

P.E.R.C. NO. 95-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CO-H-93-233

P.B.A. LOCAL NO. 98,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Sayreville violated the New Jersey Employer-Employee Relations Act by the actions of its chief of police tending to interfere with the rights of Charles Kelly in the performance of his duties as president of P.B.A. Local No. 98. The Commission orders the Borough to withdraw disciplinary charges and to expunge all references to those charges from Kelly's personnel file.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, Ruderman & Glickman, P.C., attorneys,
(Steven S. Glickman, of counsel)

For the Charging Party, Weinberg & Kaplow, P.A., attorneys,
(Richard J. Kaplow, of counsel)

DECISION AND ORDER

On December 31, 1992, P.B.A. Local No. 98 filed an unfair practice charge against the Borough of Sayreville.^{1/} The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4), (5) and (7),^{2/} when its police chief,

^{1/} The charge was amended at hearing to delete the PBA president as a charging party.

^{2/} 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. (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

Douglas A. Sprague, charged the PBA's president, Charles Kelly, with violations of department rules and regulations that have been superseded by the parties' collective negotiations agreement; the chief disciplined PBA supporters more severely than his supporters; the chief tried to terminate Kelly for engaging in protected activity; the chief refused to abide by the collective negotiations agreement; and the Borough permitted the chief to dredge up alleged violations against the PBA president, some almost three years old, to harass and intimidate the president and unit members and inhibit their pursuit of protected rights and the president's First Amendment rights.

On March 17, 1993, a Complaint and Notice of Hearing issued. On May 27 and 28, and June 3, 8 and 17, 1993, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. At the end of the charging party's case-in-chief, the Hearing Examiner granted the employer's motion to dismiss the alleged violations of subsections 5.4(a)(2), (5) and (7), but denied the motion as to subsections 5.4(a)(1), (3)

2/ Footnote Continued From Previous Page

employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (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. (7) Violating any of the rules and regulations established by the commission."

and (4). At the end of the hearing, the parties waived oral argument, but filed post-hearing briefs.

On December 6, 1993, the Hearing Examiner issued his report and recommendations. H.E. No. 94-11, 20 NJPER 36 (¶25012 1993). He found that the Borough had violated subsections 5.4(a)(1) and (3) by the "egregious conduct of its police chief, over many years," which was motivated by anti-union animus and hostility to the PBA president's protected activity and which tended to interfere with Kelly's exercise of those rights. More specifically, the Hearing Examiner found that: the 12 specifications in the November charges against Kelly "in the aggregate, constituted an independent violation of 5.4(a)(1)"; specifications 4, 5, 8, and 12 independently violated subsection 5.4(a)(1); and the chief's seeking Kelly's removal independently violated subsection 5.4(a)(1). The Hearing Examiner found that the chief's memorandum to Lieutenant Zdan regarding Kelly's assignment to Borough Hall would have independently violated subsection 5.4(a)(1), but was untimely. He dismissed the allegation of favoritism, in part because of untimeliness.

The Hearing Examiner also found that the employer's actions that independently violated subsection 5.4(a)(1) violated subsection 5.4(a)(3) as well. He declined to address the charging party's constitutional claim.

By way of remedy, the Hearing Examiner recommended that the Borough be ordered to stop interfering with Kelly's protected rights and discriminating against him because of the exercise of those rights. He also recommended that we order the Borough to withdraw specifications 2, 4, 5, 8, and 12 of the November charges and the same specifications in a "sanitized version" of the charges served on Kelly in February 1993. Finally, he recommended that any references to those specifications be expunged from Kelly's personnel file and that a notice of the Borough's violations be posted.

On December 30, 1993, the Borough filed exceptions to the Hearing Examiner's findings of fact and conclusions of law. It argued that the PBA had not established that Kelly's conduct was protected by the Act. It further argued that it had met its burden of establishing a legitimate business reason for the disciplinary charges against Kelly and that the charges would have been filed absent any protected conduct.

On January 3, 1994, the PBA filed limited exceptions to the scope of the recommended remedy. Noting that the Hearing Examiner had found that the 12 specifications, in the aggregate, violated the Act, it argued that the Hearing Examiner should have ordered the withdrawal of all the specifications. It also argued that any remedial order should have included additional specifications filed on April 3, 1993, which it claims were also the subject of this

litigation. It asked that the Complaint be amended to include those specifications.

On February 7, the Borough replied to the PBA's exceptions. It asserted that, notwithstanding its exceptions, the Hearing Examiner properly limited the scope of his recommended order.

In light of the Association's exceptions and the Borough's reply, we remanded this matter to the Hearing Examiner for clarification of the scope of his conclusions and recommendations. P.E.R.C. No. 94-104, 20 NJPER 228 (¶25112 1994). On July 22, the Hearing Examiner issued a supplemental report. H.E. No. 95-5, 20 NJPER 311 (¶25157 1994). He recommended that the Borough be ordered to withdraw all the charges in the November 18, 1992 and February 5, 1993 specifications and expunge all references to these charges from Kelly's personnel files. He further recommended that the Complaint be dismissed as to the April 2, 1993 specifications since he did not think they involved protected activities.

The Hearing Examiner served his supplemental decision on the parties and informed them that exceptions were due August 4, 1994. Neither party filed exceptions. On September 9, we asked the parties to inform us which earlier submissions they wished us to consider when deciding this case. The PBA responded that it wished us to consider its post-hearing brief and its previous exceptions. The Borough did not respond.

On October 13, 1994, we informed the Borough that if we did not receive a reply by October 20, this matter would be reviewed by us in the absence of any exceptions from the Borough. The Borough did not respond.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. No. 94-11 at 4-15) with these modifications.

We do not rely on a finding of favoritism in the resolution of grievances. The evidence on that issue was not dispositive. See finding 8.

We add these facts to findings 15 and 16 which concern the April 2, 1993 specifications seeking Kelly's removal. On February 26, 1993, Kelly sent a memorandum to Captain Farley objecting to the chief's new Internal Affairs Policies and Procedures memorandum. Kelly's memorandum suggested that PBA members would be told not to comply with the chief's directive until PBA review had been completed and PBA objections and recommendations addressed. On March 4, Kelly wrote to the chief explaining that:

it was not the intention of this PBA local to violate or hinder in any way N.J.S.A. 40A:14-118. By the same token, the PBA will not permit the violation of the contract labor agreement....

*

*

*

This letter is to serve as notice to you that the PBA is willing to meet with you and to assist in any way, in the preparation, formulation, acceptance and adoption of not only a formal Internal Affairs Policies and Procedures management system but also up to date Rules and

Regulations as well as a format for Progressive Discipline as they are required before any policy shall be adopted.

* * *

In the event I do not receive a response from your office on or before March 17, 1993, a grievance will be filed on that date citing violations of the above mentioned contract articles.

At the unfair practice hearing, Kelly had a vague recollection that before March 16, he had heard that the chief was going to charge him with insubordination based on the February 26 memorandum. Kelly wrote a March 15 letter to Farley clarifying that the PBA's concern was with possible contract violations. In addition to informing Farley that the PBA had filed a grievance, he indicated that:

neither I nor the members of the PBA intend to be insubordinate and/or dispute the carrying out of lawful orders of the Chief of Police. There are no matters pending at this time which would require the invoking of the Internal Affairs Policies, however, if, as and when we deem the Chief of Police to be acting in violation of our collective negotiations agreement and due process rights, we will challenge such action, through the appropriate process, challenging our obligation to comply with any policies or demands which violate our respective rights.

Kelly also addressed two PBA membership meetings where he clarified that his February 26 memorandum was not intended to advocate insubordination. Kelly's report to the PBA membership at its March 16 meeting indicates:

Discussed the February 26, 1993 I.A.D. letter which is being interpreted by some members to mean that we will be insubordinate and not follow the orders of the Chief when in fact the letter was meant to indicate we will challenge his order through the proper channels.

Kelly's report to the PBA membership at its April 21 meeting indicates:

Discussed I.A.D. - There appeared to be some confusion with letter dated 2-26-93 challenging I.A.D. Policy issued by the Chief. This letter was not meant to indicate that insubordination and our failure to comply with lawful orders would be acceptable behavior on our part.

On April 3, 1995, Kelly was served with a Preliminary Notice Of Disciplinary Action dated April 2. It charged that Kelly's February 26 memorandum indicated that he would not comply with the Internal Affairs memorandum and that he was informing the PBA's membership not to comply. Among other things, Kelly was charged with insubordination and conduct unbecoming a public employee.

We now address the Hearing Examiner's analysis of the three disciplinary actions taken against Kelly in November 1992, February 1993 and April 1993. After five days of hearing, the Hearing Examiner concluded that the first two sets of charges against the PBA's president were brought because of anti-union animus and hostility to his protected activity. The first set was prepared by the chief's personal attorney and included statements such as:

you have used your position as President of the PBA to criticize the actions of the Chief of Police and to undermine his authority....

Your callous disregard for your oath and position as a police officer and president of the local PBA displays a ... [course] of conduct designed to either remove the Chief from office or to interfere with his statutory responsibility as the head of the police force.

The charges resurrected actions for which Kelly had previously been charged and exonerated.

The second set of charges was a sanitized version of the first, prepared by the Borough's counsel. Direct references to Kelly's PBA activity were deleted, but the overall flavor of the charges remained. While we cannot find that every allegation concerned Kelly's protected activity, we accept the Hearing Examiner's conclusion that Kelly's protected activity motivated the bringing of charges and the call for Kelly's removal. The Hearing Examiner's report recites several incidents where he found that the chief "egregiously" violated subsection 5.4(a)(3)'s prohibition against anti-union discrimination. H.E. at 29. In addition, we accept the Hearing Examiner's conclusion that the charges would not have been brought absent that protected activity. Under these circumstances, we order the Borough to withdraw the first two sets of charges and expunge any references to them in Kelly's personnel file.

The third set of charges was triggered by the February 26, 1993 memorandum Kelly sent to Captain Farley. Kelly stated that the PBA found the chief's "Internal Affairs Policies & Procedures" memorandum to be unacceptable in its present form and that Kelly "would inform the membership of this local that this document is subject to review and should not be complied with until such time our review is completed and the objections and recommendations of the PBA are addressed." There is no evidence that Kelly actually told the PBA's membership not to comply.

A few days later, Kelly wrote to the chief and explained that it was not the PBA's intent to violate or hinder the chief's statutory powers, but that his members' statutory rights would also not be violated or waived. Kelly stated that the PBA was willing to meet about these issues, but added that a grievance would be filed absent a response.

Kelly appears to have heard that the chief was going to bring charges against him for insubordination based on his February 26 memorandum. On March 15, Kelly sent a letter to Farley stating that neither he nor the members of the PBA intended to be insubordinate or to dispute the carrying out of the chief's lawful orders. Kelly also reported to the PBA's membership meetings in March and April that there was no intent that PBA members be insubordinate.

Nevertheless, in April 1993, the chief filed a third set of charges against Kelly. These charges called for Kelly's removal for insubordination, conduct unbecoming a public employee, and other related reasons. The chief testified that the charges were brought because he did not believe that Kelly's second memorandum to Farley retracted the first memorandum's statement advising officers that they were not to comply with the chief's policy.

We disagree with the Hearing Examiner's characterization that protected activities were not involved in these memoranda. Kelly sent the memoranda in his capacity as PBA president and the subject of the memoranda concerns policy changes with respect

to terms and conditions of employment. The February 26 memorandum was interpreted by the chief as a threat that Kelly would inform officers not to comply with the new policies and procedures. This belief is supported by the tone and substance of Kelly's memorandum. But there is no evidence in the record that any such threat was carried out. Any doubts concerning this issue should have been resolved after Kelly made it clear at PBA meetings and in correspondence to the chief and captain that PBA members would comply with the chief's directive and would use only lawful means to contest alleged violations of the collective negotiations agreement.

We accept that the chief saw the need to question, challenge, and consider discipline against Kelly because of his February 26 memorandum. That memorandum could have been read as a threat that PBA members would be told not to comply with the new Internal Affairs Policies and Procedures. But under all the circumstances, particularly in light of Kelly's written and oral clarifications, we find that the chief would not have continued to seek Kelly's removal absent his general hostility to Kelly's exercise of protected rights. This third attempt to have Kelly removed followed directly on the heels of two other attempts that we have already found were motivated by anti-union animus. We would not necessarily have regarded a minor disciplinary action as violative of the Act, but the severity of the proposed penalty was disproportionate to the alleged misconduct. We therefore conclude that this attempt to seek Kelly's removal is inextricably linked to the two other charges and should be rescinded as well.

ORDER

The Borough of Sayreville is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by the actions of its chief of police tending to interfere with the rights of Charles Kelly in the performance of his duties as president of P.B.A. Local No. 98.

2. Discriminating in regard to any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by the actions of its chief of police tending to interfere with the rights of Charles Kelly in the performance of his duties as PBA president.

B. Take this action:

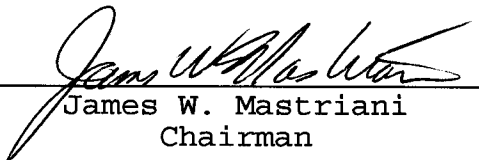
1. Withdraw the disciplinary charges against Charles Kelly, contained in the November 18, 1992, February 5, 1993, and April 2, 1993 Preliminary Notices of Disciplinary Action.

2. Expunge all references to those charges from Kelly's personnel file.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Klagholz was not present.

DATED: May 23, 1995
Trenton, New Jersey
ISSUED: May 24, 1995



NOTICE TO EMPLOYEES



**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by the actions of our chief of police tending to interfere with the rights of Charles Kelly in the performance of his duties as president of P.B.A. Local 98.

WE WILL cease and desist from discriminating in regard to any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by the actions of our chief of police tending to interfere with the rights of Charles Kelly in the performance of his duties as PBA president.

WE WILL withdraw the disciplinary charges against Charles Kelly, contained in the November 18, 1992, February 5, 1993, and April 2, 1993 Preliminary Notice of Disciplinary Action.

WE WILL expunge all references to those charges from Kelly's personnel file.

Docket No. CO-H-93-233

BOROUGH OF SAYREVILLE
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 95-5

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

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CO-H-93-233

P.B.A. LOCAL NO. 98,

Charging Party.

SYNOPSIS

In response to a remand by the Commission in PERC No. 94-104, 20 NJPER 228 (¶25112 1994), the Hearing Examiner concedes that he erred in failing to have ordered a broader remedy than he initially perceived to be necessary. The Chief of Police of the Borough had issued three sets of Specifications of violations by the PBA President, Charles Kelly, as to his duties as a patrolman, which cross-blended with his duties as PBA President. The Hearing Examiner had initially recommended that a remedy be entered only upon one half of the specifications, those being the ones that were actually litigated at the hearing. Upon reconsideration of the entire record, the Hearing Examiner realized that there was no way in which to separate the separate specifications, one from another. Therefore they should have been considered in the aggregate and an appropriate remedy made. The remedy on remand was to order withdrawn all of the Specifications made by the Chief in two separate documents and, further, that they be expunged from Kelly's personnel file.

However, there was one set of Specifications of acts of misconduct of Kelly, which warranted non-interference by the Hearing Examiner. These pertained to prerogatives of the Chief of Police in issuing an internal memorandum of guidelines for the conduct of matters within the Department. The allegations as to this portion of the Unfair Practice Charge were recommended for dismissal.

A Hearing Examiner's Supplemental 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. 95-5

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

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

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Appearances:

For the Respondent, Ruderman & Glickman,
Attorneys,
(Steven S. Glickman, of counsel)

For the Charging Party, Weinberg & Kaplow,
Attorneys,
(Richard J. Kaplow, of counsel)

HEARING EXAMINER'S RECOMMENDED SUPPLEMENTAL REPORT
AND DECISION ON REMAND

The Hearing Examiner issued his Recommended Report and Decision on December 6, 1993, in which he recommended that the Commission find that the Borough violated §§5.4(a)(1) and (3) of the Act by the egregious conduct of its Chief of Police over many years (H.E. No. 94-11, 20 NJPER 36 (¶25012 1994)). Thereafter, on January 3, 1994, the Charging Party filed limited exceptions to the Hearing Examiner's Recommended Report and Decision, namely, it contended that the scope of the Recommended Order was too narrow. The Borough responded to the Charging Party's exceptions on February 7th, contending that the Hearing Examiner's limitations on his recommended remedy were proper. The Respondent had filed plenary exceptions on December 30, 1993. On April 29, 1994, the Commission,

in a unanimous decision, ordered that the case be remanded to me for a Supplemental Report, consistent with its opinion (PERC No. 94-104, 20 NJPER 228 (¶25112 1994).

Briefly, the prior history of this case discloses that the Charging Party filed an Unfair Practice Charge on December 31, 1992, alleging, inter alia, multiple violations by the Borough of N.J.S.A. 34:13A-5.4(a)(1) and (3).^{1/} The Borough's Chief of Police, Douglas A. Sprague, charged Kelly with violations of the rules and regulations of the Police Department as of November 18, 1982; in or around early February 1992, Kelly communicated with the Mayor and Council regarding a vacancy in a Captain's position; when the Chief refused to participate in a certain proceeding and hearing, he suspended Kelly for three days without pay, following which Kelly was exonerated; notwithstanding a statute which provides that no officer shall be suspended or fined without a hearing, Kelly and other members of the PBA have been suspended without being afforded a hearing; the Chief has charged Kelly with failing to report his absences on PBA matters despite the fact that the Business Administrator of the Borough was the one who summoned Kelly to his office to discuss such PBA matters; on October 30, 1992, the Chief

^{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."

summoned Kelly and two superior officers to his office where he told Kelly that his actions as President of the PBA brought disgrace to the Department and that he would not permit Kelly to make any comments about the Department, etc.; within weeks of this meeting the Chief sought the termination of Kelly; the Chief has refused to abide by the collective negotiations agreement between the parties, stating that he will not permit the agreement to interfere in any way with his running of the Department; and the Borough has permitted the Chief to pursue stale charges for the sole purpose of harassing Kelly as President of the PBA; adding, specifically, Kelly's First Amendment rights.^{2/}

Following the issuance of my Recommended Report and Decision on December 6, 1993, supra, the Commission first noted my finding that the Borough had violated §§5.4(a)(1) and (3) by the "egregious conduct of its police chief, over many years..." and that this was motivated by anti-union animus and hostility toward the PBA President's protected activity, which tended to interfere with his exercise of those rights. Further, the Commission observed that I had found that the 12 specifications in the Chief's November 1992 charges against Kelly "...in the aggregate, constituted an independent violation of the §5.4(a)(1)"; and that specifications 4, 5, 8, and 12 independently violated the same subsection of the Act.

^{2/} On March 17, 1993, a Complaint and Notice of Hearing was issued and hearings were held before me on May 27, 28 and June 3, 8 and 17, 1993.

Also, the Chief's seeking Kelly's removal through the November 1992 charges was noted as an independent violation of §5.4(a)(1) of the Act. The Commission observed further that I had found that the Chief's memorandum to Lt. Zdan, regarding Kelly's assignment to Borough Hall, would have independently violated §5.4(a)(1), but this allegation was deemed untimely as was the independent allegation of favoritism.^{3/}

The heart of the remand pertains to my recommendations regarding remedy. Here the Commission observed that I had recommended that the Borough "cease and desist" from interfering with Kelly's protected rights and from discriminating against him because of the exercise of those rights. Note was then taken that I had only recommended that the Borough be ordered to withdraw specifications 2, 4, 5, 8 and 12 of the November 1992 charges, as well as those in the "sanitized version" of these charges served upon Kelly in February 1993. The Commission noted, finally, my recommendation that any reference to those specifications be expunged from Kelly's personnel file and that a notice of the Borough's violations be posted.

On December 30, 1993, the Borough filed exceptions to my findings of fact and conclusions of law, supra, which the Commission determined need not be addressed at this time. However, as

^{3/} The Commission noted finally that I had found that those of the Borough's actions that independently violated §5.4(a)(1) of the Act also had violated §5.4(a)(3).

previously noted, the Charging Party filed limited exceptions to the scope of my recommended remedy on January 3, 1994. There it was contended that I had erred in not having recommended the withdrawal of all 12 specifications filed by the Chief against Kelly, i.e., November 1992, and including those charges filed in February 1993 and on April 3, 1993. On February 7th, the Borough replied to the PBA's exceptions, asserting that I had properly limited the scope of the withdrawal of specifications in my recommended order of December 6, 1993.

Based upon the issues raised in the exceptions of the PBA and the Borough's reply, the matter was remanded to me "...for clarification of the scope of his (my) conclusions and recommendations..."

* * * *

Based upon the original pleadings, the transcripts of the five days of hearing in this matter, the several exhibits, the post-hearing briefs of the parties, their respective exceptions and the reply of the Borough, which together constitute the entire record in this proceeding, I reiterate my 21 Original Findings of Fact, set forth in H.E. No. 94-11 at pp.4-15, which are incorporated herein by reference.

* * * *

SUPPLEMENTAL ANALYSISPreliminary Notes

1. It would appear from the Commission's Remand of April 29, 1994, that I am, inter alia, directed to explain why I did not order the Borough to withdraw forthwith all of the original 12 specifications of charges against Charles Kelly, contained in the Chief's November 18, 1992 specification of charges (CP-1), instead of having recommended that only ¶'s 2^{4/}, 4, 5, 8 and 12 be withdrawn. Similarly, I am to address the "sanitized version" of the charges as served upon Charles Kelly on February 5, 1993 (CP-11). These latter charges were filed to conform with the fact that the Borough is a Civil Service municipality, which requires that a precise format be followed. CP-1 and CP-11 will be considered together with primary emphasis on CP-1.

2. My original Recommended Order failed to make any reference to the Chief's Specifications against Charles Kelly in Section B., which were dated April 2, 1993 (CP-12). These were the subject of my original Findings of Fact Nos. 15 & 16 wherein I found that the Chief alleged in a memorandum of February 26, 1993 to Captain Farley that Kelly had stated that because the Chief's undated "Internal Affairs Policies & Procedures" memo was subject to review, the members of the PBA would not comply with it. Further, on March 15, 1993, Kelly had written to Farley, complaining again about the inadequacy of the Chief's "Internal Affairs" guidelines, and that a grievance had just been filed, challenging the Chief's

^{4/} This ¶ reference is in error. It is hereby corrected to read ¶1 and is now consistent with CP-1 and F/F No. 9.

issuance of these guidelines. The April 2nd charges by the Chief resulted from the failure of Kelly to retract his February 26th memo to Farley. My failure to have discussed my Findings of Fact Nos. 15 and 16, and to have made recommendations(s), will be rectified hereinafter.

3. Finally, a review of the pleadings discloses that although the February 1993 and April 1993 specifications filed by the Chief against Kelly (CP-11 & CP-12) were after-the-fact of the filing of the original Unfair Practice Charge, these allegations were timely, were "fully litigated" during the hearing, and are properly before the Commission in this remand: Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

By Way of Explanation, The Hearing Examiner Initially Recommended In His "Recommended Order" [H.E. No. 94-11, p.p. 32, 33] That Only Five Of The Specifications In CP-1 and CP-11 Be Withdrawn -- This Was in Error _____

First, it is noted that the incorporation of ¶2 from CP-1 and CP-11 into Section B.2. of my Recommended Order was erroneous; it should have been ¶1 from CP-1 & CP-11 instead. This is now corrected.

This aside, I recommended that only the five enumerated paragraphs be withdrawn from the Chief's Specifications [¶'s 1, 4, 5, 8 & 12] for the reason that they were the only paragraphs that were litigated. In other words, as you comb through the record, you

will note that there was no evidence adduced as to ¶'s 2, 3, 6, 7,^{5/} 9, 10 or 11 of the Chief's Specifications. In so doing, I overlooked the total picture, namely, that the twelve Specifications in CP-1 and CP-11 were, in the aggregate, part and parcel of the same "ball of wax." I am here concluding that, in the exercise of my authority to make recommendations as to remedy, I can find that the twelve Specifications together violated the Act, notwithstanding the fact that each and every one was not actually litigated before me. This is the case because there is ample basis for me to infer from those Specifications not litigated that the same conclusions would obtain vis-a-vis an independent violation of §5.4(a)(1) and a related violation of §5.4(a)(3). Thus, I intend to recommend a broad order as to the conduct of the Borough by its Chief of Police with respect to CP-1 and CP-11.^{6/}

I initially held that the Borough independently violated Section 5.4(a)(1) of the Act but only as to ¶'s 1, 4, 5, 8 and 12 of the Chief's Specifications. This was erroneous since it was the Chief who decided to serve Kelly with twelve Specifications on November 18, 1992, some of which were timely under the six-month

^{5/} The evidence in F/F No. 12 was found to be tangential to the issues presented.

^{6/} See here the decision of a Hearing Examiner of the Pennsylvania Labor Relations Board in Lackawanna County Area Vo-Tech School, 25 PPER ¶25104 (1994) where the negative evaluation and suspension of a teacher was motivated by animus. Although three of six infractions appeared to be legitimate, the evaluation as a whole was tainted by retaliatory motivation.

limitation Section 5(c) and some of which were not. I am now finding that all of the charges were timely and, as such, were within my authority to recommend a remedy.^{7/} I reiterate here that the Chief's issuance of CP-1 and CP-11 constituted violations of §5.4(a)(1) independently [H.E. No. 94-11, pp. 20-26] and §5.4(a)(3) [hostility] (H.E. No. 94-11, pp. 27-30).

The Specifications In CP-12 Will
Not Be Ordered Withdrawn

As noted previously under ¶2 of my Preliminary Notes, my original Recommended Order failed to make any reference to those Specifications by the Chief against Kelly, which were dated April 2, 1993 (CP-12) and which were fully litigated. I had, however, made two Findings of Fact with respect to these Specifications (F/F Nos. 15 & 16). These Specifications resulted from Kelly's failure to have retracted a memorandum of February 26, 1993 to Captain Farley where Kelly had stated that because the Chief's undated "Internal Affairs Policies & Procedures" memorandum was subject to review, the members of the PBA would not comply with it. Further, on March 15th, Kelly had written to Farley, complaining again about the inadequacy of the Chief's "Internal Affairs" guidelines, adding that a grievance had just been filed, challenging the Chief's issuance of these guidelines.

^{7/} My earlier comments in H.E. No. 94-11 with respect to timeliness in F/F Nos. 7, 9, 12 & 18 are now superceded by my original Analysis at Section II, pp. 20, 21, which correctly states my initial, and now current, conclusions as to CP-1 and CP-11. My Recommended Order, infra, will necessarily refer to both the original charges of November 18, 1992 (CP-1) and the "sanitized" charges of February 5, 1993 (CP-11).

I find that there is nothing whatsoever involving Kelly and the exercise of protected activities in his conduct as found above. Therefore, I find that Kelly was without the Act's protection in this matter.

Additionally, nothing changed when, on March 15, 1993, Kelly advised Farley that a grievance had been filed by the PBA, challenging the Chief's issuance of these guidelines. Even if a grievance of this type were to have had ultimate merit, the basic rule is that you follow the orders given and grieve later.

Accordingly, my Findings of Fact Nos. 15 & 16 are restated upon this record. The conduct of Charles Kelly did not involve the exercise by him of protected activities under our Act.

* * * *

Upon the remand from the Commission, as described above, I have concluded that no additional Findings of Fact are necessary but that the recommendations as to the findings previously made must be modified in accordance with the discussion and analysis set forth above in this Decision. Based upon reconsideration of the entire record in this case or the respective exceptions filed by the parties the Commission's decision on remand, I make the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Respondent Borough independently and derivatively violated N.J.S.A. 34:13A-5.4(a)(1) by the egregious conduct of its Chief of Police, Douglas A. Sprague, over many years, dating at least to 1987, which conduct includes, in particular, the

Specifications set forth by the Chief on November 18, 1992 and restated on February 5, 1993 (CP-1 & CP-11), all of which has tended to interfere with the rights of Charles Kelly, the President of the PBA, which are guaranteed by Section 5.4(a)(1) of the Act.

2. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(3) by the same conduct of the Chief vis-a-vis Charles Kelly as under §5.4(a)(1) above since the Charging Party has fully met the requisites of Bridgewater Tp. v. Bridgewater Public Works Ass'n. in having proven that the Chief's conduct toward Kelly was motivated by anti-union animus and hostility to Kelly's exercise of protected rights.

SUPPLEMENTAL RECOMMENDED ORDER

The Hearing Examiner supplementally recommends that the Commission ORDER:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to check the conduct of its Chief of Police who, over many years, from at least 1987, has tended to interfere with the rights of Charles Kelly in the performance of his duties as PBA President.

2. Discriminating in regard to any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to check the conduct of its Chief of Police who has, over

many years, manifested animus and hostility toward Charles Kelly and, additionally, has retaliated against him for his exercise of protected activities, all of which was known to the Borough.

B. That the Respondent Borough take the following supplemental affirmative action:

1. Cease and desist from permitting its Chief of Police to engage in the activities set forth above under paragraphs A.1 and A.2.

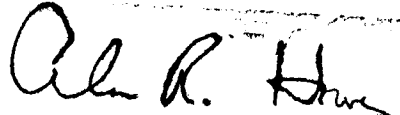
2. Withdraw forthwith the following disciplinary charges against Charles Kelly, contained in the November 18, 1992 Specifications (CP-1): ¶'s 1 through 12; and as similarly repeated in the sanitized version of February 5, 1993 (date served) [CP-11]: ¶'s 1 through 12.

3. Any and all references to the above Specifications in CP-1 and CP-11, which now appear in the personnel file of Charles Kelly are to be expunged forthwith.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the allegations in the Unfair Practice Charge that the Borough violated the Act by having served Charles Kelly with Specifications on April 2, 1993 (CP-12) are hereby dismissed in their entirety.

A handwritten signature in cursive script, appearing to read "Alan R. Howe", is written above a horizontal line.

Alan R. Howe
Hearing Examiner

Dated: July 22, 1994
Trenton, New Jersey