his handling and storage of a controlled substance, which had been turned over to him on November 8th. Of particular relevance to Tallarico's causation contention is the fact that he acknowledged on cross-examination that his handling of the controlled substance was in violation of several orders of the Police Department, dated May 10, 1990. He also acknowledged that the Performance Notice of November 14th

(CP-11) correctly stated that he had failed to handle the storage of evidence in a gun locker properly. [Tr 99-102].^{7/}

12. Exhibits R-1 through R-12 were admitted in evidence at the hearing (Tr 140-144). However, since the Respondent Borough's Motion to Dismiss allows only for my determination as to whether or not the Charging Party's evidence meets the appropriate legal standards, infra, it would be premature to give any consideration to these exhibits at this point, notwithstanding that the Charging Party did not object to their admission.

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 (¶10112 1979) restated the standard that it utilizes on a motion 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

^{7/} Based on this evidence, I cannot accept the contention of the Charging Party that the issuance of the Performance Notices of November 9th and November 14th by Sgts. Richter and Duerr were causally related to Tallarico's November 4th amendment to the original Unfair Practice Charge (Tr 75-77).

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.

Additionally, the nature of Tallarico's allegations requires that I apply the New Jersey Supreme Court's analysis in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). This is so because the thrust of Tallarico's Unfair Practice Charge, twice amended, deals with his complaint regarding: (1) the Mayor's reprimand of September 24, 1991; (2) the series of allegedly retaliatory Performance Notices; (3) the Chief's having charged him at a meeting on October 22, 1991, with having had a "bad attitude for years"; and (4) the Chief's having taken back Tallarico's detective badge and "I.D." and then reassigned him to patrolman.^{8/} By these actions of the Borough Tallarico claims that it has violated Sections 5.4(a)(3) and (4) of the Act.

Bridgewater was concerned with the criteria for deciding whether a violation of Section 5.4(a)(3) had occurred. Since Section 5.4(a)(4) is also alleged to have been violated, it is necessary to cite two relevant decisions of the Commission: Hunterdon Cty. Bd. of Chosen Freeholders, P.E.R.C. Nos. 87-35 and 87-150; 12 NJPER 768, 771 (¶17293 1986) & 13 NJPER 506, 507 (¶18188

^{8/} I have considered the Chief's Performance Notice of October 22, 1991 ("...creating discord...etc.") as part and parcel of the events that occurred on the same date when he met with Tallarico and the two Sergeants (Findings of Fact Nos. 7 & 8).

1987), respectively.^{9/} Thus, the Bridgewater analysis is equally applicable to Section 5.4(a)(3) and (4) cases.

The Court held in Bridgewater that the following requisites would be utilized in assessing employer motivation in "dual motive" cases:^{10/} (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 terminate; and (2) once this is established, then the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242).

The Court in Bridgewater also refined this test by adding that there must be proof that protected activity had been engaged in and that this activity was known by the employer. Finally, the Charging Party must also establish that the employer was hostile towards the exercise of the protected activity, i.e., that it manifested anti-union animus (95 N.J. at 246).

The Respondent Borough's Motion To Dismiss Is Granted Since Tallarico Has Failed To Adduce Even A "Scintilla" Of Evidence That The Borough Manifested Hostility Toward Him Within The Meaning Of Bridgewater And Hunterdon By The Conduct Of The Mayor, the Chief Or Sergeants Richter And Duerr.

It is first noted that the Borough necessarily had knowledge of Tallarico's having engaged in protected activities

9/ See, also, Downe Tp. Bd. of Ed., P.E.R.C. No. 87-154, 13 NJPER 576, 577 (¶18211 1987) where the Commission stated that it also applied the Bridgewater analysis to allegations of a violation of Section 5.4(a)(4) of the Act (Id. at fn. 3).

10/ Adopting the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980).

under our Act since he was a past President of the PBA and was also one of the negotiators for the current collective negotiations agreement (CP-4). In addition, Tallarico filed a grievance against the Chief on November 1, 1991 (CP-16). The Commission has on many occasions held that the filing of a grievance is a protected activity.^{11/} Thus, the first two requisites of Bridgewater and Hunterdon Cty. have been satisfied, namely, Tallarico's exercise of protected activities and the actual knowledge of the Borough.

Contrary to Tallarico's original allegation of August 28, 1991, he was never suspended for three days. Rather, the Mayor on July 26th decided that Tallarico should lose three days' compensatory time in lieu of suspension. However, after a hearing on September 5th, Tallarico received only a reprimand for one incident of neglect of duty with no pecuniary loss. [Finding of Fact No. 5].^{12/}

^{11/} Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986); and Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988), adopting H.E. No. 88-52, 14 NJPER 319, 322 (¶19117 1988).

^{12/} The Mayor's reprimand of September 24th is so far "out of the loop" of alleged hostility that any serious suggestion that his reprimand related to Tallarico's exercise of protected activity need not be considered further.

There are next the matters of the Performance Notices and the Chief's having reassigned Tallarico to patrolman on October 22, 1991, after relieving him of his detective duties because of his poor handling of a burglary investigation. Tallarico did not effectively deny the charge that he handled the burglary investigation poorly. The mere issuance of Performance Notices by Richter and Duerr proves nothing in the absence of a "scintilla" of evidence that the Notices contained material from which hostility might be inferred or that the conduct of Richter or Duerr indicated hostility toward Tallarico's rights guaranteed by the Act. [Findings of Fact Nos. 6-8, 11].

However, both Bridgewater and Hunterdon Cty. require, additionally, that Tallarico demonstrate that the Borough by its agents was hostile toward his exercise of protected activities, i.e., that the Borough manifested hostility or anti-union animus toward him. Here Tallarico's proofs are deficient since there is no evidence whatsoever, not even a "scintilla," that either the Chief of Police or Sergeants Richter and Duerr manifested hostility toward Tallarico either because of his past role as PBA President or as a contract negotiator or in his having filed a grievance on November 1st.

A public employer may legally take action inimical to an employee so long as its motivation is not one of interference with the rights protected by our Act: NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 669 (1st Cir. 1979). It was Tallarico's burden to establish that the Chief's disciplinary action

of October 22nd, supra, and the issuance of the Performance Notices occurred because of Bridgewater "hostility," i.e., retaliation for his exercise of protected activities. Since Tallarico's grievance of November 1st was filed after the Chief's action of October 22nd, then a priori no retaliation could have occurred. The Performance Notices of November 9th and November 14th appear to have been fully warranted by Tallarico's admissions on cross-examination (Finding of Fact No. 11).

Examining further the circumstances of the Chief's having disciplined Tallarico on October 22nd, it is true that the Chief used the phrases "creating discord" and "bad attitude," which, in another context, might be deemed indicative of Bridgewater hostility. However, I attach little weight to these statements since the Chief appeared to have had untainted cause for disciplining Tallarico on that date (Findings of Fact Nos. 6-8). Recall that these words of the Chief were uttered in the atmosphere of the investigation of a burglary which Tallarico failed to report until he had returned from having taken two days off. [Finding of Fact No. 6]. Under these circumstances I cannot question the motivation of the Chief in his having disciplined Tallarico. Therefore, I find that retaliation played no role in the Chief's action in disciplining Tallarico on October 22nd.

In summary, after giving Tallarico the benefit of all favorable inferences and resolving all doubts against the Respondent Borough as the moving party, he has failed to adduce even a

"scintilla" of evidence of "hostility" or "animus" in retaliation against his exercise of protected activities under the Act.

Therefore, I must recommend that the allegations that the Respondent Borough violated Sections 5.4(a)(3) and (4) of the Act be dismissed.^{13/}

In conclusion, I refer the parties to three of my prior decisions, which involved the identical issue, *i.e.*, the absence of a "scintilla" of evidence of "hostility" or "anti-union animus": Lyndhurst Bd. of Ed., H.E. No. 87-56, 13 NJPER 285 (¶18119 1987), adopted P.E.R.C. No. 87-139, 13 NJPER 482 (¶18177 1987); Southeast Morris Cty. M.U.A., H.E. No. 89-9, 14 NJPER 591 (¶19251 1988) [not appealed]; and City of Bayonne, H.E. No. 91-21, 17 NJPER 111 (¶22048 1991) [not appealed]. These decisions afford additional precedent for my recommendation that the Respondent Borough's Motion to Dismiss must be granted and that Tallarico's Unfair Practice Charge, as amended, must be dismissed.


* * * *

Upon the foregoing, and upon the testimony and the documentary evidence adduced by the Charging Party only, I make the following:

^{13/} Note that I have made no prior reference to Section 5.4(a)(1) of the Act, which prohibits interference, restraint or coercion of employees in the exercise of the rights guaranteed to them by the Act since this subsection was never alleged in either the original Unfair Practice Charge or in any of the subsequent amendments. Even if there had been a subsection (a)(1) allegation, based upon this record, I could not have found that the Respondent Borough violated this subsection of the Act, either independently or derivatively. Accordingly, I would have recommended dismissal.

RECOMMENDED ORDER

The Respondent Borough did not violate N.J.S.A.
34:13A-5.4(a)(3) or (4) and, therefore, its Motion to Dismiss is
granted and the Complaint is dismissed.



Alan R. Howe
Hearing Examiner

Dated: August 5, 1992
Trenton, New Jersey