P.E.R.C. NO. 78-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NORTH BERGEN,

Respondent,

Docket No. CI-77-10-17

-and-

JAMES SCOGNAMIGLIO,

Charging Party.

SYNOPSIS

The Chairman of the Commission denies a request for special permission to appeal the interlocutory decision of the Hearing Examiner to the full Commission. The Respondent had moved to dismiss the Complaint at the close of the Charging Party's case for failure to prove the allegations of his charge as a matter of law. The Hearing Examiner had denied the motion whereupon the Respondent had attempted to appeal the decision to the full Commission. Pursuant to N.J.A.C. 19:14-4.6(a) interlocutory rulings of a hearing examiner become part of the record and are normally subject to review by the Commission at the conclusion of the entire hearing under the same rules as are all findings and rulings of the Hearing Examiner. However, N.J.A.C. 19:14-4.6(a) does permit an exception to this procedure in exceptional cases by directing a request for special permission to the Chairman.

The Chairman in the instant case, relying upon the approach taken by the courts to analogous motions for involuntary dismissals and for leave to file interlocutory appeals generally, denies the motion. The Chairman does note that nothing in the decision should be taken as suggesting a finding or conclusion on the merits of the case. Rather, it is a decision that based on the record developed at this stage of the hearing he does not believe an interlocutory appeal to the full Commission on the correctness of disputed ruling is warranted.

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Appearances:
For the Respondent, Gerald L. Dorf, P.A.
(Mr. David A. Wallace, on the Request)

For the Charging Party, James Scognamiglio, pro se.

DECISION ON REQUEST FOR SPECIAL PERMISSION TO APPEAL

An Unfair Practice Charge was filed with the Public Employment Relations Commission on February 3, 1977 by James Scognamiglio (the "Charging Party") alleging that the Township of North Bergen (the "Township" or "Respondent") had violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, it is alleged that the Respondent violated N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (4) [1/] by,

1/ These subsections prohibit 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."

inter alia, discharging Scognamiglio as a result of his assertion of rights protected by the Act, specifically the filing of a petition for certification of public employee representative on behalf of himself and other fellow employees.

The charge was processed in accordance with the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute an unfair practice, a Complaint and Notice of Hearing was issued on September 8, 1977.[2/] Pursuant to that Complaint and Notice a hearing was held on October 5, 1977 before Commission Hearing Examiner Alan R. Howe.

At the close of the Charging Party's case, counsel for the Respondent moved to dismiss the Complaint on the ground that the Charging Party had not proved his case as a matter of law.[3/] The Hearing Examiner made an oral ruling on the record denying the Respondent's motion. Counsel for the Respondent then asked for an adjournment to permit him to file the within request for special permission to appeal the Hearing Examiner's ruling.

On October 20, 1977 the Commission received a Request for Special Permission to Appeal from Hearing Examiner's Ruling on

2/ Initially this charge was consolidated with another charge filed by Scognamiglio against the Respondent stemming from certain subsequent events. However, by agreement between the parties, these charges were severed prior to hearing. Additionally, following the issuance of the Complaint the Charging Party amended his charge in some respects; however, the basic factual allegations and subsections of the Act alleged to be violated remained the same.

3/ Both the Act, at N.J.S.A. 34:13A-5.4(c) and the Commission's Rules, N.J.A.C. 19:14-6.8 implementing the statute, require the Charging Party to prosecute its case before the Commission or its designated hearing examiner.

Motion filed pursuant to N.J.A.C. 19:14-4.6(b).[4/] This Request, as required by the Rule, was directed to the Chairman of the Commission and contained within it a memorandum setting forth the grounds upon which Respondent relied in seeking this leave to appeal the Hearing Examiner's ruling. The rules provide that such requests for leave to file interlocutory appeals be directed to the Chairman, the only full time member of the Commission and its chief executive officer (See N.J.S.A. 34:13A-5.2). In this way it is hoped that the delay otherwise inherent in the fact that the Commission is a part-time body can be reduced.

The Commission's function in an unfair practice proceeding is quasi-judicial in nature and therefore the undersigned, in deciding the instant request for special permission, is justified in looking for guidance to analogous situations which arise in judicial proceedings under the New Jersey Court Rules. The Respondent's motion in this case is the equivalent of a motion for

4/ N.J.A.C. 19:14-4.6(a) provides that all motions, rulings and orders of the Hearing Examiner shall become part of the record and shall be considered by the Commission in reviewing the entire record. However, N.J.A.C. 19:14-4.6(a) does permit an exception to this general rule for requests for special permission to appeal such rulings. N.J.A.C. 19:14-4.6(b) sets forth the procedure to be followed in seeking such interlocutory permission to appeal the ruling of the Hearing Examiner. (Other sections of the rules provide for direct appeal to the Commission where the Hearing Examiner's ruling would finally dispose of the matter.)

It should be noted that the citation to sections of the Commission's rules are to the New Jersey Administrative Code and reflect the rule designations in the Commission's Rules as revised to and effective on August 2, 1977. This revision of the Commission's Rules is reported at 9 N.J.R. 448(a).

The Respondent was granted a short extension of the five day time limit in which to file this request for special permission. N.J.A.C. 19:14-4.6(b).

involuntary dismissal at the close of the plaintiff's case in a civil action pursuant to New Jersey Court Rule 4:37-2(b).[5/] It is significant that this rule applies both to jury trials and to matters tried without a jury so that it would appear to be an appropriate standard for unfair practices tried before a hearing examiner. The language of the court rule is quite restrictive in the standard to be applied if the defendant's motion is to be granted. Plaintiff appears to be the recipient of the benefit of doubt in these situations and the beneficiary of any legitimate inferences which could be drawn from the evidence that was submitted. This analysis is confirmed by research into the application of this rule.

The comments associated with this rule in Pressler, Current N.J. Court Rules Annotated, Comment R.4:37-2(b); revised to September 6, 1977 makes the following statement as to the standard to be applied:

> Paragraph (b) made a significant change in the practice by requiring denial of the defendant's motion for involuntary dismissal at the close of the plaintiff's case, even where the trial is by the court without a jury, if the plaintiff has shown a prima facie case- i.e., any evidence

5/ R.4:37-2(b) states: "(b) At Trial-Generally. After the plaintiff has completed the presentation of his evidence on all matters other than the matter of damages (if that is an issue), he shall so announce to the court and thereupon the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or any claim against him on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor."

> including any favorable inference to be drawn therefrom which could sustain a judgment in plaintiff's favor. This is the same standard required to be applied in such motions made at the close of plaintiff's case in jury trials. Id. at pg. 675.

Further in the comment accompanying R.4:40-1 Motion for Judgment at Trial which can be made at the close of the evidence offered by an opponent, Pressler notes that the standard is the same as that to be applied in motions under R.4:37-2(b):

> "that is, the court must accept as true all the evidence which supports the positions of the party defending against the motion and must accord him the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied. Id. at pg. 685.

This statement in the Pressler commentary is based on a synthesis of the standards for applying Rule 4:37-2(b) and R.4:40-1 taken from numerous judicial decisions applying these rules. One such case relied upon is Dolson v. Anastasia, 55 N.J. 2 (1969) in which the New Jersey Supreme Court summarized the role of a judge on a motion for involuntary dismissal at the close of a plaintiff's case. In addition to stating the standards enumerated above, the Court went on to state:

> The point is that the judicial function here is quite a mechanical one. The trial Court is 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. 55 N.J. 2 at 5-6.

Applying these principles to the instant case, the undersigned concludes, after a review of the transcript of the hearing to date and consideration of the arguments made by the Respondent, that the request for special permission to appeal to the Commission should

be denied. It is undisputed that the Charging Party was the principal organizer of an attempt to form an employee organization as the representative of the civilian dispatchers of the Respondent's police and fire departments; that the Charging Party prepared a representation petition including the necessary showing of interest cards to have that representative certified by this Commission as the exclusive representative of those particular employees; that on January 19, 1977 Mr. Scognamiglio took envelopes containing copies of the representation petition and personally served them upon the Chief of the Fire Department, Chief of the Police Department, a clerk in the office of the Township Clerk, and a secretary in the office of the Public Safety Commissioner, who was then on vacation. On cross-examination it developed that Lt. Dulanie, the Assistant to the Public Safety Commissioner was present at the time Mr. Scognamiglio handed the envelope to the secretary in that office.[6/] It was also stated on cross-examination that Mr. Scognamiglio discussed the representation petition with the Chief of Police at the time he served it upon him.[7/] These events occurred on January 19, 1977. On January 20, 1977, a letter was prepared and signed by Lt. Dulanie for the Public Safety Commissioner which was later hand delivered to Mr. Scognamiglio and which terminated his employment with Respondent effective January 21, 1977.

It is the position of the Respondent in his motion and in

6/ T. 40-22 to T. 41-2.
7/ T. 42-8

this request that Mr. Scognamiglio has not sustained his burden of proof in establishing knowledge on the part of the Respondent of his protected activities:[8/] specifically the preparation and filing of the representation petition by the Charging Party at the time Lt. Dulanie prepared the letter terminating his employment. The Respondent's motion is based on the Charging Party's admission that he never actually saw any of the four persons served open the envelopes and read the petition at the time he served them on January 19, 1977; therefore he had not established as a fact that Lt. Dulanie, the Public Safety Commissioner or any official responsible for Mr. Scognamiglio's termination had knowledge of his activity on January 20, 1977, the date of his termination.

Lt. Dulanie was called as a witness by Mr. Scognamiglio and testified that he had a conversation with the Public Safety Commissioner on the morning of January 20, 1977 at which time he stated he had not yet read the representation petition. During that phone call which Lt. Dulanie testified was made by the Commissioner while enroute to Florida, he was directed to follow through on a decision to discharge Mr. Scagnamiglio which had been made

8/ In two recent decisions, In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977) and In re Haddonfield Borough, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) dealing with charges of discriminatory conduct based on union animus the Commission has indicated that as part of its case a successful charging party must prove that the employer had knowledge, either actual or implied, or thought that it had knowledge of the employees' protected activities.

in October 1976.[9/] It was only coincidence that these actions occurred following receipt of the representation petition. Based on this testimony, the Respondent argues that it is illogical to infer that the Public Safety Commissioner could have known about the representation petition and called Lt. Dulanie. However, such an inference is not necessary since the letter of dismissal in evidence was not signed by the Public Safety Commissioner, but was prepared and signed by Lt. Dulanie who was present at the time Mr. Scognamiglio handed a copy of the representation petition to the secretary of that department.

Admittedly, Lt. Dulanie was called as a witness by Mr. Scagnamiglio and he denied knowledge of the petition at the time he spoke to the Commissioner on January 20th. However, it must be noted that the Lieutenant is the agent of the Respondent who effectuated the Charging Party's discharge and was apparently in charge of the Department of Public Safety at the time in question, and while he denied having read the petition by the morning of January 20, 1977, it is not illogical to infer that he may have been aware of Mr. Scognamiglio's efforts to organize and secure signatures of other employees, and to engage in other conduct necessary to permit the filing of the petition. Mr. Scognamiglio testified he discussed it with the Chief of Police. In any event, the Respondent's motion depends, to a large degree, on complete acceptance

9/ T. 53-7 to 9. Lt. Dulanie also testified that he mentioned an additional incident to the Commissioner in which the Respondent had agreed to settle a lawsuit filed by Mr. Scognamiglio which sought pay for the two week period of his National Guard duty. According to Lt. Dulanie's testimony, it was this information which prempted the Commissioner to order that his October order to discharge Mr. Scognamiglio be carried out immediately.

of Lt. Dulanie's version of the events[10/] and he is not an uninterested witness. The Courts have been very reluctant to grant a motion for involuntary dismissal which depends on accepting the credibility of a key witness. Pressler, supra., Comment R.4:37-2(b) pg. 675-676. This is particularly true where, as here, the witness is the key agent of the Respondent and therefore likely to have an interest in the outcome of the proceeding. The Courts have held that a judgment should not be directed

> "where men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed..." Ferdinand v. Agricultural Insurance Co. of Watertown, 22 N.J. 482, 494 (1956).

In the instant case the Hearing Examiner heard all the testimony and was able to judge the demeanor and credibility of the witnesses, including Lt. Dulanie. He indicated that he was satisfied that there was enough evidence in the record, including the sequence of events, to infer knowledge on the part of Respondent's agents of Mr. Scognamiglio's organizational activities and that this, at least in part, was the motivation for his discharge. He therefore denied the motion.

At this stage of the case the Charging Party is entitled to the assumption that all evidence in his favor is true and he is given the benefit of every reasonable inference which can be

10/ Even if Lt. Dulanie's testimony is totally accepted, it is possible that he was aware of other activities of Mr. Scognamiglio related to his organizational attempts and that is what caused him to broach the subject of Mr. Scognamiglio to the Commissioner when he called.

drawn from that evidence. Viewed in this light, the undersigned is in sufficient agreement with the Hearing Examiner to see no reason to permit an appeal at this time to the Commission.[11/] Any doubt which the undersigned might have as to the wisdom of this decision to deny special permission is removed by the fact that this is an interlocutory appeal. Again turning to the Court Rules and judicial decisions for guidance, it has repeatedly been stated that the Appellate Courts will exercise their discretionary power to grant leave to appeal from the interlocutory order of a trial court or administrative agency or officer very sparingly, and only in the exceptional case where, on a balancing of all interests and special circumstances involved, justice dictates the need for immediate appellate review in advance of the final judgment. Leave to appeal will be granted only in those instances where some grave damage or injustice may be caused, as where a party will suffer irreparable harm as a result of the trial court's decision on the motion; ample opportunity for the party to adjudicate and protect its rights in relation to the motion not being provided by the usual process of appeal subsequent to a final judgment. This

11/ The Respondent in its Request cites several National Labor Relations Board decisions on the weight to be given inferences and on the standard of proof necessary to establish a violation of the federal act. However, all these cases are concerned with a finding that the law has been violated at the conclusion of the case, and are not concerned with the standards to be applied to a decision on a motion for involuntary dismissal at the close of the charging party's case.

Even assuming that the burden of proof is the same at this stage of the proceeding as at the conclusion, the Charging Party would not be the beneficiary of the various inferences and assumptions of veracity which are part of the deliberations in deciding this motion.

restriction on the use of the interlocutory appellate process is based on the strong public policy which favors uninterrupted proceedings at the trial level with a single and complete review, as opposed to piecemeal adjudication of controversies. Fragmentation of the trial process results in inconvenience, expense and delay and should be avoided unless there are compelling reasons. Finally, the courts have considered the problems of imparing speedy litigation, dilatory justice, expense, harrassment by an adversary, delays, costs and calendar congestion. See R.2:2-4, R.2:5-6, Romano v. Maglio, 41 N.J. Super. 561 (App. Div. 1956), cert. denied 22 N.J. 574 (1956), cert. denied 353 U.S. 923, 77 S. Ct. 682, 1 L.Ed.2d 720 (1957); Appeal of Pennsylvania Railroad Co., 20 N.J. 398 (1956); Trecortin v. Mahoney-Troast Construction Co., 21 N.J. 1 (1956); City of Newark v. Division of Tax Appeals, Dept. of Treasury, 7 N.J. 8 (1951); Warren v. Hague, 11 N.J. Super. 311 (App. Div. 1951); Clock v. Public Service Coordinated Transport Co., 8 N.J. Super. 20 (App. Div. 1950); Zaleski v. Local 401, U.E.W.A., 6 N.J. 109 (1951); Railroad Co., 34 N.J. Super. 103 (App. Div. 1955); In re Tiere, 17 N.J. 179 (1954); Application of Tiere, 19 N.J. 149 (1955); Eiler v. Tappin's Inc., 14 N.J. Super. 162 (App. Div. 1951); Interlocutory Appeals, 92 N.J. L.J. Index Page 161 (1969) by Justice Mark A. Sullivan.

These principles seem applicable to the instant case and to other situations where a party would seek special permission to appeal to an interlocutory ruling of a hearing examiner to the Commission. The Respondent herein is still free to seek review of

the Hearing Examiner's ruling at the Commission level by taking exception to it when the matter is transferred to the full Commission at the close of the hearing. See N.J.A.C. 19:14-4.6(a), N.J.A.C. 19:14-7.1 and N.J.A.C. 19:14-7.3. This could be done as a cross-exception to the Hearing Examiner's Recommended Report and Decision even if the Hearing Examiner ultimately finds for the Respondent, and recommends dismissal of the Complaint.

Finally, the undersigned points out what is hoped is already clear. Nothing in this decision is intended in any way to suggest any finding or conclusions on the merits of this case. Rather, it is simply a decision that, based on the record established to date, the undersigned can find no basis for granting special permission to appeal the ruling of the Hearing Examiner on the Respondent's motion for involuntary dismissal and the Request is hereby denied.

Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
December 2, 1977