P.E.R.C. NO. 88-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CI-H-87-81

ROBERT L. DOHERTY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Robert L. Doherty against the City of Newark. The charge alleged the City violated the New Jersey Employer-Employee Relations Act when it denied Doherty's request, after he lost a union election, for deferral of accumulated vacation and personal leave. Doherty alleged this denial was in retaliation for his union activity. The Commission, in agreement with a Hearing Examiner, finds that Doherty did not present evidence that the City denied his request because of his union activity.

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Appearances:

For the Respondent, Glenn A. Grant, Corporation Counsel

For the Charging Party, Robert L. Doherty, pro se

DECISION AND ORDER

On June 11, 1987, Robert L. Doherty filed an unfair practice charge against the City of Newark ("City"). The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (4),[1/] when it denied his request, after he lost a union election, for deferral of accumulated vacation and

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; (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."

personal leave. The charge alleges this denial was in retaliation for his activity as vice-president and president of the Newark Professional Fire Officers Association, Local 1860, International Association of Fire Fighters.

On August 26, 1987, the Director issued a Complaint and Notice of Hearing. On September 24, the City submitted its Answer, relying on previous statements of position asserting that it denied Doherty's request to defer accumulated time under a uniform policy and the collective negotiations agreement.

On October 7 1987, Hearing Examiner Alan R. Howe conducted a hearing. The charging party testified. At the conclusion of his case, the City moved to dismiss. After argument, the Hearing Examiner granted the motion. On October 16, 1987, he issued his recommended decision. H.E. No. 88-19, 13 NJPER ___ (¶_____ 1987). The Hearing Examiner found that although Doherty had established that the City knew of his extended protected activities, he had produced no evidence that the City was hostile towards these activities.

On November 18, 1987, after receiving an extension, Doherty filed exceptions. He excepts to the denial of his motion that the Complaint's allegations be accepted as true and the finding that there was insufficient evidence of hostility.

On December 4, 1987, the City submitted a response. It contends that its position statement submitted as an Answer responded to Doherty's allegations and that the Hearing Examiner properly granted the motion to dismiss.

The Hearing Examiner's findings of fact (pp. 3-5) are accurate. We adopt and incorporate them here.

Doherty's motion to have the Complaint's allegations be deemed true is meritless. N.J.A.C. 19:14-3.1 provides, in part:

> The respondent shall specifically admit, deny or explain each of the charging party's allegations set forth in the complaint, unless the Respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegations not specifically denied or explained, unless the respondent shall state that he is without knowledge shall be deemed to be admitted to be true and shall be so found by the Commission unless good cause to the contrary is shown....

Here, the City specifically responded to each allegation. On September 24, 1987, the City requested that its August 4 position statement be accepted as an Answer. The City had also submitted a position statement on July 17. The City stated that it did not grant the deferral request, but explained its reasons. Despite its informality, the position statement is an acceptable Answer since it adequately set forth the City's defense. Compare Passaic Cty., P.E.R.C. No. 88-64, 14 NJPER ___ (¶_____ 1987).

We now consider whether the Hearing Examiner properly granted the motion to dismiss. The test is whether:

> "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in...favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and affording him the benefit of all inferences which can reasonably and legitimately be deduced therefrom,

> reasonable minds could differ, the motion must be denied. [Dolson v. Anastasia, 55 N.J. 2, 5 (1969); citations omitted]

See also Old Bridge Bd. of Ed., P.E.R.C. No. 88-69, 14 NJPER ___ (¶_____ 1988); Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Essex Cty. Educational Services Comm'n, P.E.R.C. No. 86-78, 12 NJPER 13 (¶17004 1985). The precise issue is whether Doherty presented evidence which, affording him the benefit of all reasonable inferences, could sustain a judgment that the City unlawfully denied his request because of his union activity. We conclude he did not.

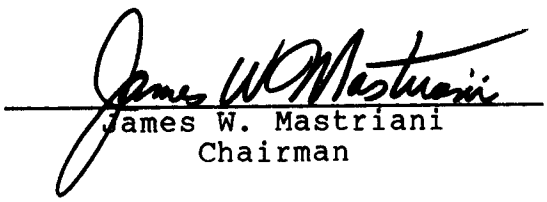
Doherty contends the following evidence shows discrimination: (1) upon becoming union vice-president in 1979, he was not excused from duty to perform union duties until an arbitrator found that this failure violated the contract; (2) he was assigned to be a firefighter for one day until he threatened to file a grievance, and (3) a City attorney, in 1980, threatened not to attend arbitration sessions if Doherty was present. This evidence is insufficient to survive this motion to dismiss. One or two contractual violations which did not involve an anti-union animus finding, which occurred over seven years before the denial do not establish an inference of anti-union animus. Nor does the attorney's statement: it was based on her perception that Doherty, as a firefighter, had a conflict of interest in representing fire superiors. Further, there is no evidence tying that alleged animus to the official who denied Doherty's request. Nor is there any evidence that Doherty was treated differently because of his union

status. To the contrary, the denial was authorized by the City's agreement with the union.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Wenzler voted in favor of this decision. None opposed. Commissioner Smith abstained.

DATED: Trenton, New Jersey
March 18, 1988
ISSUED: March 21, 1988

H.E. NO. 88-19

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CI-H-87-81

ROBERT L. DOHERTY,

Charging Party.

SYNOPSIS

A Hearing Examiner, in granting a Motion to Dismiss at the conclusion of the Charging Party's case, recommends that the Commission find that the Respondent City did not violate §§5.4(a)(1), (3) or (4) of the New Jersey Employer-Employee Relations Act when the Chief of it Fire Department refused a request by the Charging Party to defer accumulated vacation and personal leave to a future date. The Charging Party established only that he had engaged in protected activity as a Union officer from 1979 to 1986 and that the City knew of this activity. However, he failed to satisfy the Bridgewater requisite of at least a "scintilla" of evidence of hostility or anti-union animus on the part of some representative of the Respondent toward him. Thus, the grant of the Respondent City's Motion to Dismiss was entirely in order: Lyndhurst Bd. of Ed., P.E.R.C. No. 87-139, 13 NJPER 482 (¶18177 1987).

A Hearing Examiner's decision to dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten days from the date of the decision to request review by the Commission or else the case is closed.

H.E. NO. 88-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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CITY OF NEWARK,1/

Respondent,

-and- Docket No. CI-H-87-81

ROBERT L. DOHERTY,

Charging Party.

Appearances:

For the City of Newark
Glenn A. Grant, Corporation Counsel
(JoAnne Y. Johnson, Esq.)

For the Charging Party
Robert L. Doherty, pro se

HEARING EXAMINER'S DECISION AND ORDER
ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 11, 1987 by Robert L. Doherty (hereinafter the "Charging Party" or "Doherty"") alleging that the City of Newark (hereinafter the "Respondent" or the "City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that, as a result of Doherty's activities as Vice-President and President

1/ As amended at the hearing.

of the Newark Professional Fire Officers Association, Local 1860, International Association of Fire Fighters, he was, after his defeat as President in October 1986, discriminatorily denied a request for deferral of accumulated vacation and personal leave by the Fire Chief, Stanley J. Kossup on December 11, 1986; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) of the Act.2/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 26, 1987. Pursuant to the Complaint and Notice of Hearing, a hearing was held on October 7, 1987 in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case, the Respondent made a Motion to Dismiss on the record and the Hearing Examiner, after hearing oral argument, granted the Motion on the record as to the allegations that the Respondent had violated the subsections of the Act, supra. The

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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; (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."

parties were advised that a written Decision and Order of the Hearing Examiner would follow.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and upon the record made by the Charging Party only, and after consideration of the oral argument of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the record made by the Charging Party only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The City of Newark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Robert L. Doherty is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. The parties stipulated that the contractual provisions regarding Doherty's claim for deferral, infra, involve Article 6, §6.02--"Compensatory Time" and Article 8, §8.01--"Vacation" of the 1984-86 collective negotiations agreement (J-1).

4. From July 1979 to October 14, 1986, Doherty served continuously as Vice-President and then President of the Newark Professional Fire Officers Association, Local 1860, International Association of Fire Fighters, which has been and continues to be the recognized collective negotiations representative for a unit of superior fire officers in the City.

5. Due to the demands of his union activities, Doherty did not use most of the vacation and personal leave that he was entitled to.

6. On September 9, 1986, Doherty was defeated in the union election for the office of President and returned to duty with the Fire Department of the City on October 15, 1986.

7. On or about December 11, 1986, Doherty in a memo to Fire Chief Stanley J. Kossup requested deferral of 16 days of his 1986 vacation, to be taken in 1987 or as terminal leave in 1990, and, further, the deferral of vacation and personal leave that he had accrued prior to 1986 to be taken as terminal leave.

8. Subsequent to December 11, 1986, Doherty received a copy of his leave deferral request, supra, which had been denied by Kossup.

9. Thereafter, Doherty met with Kossup and was informed by Kossup that he had discussed Doherty's deferral request with Director Coleman and that deferral of all vacation and personal leave prior to 1986 was denied and that Doherty was to take his 1986 vacation leave prior to the end of the 1986 vacation cycle, i.e., as of February 1, 1987.

10. The current collective negotiations agreement between the parties, and the Newark Fire Department Rules and Regulations, contain procedures for vacation leave, personal leave, sick leave, injury leave and funeral leave.

11. Since Doherty became an officer of the Union in July 1979, the City has never requested that he follow the contractual procedures for the taking of vacation and personal leave.

12. Doherty, as a Union Officer, did not report to anyone in the City regarding the submission of vacation or personal leave requests.3/

13. The denial by the City to Doherty of accrued leave has been and is common knowledge in the City's Fire Department.

14. Doherty testified that he never filed a grievance under the collective negotiations agreement (J-1, supra) because, according to Doherty, the accumulation of leave for the Vice-President and President of the Union is "extra-contractual." Doherty testified that but for this fact he would have filed a grievance under the collective negotiations agreement.

15. As President of the Newark Firemen's Union from June 1974 to May 1977 and as Vice-President and President of the Newark Professional Fire Officers Association, Local 1860, International Association of Fire Fighters, from July 1979 to October 14, 1986, Doherty has filed affidavits, petitions and given information and testimony under the Act.

3/ Doherty alleges and testified at the hearing regarding ¶'s 10-12 of the Unfair Practice Charge (C-1), which the Hearing Examiner deems totally irrelevant to the resolution of the underlying Unfair Practice Charge and, thus, the substance of the allegations and/or testimony in support thereof is omitted herein.

DISCUSSION AND ANALYSIS

The Applicable Standard On a Motion To Dismiss.

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

Additionally, there is involved in the instant case the necessity to include in the above analysis the decision by the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) since the thrust of the Association's charge centers on the allegation that the Respondent violated §§5.4(a)(1), (3) and (4) of the Act.

In Bridgewater, the Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases where the following requisites are utilized in assessing employer motivation: (1) The Charging Party must make a prima facie showing sufficient to support

an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to terminate; and (2) once this is established, then the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Court in Bridgewater further refined the above test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity, i.e., manifested anti-union animus (95 N.J. at 246).[4/]

The Respondent City's Motion To Dismiss Is Granted Since The Charging Party Has Failed To Adduce Even A Scintilla Of Evidence As To Hostility Within The Meaning Of §§5.4(a)(1), (3) Or (4) Of The Act.

The Hearing Examiner is persuaded that when the testimony of Doherty, the only witness for the Charging Party, is viewed most favorably to him, he has established only that (1) he was engaged in the exercise of extended protected activity between July 1979 and October 1986, during which time he served either as Vice-President or President of the Newark Professional Fire Officers Association, Local 1860, International Association of Fire Fighters, where he had occasion to administer contracts, participate in arbitrations, file affidavits and petitions and give testimony under the Act; and (2)

4/ The Bridgewater analysis is applicable to alleged violations of §§5.4(a)(1), (3) and well as to (4) of the Act: Hunterdon Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 87-150, 13 NJPER 506, 507 (¶18188 1987).

that the Respondent City necessarily knew of Doherty's exercise of the foregoing protected activities. However, Doherty has failed to adduce any evidence whatever that the Respondent City was hostile to or manifested anti-union animus toward him in his exercise of these protected activities.

In so concluding that there was a total absence of hostility or animus toward Doherty, the Hearing Examiner has considered carefully the allegation and proofs adduced under ¶11 of the Unfair Practice Charge. It was there alleged and proved by the testimony of Doherty that at a contract arbitration session in May 1980, the City's attorney threatened not to attend future arbitration sessions if he was present since the City was concerned about a conflict of interest. Even assuming that this demonstrated some evidence of hostility or animus, although not altogether clear, the Hearing Examiner would have to conclude that it is so remote in time that it is devoid of any probative value as to what Chief Kossup did in December 1986 with respect to Doherty's request for deferral of vacation and personal leave.

Thus, Doherty has met only two of the three requisites enunciated in Bridgewater for establishing a prima facie case. As noted previously, he has established protected activity and City knowledge but he has failed to adduce even a "scintilla" of evidence that the City was hostile to his exercise of protected activities between July 1979 and October 1986.

The Charging Party having failed to adduce even a "scintilla" of evidence of hostility or animus by the City toward

his exercise of protected activities as Vice-President and President of the Union, the Hearing Examiner must conclude that the allegations that the Respondent City violated §§5.4(a)(1), (3) or (4) of the Act be dismissed.[5/]

* * * *

Accordingly, upon the foregoing, and upon the testimony adduced in this proceeding by Robert L. Doherty only as the Charging Party, the Hearing Examiner makes the following:

ORDER

Upon the entire record adduced by the Charging Party, the Hearing Examiner concludes that the Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (4) and hereby grants the Respondent City's Motion to Dismiss. The Complaint is, therefore, dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: October 16, 1987
Trenton, New Jersey

5/ For other cases where a motion to dismiss was granted by the undersigned Hearing Examiner at the conclusion of the Charging Party's case, see: Essex County College, H.E. No. 88-5, 13 NJPER ___ (¶_____ 1987), P.E.R.C. No. 88-32, 13 NJPER (¶_____ 1987); Lyndhurst Bd. of Ed., H.E. No. 87-56, 13 NJPER 285 (¶18119 1987), P.E.R.C. No. 87-139, 13 NJPER 482 (¶18177 1987); and State of New Jersey (Public Defender), H.E. No. 85-48, 11 NJPER 425 (¶16147 1985), P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985), aff'd App. Div. Dkt. No. A-2435-85T6 (1987).