

P.E.R.C. NO. 82-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MANTUA,

Respondent,

-and-

Docket No. CO-82-4-37

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 676,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands for a new hearing on the contention of the International Brotherhood of Teamsters, Local 676, that the Township of Mantua violated the New Jersey Employer-Employee Relations Act when, in retaliation for an employee's pro-union activities, it terminated the employee from the Streets and Roads Department and then refused to consider him for the position of police dispatcher. The Hearing Examiner erred in considering the employee's refusal to settle the case.

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Appearances:

For the Respondent, Boakes, Lindsay & Smith, Esqs.

(John J. Lindsay, of Counsel)

For the Charging Party, Tomar, Parks, Seliger,

Simonoff & Adourian, Esqs.

(Barry M. Bennett, of Counsel)

DECISION AND ORDER

On July 7, 1981, the International Brotherhood of Teamsters, Local 676 ("Local 676") filed an unfair practice charge against the Township of Mantua, Streets and Roads Department ("Township") with the Public Employment Relations Commission. The charge alleged that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1), (3), and (5),^{1/} when on or about May 12, 1981, it terminated Jed Mercer in

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; and (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."

retaliation for his union organizational activities. The charge also alleged that the Township contravened the same subsections when it issued a notice of layoff to union supporter Dewey DiPiero and conditioned continued employment on his obtaining a driver's license.

On October 6, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On October 13, 1981, the Township filed an Answer. It averred that the supervisor of the Streets and Road Department and the Director of Public Works laid off Mercer because there was not enough work for the five men in the department and Mercer had the least seniority. It also averred that DiPiero's job classification required him to possess a driver's license so that he could drive light motor vehicles; the Township did not threaten to lay him off or terminate him, but gave him 90 days to obtain a license.

On October 30, 1981 Commission Hearing Examiner Alan R. Howe commenced a hearing at which he afforded the parties the opportunity to present evidence, examine witnesses, and argue orally. At the conclusion of the October 30 hearing session, the parties settled the charge insofar as it alleged retaliation against DiPiero. The Hearing Examiner read the settlement into the record. Noting that settlement efforts had failed insofar as the charge alleged retaliation against Mercer, the Hearing Examiner scheduled another day of hearing.

On November 12, 1981, the hearing resumed. At the outset, Local 676 amended its charge to allege that the Township violated subsections 5.4(a)(1) and (3) of the Act when, after laying Mercer off from the Streets and Roads Department, it refused to hire him as a police dispatcher due to his organizational activities.

Mercer then completed his testimony. Before excusing the witness, the Hearing Examiner asked him to verify on the record that at the October 30 session, the Township offered him the position of police dispatcher in exchange for the dropping of his charges and he rejected that offer.^{2/} Local 676's attorney then elicited testimony that Mercer had accepted, but the Township later withdrew, an offer to make him a dispatcher and pay him one-half of the difference between his net pay per week at the time of layoff (\$177) and his net unemployment compensation per week (\$133). Mercer testified that he was not willing to accept a settlement offer without any monetary compensation because he had incurred debts since the layoff and did not believe he should have to carry the entire burden.

After Mercer testified, Local 676 rested and the Township presented its case. Neither party argued orally. Both parties filed post-hearing briefs.

On January 4, 1982, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-25, 8 NJPER _____ (¶ _____ 1982) (copy attached). Crediting the Township's wit-

^{2/} The Hearing Examiner observed that normally he did not put anything involving a settlement on the record unless the case had been settled.

nesses and finding that anti-union animus did not motivate either the layoff or the refusal to make Mercer a police dispatcher, he recommended that the Complaint be dismissed in its entirety. The report concluded:

Finally, the Hearing Examiner would be less than candid in reaching his conclusion herein if he did not take note of the fact that Mercer was offered the job of Police Dispatcher at the first day of hearing on October 30, 1981 during settlement discussions off the record but declined the Township's offer. Mercer's reason for so declining was his dissatisfaction with the failure of the Township to offer him back pay since his termination on May 13, 1981. It is noted that the Police Dispatcher position pays \$2200 more per year than the position from which Mercer was terminated on May 13, 1981.[3] Mercer must live with the decision that he made on October 30, 1981.

Accordingly, the Hearing Examiner will recommend dismissal of the amended Unfair Practice Charge.

(Slip opinion at pp. 8-9)

On January 22, 1982, Local 676 filed Exceptions and a supporting brief. Local 676 specifically took exception to the Hearing Examiner's consideration of the Township's settlement offer and Mercer's rejection. Local 676 also contended that the Hearing Examiner erred when he found: (1) anti-union animus did not motivate either Mercer's layoff or the refusal to make him a police dispatcher, and (2) the Township Code did not give Mercer any superior rights for hire as a police dispatcher.^{4/} On February 8, 1982, the Township filed a response incorporating the arguments in its post-hearing brief.

[3] Mercer had previously worked as a dispatcher, but requested a transfer to the Street and Roads Department, despite the lower pay, because he liked working outdoors and disliked working on weekends and holidays.

^{4/} Local 676 also requested oral argument. We decline this request.

We hold that the Hearing Examiner erred when he made the unsuccessful settlement negotiations part of the record and considered them in reaching his conclusion that the Complaint should be dismissed. Accordingly, we remand for a new hearing.

In New Jersey, evidence that a party has, in an attempt to compromise, offered or promised to accept a settlement proposal is inadmissible to establish either a defendant's liability or the invalidity of a plaintiff's claim. N.J.R. Evid. 52 and 53. These exclusionary rules serve two purposes: (1) excluding evidence which has no necessary relevance to disproving a claim or a defense, and (2) promoting the out-of-court settlement of disputes. See Comments to N.J.R. Evid 52 and 53; McCormick on Evidence, §274 (Cleary Ed. 1972).

In proceedings before our agency, the parties are not strictly bound by the rules of evidence. N.J.A.C. 19:14-6.6. Nevertheless, we believe these rules espouse valid public policy concerns, particularly in a labor relations context where negotiations are the foundation of the process. In this case, the evidence of the settlement efforts was irrelevant to the merits of the unfair practice charge and was unduly prejudicial.

Mercer's unwillingness to accept the Township's offer of the dispatcher position without back pay does not undercut the merits of his claim. If anything, this unwillingness may manifest his unswerving belief that the allegations of the charge

had merit. The Hearing Examiner, however, used this irrelevant evidence to help him reach his conclusions on the merits of the charge. A party has the right to reject an offer of settlement and still have the case decided on the merits. By considering Mercer's rejection of the Township's settlement offer and by concluding that Mercer had to live with this rejection, the Hearing Examiner abridged that right. Compare, In re New Jersey Institute of Technology, P.E.R.C. No. 80-54, 5 NJPER 491 (¶10251 1979), aff'd App. Div. Docket No. A-1095-79 (11/24/80) (Employer's unilateral changes in terms and conditions of employment not cured or waived by Association's failure to accept offer to negotiate several months after implementation).

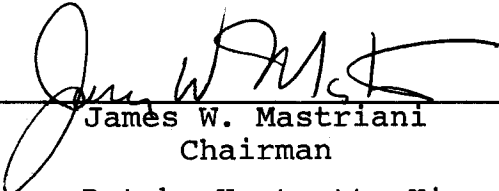
We believe that a new hearing must be held. The record establishes that the Hearing Examiner weighed evidence of compromise proposals and rejections in reaching his conclusions. Contrast, Armstrong v. Francis Corp., 20 N.J. 320 (1956) (admission into evidence of offer of compromise harmless error since record did not suggest trial judge weighed the objectionable evidence in reaching his conclusions). These impermissible considerations may have influenced the essential credibility determinations underpinning the Hearing Examiner's conclusion that anti-union animus did not motivate either Mercer's layoff or the Township's failure to accept in May 1981 or thereafter his application for the position of dispatcher. A new hearing is the only way to insure

that the Charging Party's allegations of unfair practices receive consideration solely on their merits.^{5/}

ORDER

This case is remanded for a new hearing.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp, Graves and Suskin voted in favor of this decision. None opposed. Commissioner Newbaker was not present.

DATED: Trenton, New Jersey
May 4, 1982
ISSUED: May 5, 1982

^{5/} In light of this result, we do not treat the remaining exceptions. Whether or not the Township acted illegally and whether or not the Township Code gave Mercer certain re-employment rights will be considered anew on remand.