

P.E.R.C. NO. 85-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CI-82-60-107

ANTHONY F. ACETI,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Jersey City Housing Authority did not violate the New Jersey Employer-Employee Relations Act when it partially laid off Anthony F. Aceti, a mason-plasterer.

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Appearances:

For the Respondent, Shaljian, Cammarata, O'Connor
and Messano, Esqs. (Carmen Messano, Of Counsel)

For the Charging Party, Alan Zark, Esquire

DECISION AND ORDER

On June 14, 1982, Anthony F. Aceti, a mason-plasterer, filed an unfair practice charge against the Jersey City Housing Authority ("Authority"), his employer, with the Public Employment Relations Commission. The charge alleged that the Authority 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) and (5) ^{1/} when, allegedly because of Aceti's union activities, it reduced his position from full-time to part-time.

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; (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; 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."

On March 1, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Authority then filed a timely Answer denying the allegations of anti-union animus, discrimination, and harrassment and asserting that it laid off Aceti for reasons of economy and efficiency. The Answer also asserted that the charge should be dismissed because the Civil Service Commission had already upheld Aceti's layoff; because Aceti had since been reemployed in his full-time position, and since the parties had allegedly settled this matter as part of a new agreement.

On August 8, 1984, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties made motions, ^{2/} examined witnesses and introduced exhibits. Aceti's attorney argued orally, and the Authority filed a post-hearing brief on October 19, 1984.

On November 7, 1984, the Hearing Examiner issued a report recommending dismissal of the Complaint. H.E. No. 85-21, 10 NJPER ____ (¶ ____ 1984) (copy attached). He found that the single controversy doctrine barred relitigation of the Civil Service Commission's finding that the layoff was economically motivated and, in the alternative, that Aceti's partial layoff was in fact due to economic reasons rather than anti-union discrimination.

The Hearing Examiner served a copy of his report on the parties and informed them that exceptions, if any, were due

^{2/} The Authority moved to dismiss the Complaint because it was allegedly untimely and barred by the single controversy doctrine. The Hearing Examiner reserved decision on this motion.

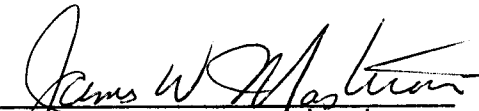
on or before November 20, 1984. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-8) are accurate. We adopt and incorporate them here. Applying the standards set forth in Township of Bridgewater v. Bridgewater Public Works Association, 95 N.J. 235 (1984), we hold, under all the circumstances of this case, that the charging party did not prove that his partial layoff was discriminatorily motivated and that the Authority proved that it would have laid off Aceti in any event because of a severe cutback in federal funds.^{3/} Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. Commissioner Graves opposed.

DATED: Trenton, New Jersey
December 19, 1984
ISSUED: December 21, 1984

^{3/} We express no opinion on the statute of limitations question. We also do not analyze the application of the single controversy doctrine to this case since we are in complete agreement with the findings and conclusions of the Civil Service Commission.

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SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Jersey City Housing Authority did not violate the New Jersey Employer-Employee Relations Act by laying off Anthony Aceti from a full-time position. The Hearing Examiner found that the Charging Party failed to prove by a preponderance of the evidence that he was laid off because of his union activity. The Hearing Examiner further found that the Authority had legitimate business justification for the layoff.

A Hearing Examiner's 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.

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For the Respondent

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(Carmen Messano, of Counsel)

For the Charging Party

Alan Zark, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 14, 1982 by Anthony F. Aceti ("Charging Party") alleging that the Jersey City Housing Authority ("Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party alleged that the Authority harassed and coerced him, unlawfully changed or laid him off from a full to a part-time position, and that it refused to process grievances he filed all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act. 1/

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; (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; (5) Refusing to nego-
(continued)

The Authority denied that it harassed or unlawfully changed or laid off the Charging Party or that it refused to process his grievances. The Authority alleged financial reasons for the layoff/position change and argued that the Complaint should be dismissed because the Civil Service Commission has already decided a similar issue regarding Aceti; because the Charging Party has since been reemployed in his full-time position; and, because the parties reached a new agreement which allegedly encompassed a settlement of the instant matter.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 1, 1984. The Authority's Answer was received on March 13, 1984. A hearing was then held on August 8, 1984 in Newark, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. ^{2/}

After the hearing was opened the Authority moved to dismiss the Complaint for three reasons. First, it argued that the

1/ (continued)
tiate 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."

2/ The delay between the filing of the Charge and the issuance of Complaint occurred partly because of the need to wait for the Civil Service decision regarding Aceti, and partly because of a change in Commission personnel responsible for the issuance of complaints.

Upon issuance of the Complaint the hearing was originally scheduled for June 1984, however, pursuant to the parties' requests for postponement to attempt to settle the matter, the hearing was not conducted until August 1984.

Charge in this matter which was filed on June 14, 1982 was outside the six months statute of limitations as provided for in the Act at 34:13A-5.4(c). The Authority contended that the State Supreme Court's decision in Kaczmarek v. N.J. Turnpike Authority and N.J. Turnpike Authority Employees Union Local 194, IFPTE, 77 N.J. 329, 4 NJPER 368 (¶4168 1978), which liberally interpreted the Act's statute of limitations, was distinguishable from the instant matter. Second, the Authority argued under the single controversy doctrine and relying upon Hackensack v. Winner, 82 N.J. 1, 6 NJPER 124 (¶11067 1980), that the instant Complaint be dismissed because the Civil Service Commission already conducted a hearing regarding Aceti's layoff and concluded that the layoff or position change was lawfully based upon economic reasons. Finally, the Authority argued for dismissal relying upon the Supreme Court's test in Township of Bridgewater v. Bridgewater Public Works Association, 95 N.J. 235 (1984), and alleging that the Charging Party did not establish a prima facie case in the Civil Service matter, but even if he did, that the Authority proved that the layoff was based upon economic considerations. The Charging Party opposed the Motion, and I reserved any decision until the record was completed.

The Charging Party argued orally at the close of the hearing, and the Authority filed a post-hearing brief which was received on October 19, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the oral argument and post-hearing brief, the matter is appropriately before the Commission by its designated Hearing Examination for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The Jersey City Housing Authority is a public employer within the meaning of the Act and is subject to its provisions.

2. Anthony Aceti is a public employee within the meaning of the Act and is employed by the Authority.

3. The record shows that 75% of the Charging Party's salary was derived from funds obtained through the U. S. Department of Housing and Urban Development ("HUD"), and the remaining 25% was obtained from the Authority's regular budget. (Transcript "T" p. 196). By letter dated February 10, 1981 (Exhibit R-3) the Authority's Executive Director, Robert Rigby, notified a HUD official of the Authority's need for supplemental subsidies to fulfill its obligations. The HUD official responded on April 22, 1981 and indicated that HUD could not authorize payment of the Authority's full subsidy, and he therefore recommended that the Authority make substantial supervisory and service level cuts.

On April 30, 1981 (Exhibit R-4) Rigby advised HUD that he would not initiate such drastic cuts at that time but would draw on the Authority's operating reserves for as long as possible.

However, by October 20, 1981 the Authority, as a direct result of its economic difficulties, posted a notice to all employees (Exhibit R-1) informing them of the Authority's financial situation and of the need for layoffs, and advising them of their Civil Service rights. On that same day the Authority advised the

Charging Party that for reasons of efficiency he was laid off from his position effective December 4, 1981 (Exhibit C-1N). That letter advised Aceti that the layoff was not related to his performance, and it further advised him of his Civil Service right to appeal the action. ^{3/}

Subsequently, on October 27, 1981 the Charging Party appealed his layoff to Civil Service, and on that same day he sent a letter (Exhibit C-1P) to his union, the International Service Workers of America ("Union") asking it to appeal his layoff because he alleged that the layoff was based on his union activities.

On November 16, 1981 Aceti again wrote to the Union regarding its alleged failure to provide assistance. That letter (Exhibit C-10) provides as follows:

As I have not, as yet, received any response from you, nor any representative of the union concerning the request for legal representation, I must assume that I must seek counsel on my own, in contesting my pending dismissal from the Housing Authority.

I would request that, at the very least, the union file a formal protest with the Housing Authority and with Public Employees Relations Commission. (PERC) Any such correspondence would be appreciated.

Please accept this as my formal resignation as a trustee of the union as well as representative to the Negotiating Committee in the upcoming contract renewal. I feel that, in view of the lack of response from the union and others, I will require my full time and effort to preserve my position as an employee of the Housing Authority.

Subsequent to C-10 Aceti obtained his own legal counsel to assist him regarding the layoff (T pp. 87-88). Then on November 30, 1981 (Exhibit CP-1) the Union informed Aceti that it too

^{3/} Aceti admitted that he was unaware of how much money was in the budget to do particular jobs (T pp. 132-133).

opposed his layoff and had referred the matter to their legal counsel and invited Aceti to contact the Union's attorney regarding the matter. However, Aceti admitted that he did not avail himself of that opportunity because he already had his own attorney (T p. 89).

The evidence also shows that on or about November 30, 1981, Stanley Rotepel, the Union's Chief Shop Steward and Vice President, telephoned the Charging Party and told him he would file a grievance and a Charge with the Commission concerning his layoff (T pp. 39-40). Aceti believed the matter had been placed before the Commission until May of 1982 when he called the Commission and was advised nothing had been filed (T pp. 42-43, 92).

On December 4, 1981 Aceti's full-time position was eliminated and he was offered and accepted a part-time position. In addition to eliminating Aceti's full-time position at that time, the Authority, through over 30 personnel actions, saved a projected \$473,754 (Exhibit J-1). Included in those personnel actions was the elimination of over 20 positions which resulted in the layoff of at least four people in addition to Aceti.

On May 5, 1982, a Civil Service hearing was conducted regarding Aceti's layoff from which a decision was issued on June 17, 1982 (Exhibit C-3). The Administrative Law Judge ("ALJ") found that Aceti was laid off due to economic reasons. However, it did not appear from that decision that the ALJ was aware of or considered the unfair practice issues that were raised herein. On August 4, 1982, the Civil Service Commission adopted the ALJ's recommendation.

Finally the Charging Party did not return to full-time

employment with the Authority until September 1983.

4. During the course of these proceedings the Charging Party argued that he has been harassed by the Authority because of his union activities, and that the Authority, and his Union, acted together to harass him and cause his layoff. The record shows that Aceti was first employed by the Authority in 1974, but did not become active in the Union until March of 1980 at which time he was elected a Union trustee (T pp. 44-46). The record shows that prior to March 1980 Aceti received good evaluations.

On March 20, 1980 (Exhibit C-1D) a carpenter foreman recommended that Aceti be disciplined for failing to perform required tasks. Aceti denied any wrongdoing on April 20, 1980 (Exhibit C-1E). Subsequently, on September 29, 1980 Aceti received two warnings for disobedience (Exhibits C-1G and C-1H), and the following day the carpenter formen issued another written criticism of Aceti's behavior (Exhibit C-1M). Aceti responded to those warning notices on October 14, 1980 (Exhibit C-1F) and denied any wrongdoing.

Aceti received another warning notice on April 16, 1981 (Exhibit C-1J) which he responded to on April 28, 1981 (Exhibit C-1I). On May 1, 1981 (Exhibit C-1K) Aceti contested his evaluation, and on August 28, 1981 (Exhibit C-1L) Aceti complained about the actions of his foreman in disclosing his salary and benefits to another union.

The record further shows that sometime after Aceti became a trustee he joined with certain other union officials and unit members in filing a lawsuit against the Union President, Ralph Perfetto, to remove him from his Union position allegedly because

he was not running the Union properly (T pp. 51, 62). Aceti was joined in the suit against Perfetto by Stanley Rotepel (T pp. 39, 55). The Charging Party alleged that the Authority knew that he had joined in the suit against Perfetto, and he alleged that the Authority and Union conspired to harass him because of his participation therein. However, other than alleging collusion based upon his own feelings, Aceti could not provide any reliable evidence of the same (T pp. 60-61, 128-129). ^{4/}

5. The Authority argued that the Charging Party could not pursue the Charge herein because the Union and Authority agreed in their collective agreement (Exhibit R-5) to give employees an option, and that Aceti elected his option to have his layoff reviewed by Civil Service. The pertinent part of that clause, Article 4 Section C (Step Four) (2) provides as follows:

2. However, no arbitration hearing shall be scheduled sooner than thirty (30) days after the final decision of the Executive Director and until both the aggrieved and the Chief Shop Steward have executed affidavits indicating that no application to Civil Service has been made. In the event the aggrieved elects to pursue his Civil Service remedies, the arbitration hearing shall be cancelled and the matter withdrawn from arbitration.

However, regardless of the wording of that clause, there was no language in R-5 to suggest that an individual (or the Union) waives his/her right (assuming such a waiver were legal) to file charges under the Act.

^{4/} The only information the Charging Party could offer to support his allegation of collusion was that when he resigned from the Union trustee position the alleged harassment stopped (T p. 76). That is only circumstantial evidence and is not enough to prove collusion or any other violation herein.

Analysis

The Motion to Dismiss

In Kaczmarek v. N. J. Tpk. Auth., supra, the Supreme Court clearly enunciated a preference toward a liberal interpretation of the six-month statute of limitations period set forth in the Act. The Court held that:

...it would be derelict for the Court to apply strictly and uncritically a statutory period of limitations without considering conscientiously the circumstances of the individual case....
77 N.J. at 338.

and it went on to say:

...the Legislature, by its very choice of expression, evinced a purpose to permit equitable considerations to be brought to bear. 77 N.J. at 339.

The Court continued its analysis by suggesting that a Charging Party who was "prevented" from filing timely, and who otherwise did not sleep on his rights, should not be barred from proceeding before the Commission. 77 N.J. at 340-341.

The instant facts show that Aceti was aware of his rights before the Commission shortly after he received his layoff notice; he specifically asked his Union to file a charge with the Commission regarding his layoff as early as November 16, 1981; the Union responded that it was referring the matter to its attorney; and finally, a Union official told him in late November-early December 1981 that he would file a charge with the Commission on his behalf. Thus, it is clear that Aceti did not sleep on his rights, and it is equally clear that Aceti had good reason to believe that the Union would file the charge. But since the Union did not file the charge, Aceti was, at the very least, "prevented," in a certain respect, from filing the charge himself as early as November 16,

1981. Although Aceti may have hired his own attorney in late November-early December 1981, it appears that he detrimentally relied upon Rotepel's assurances that the Union would file a charge. Consequently, under all of the circumstances I believe the Charge was timely filed. ^{5/}

With regard to the single controversy doctrine issue, it appears from a review of the Civil Service decision regarding Aceti that the unfair practice issues raised before this Commission were not considered by Civil Service. That is a marked distinction from Hackensack v. Winner, supra, where Civil Service specifically held that there was no discrimination based upon union activities. 82 N.J. at 11. However, the issue does not end there because the record shows that the same facts that were presented before Civil Service regarding the Authority's economic reasons for Aceti's layoff were presented herein. Civil Service found that the layoff was based upon economic considerations. Under the Hackensack rationale I am bound to accept the finding that the layoff was based on economic considerations, and when combined with the business justification standard established in Bridgewater, supra, I must, at least in theory, sustain the Motion to Dismiss because even if a prima facie showing of a violation was established, the Charge would be dismissed because the Authority demonstrated that the layoff would have occurred because of economic reasons.

^{5/} By finding that the Charge was timely in part because the Union did not file the same, I am not finding, nor do I even mean to suggest that the Union violated the Act. The Charging Party did not file a charge against the Union and the facts may not be complete with respect to the Union's involvement herein or lack thereof. Rather, I am merely crediting, for purposes of the statute of limitations issue, Aceti's testimony showing his reliance upon the Union to file the charge as his reason for not filing the charges himself at an earlier time.

The Merits

Notwithstanding the above finding, and even when the matter is considered entirely on the merits, I find that the Charging Party failed to show by a preponderance of the evidence that he was harassed or laid off because of his union activities. Moreover, the Charging Party did not, in my estimation, even prove a prima facie case which would require the application of the Bridgewater standards.

First, even if the Charge was filed as early as October 20, 1981, the date Aceti was notified of his layoff, all of the events in 1980 are still well outside the statute of limitations period, and even C-1J, the April 16, 1981 warning notice, would be outside the statute of limitations period. But even if C-1J were considered, it does not appear to be based on Aceti's union activities.

Second, most of the events or incidents that are complained of which are within the statute of limitations period are addressed against the Union and cannot be the basis of a charge against the Authority. Moreover, there was insufficient evidence of collusion between the Authority and Union to prove a violation herein.

Third, Aceti's letter of May 1, 1981 (C-1K) contesting his earlier evaluation is nothing more than his response to an evaluation which occurred beyond the statute of limitations period and it, therefore, does not establish a violation of the Act. In addition, the content of Aceti's letter of August 28, 1981 (C-1L) concerning alleged statements by Authority representatives is not supported by any record evidence and is therefore insufficient to establish a violation herein.

Finally, even assuming arguendo that the Charging Party established a prima facie violation of the Act, the economic basis for Aceti's layoff is well documented and is sufficient to satisfy the second part of the Court's Bridgewater test.

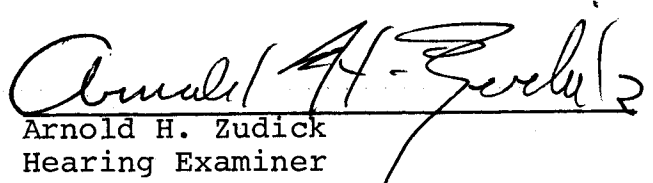
Accordingly, based upon the entire record and the above analysis, I make the following:

Conclusions of Law

The Authority did not violate N.J.S.A. 34:13A-5.4(a) (1), (2), (3) or (5) by laying off Anthony Aceti from a full-time position.

Recommended Order

I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.


Arnold H. Zudick
Hearing Examiner

Dated: November 7, 1984
Trenton, New Jersey