

P.E.R.C. NO. 79-82

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SHREWSBURY,

Respondent,

-and-

Docket No. CI-79-12-36

RAYMOND MASS, CHIEF OF
POLICE,

Charging Party.

SYNOPSIS

An Unfair Practice Charge was filed by the Chief of Police of Shrewsbury alleging a violation of the Employer-Employee Relations Act. Several subsections of that Act were claimed to have been violated. The Director had refused to issue a complaint with respect to some of these charges and, upon appeal, the Commission, in a previous decision, had upheld the Director's refusal to issue a complaint with respect to those matters. See D.U.P. No. 79-12, 5 NJPER 13 (¶10007 1979), affirmed P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979). A hearing was held with respect to the remaining aspects of the charge and the Commission, in agreement with the Hearing Examiner, dismissed the remaining allegations against the employer. Accordingly, the complaint was dismissed in its entirety.

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Appearances:

For the Respondent, Reussille, Cornwell, Mausner
& Carotenuto (Martin M. Barger, of Counsel)

For the Charging Party, Douglas J. Widman, Esq.

DECISION AND ORDER

On August 28, 1978 an Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") by Raymond Mass, Chief of Police (the "Chief") alleging that the Borough of Shrewsbury ("Borough") had violated the New Jersey Employer-Employee Relations Act (the "Act"). A Complaint and Notice of Hearing was issued as to some of the allegations, but the Director of Unfair Practices refused to issue a Complaint as to other aspects of the charge.^{1/} After a hearing held on March 12 and 13, 1979, the Commission Hearing Examiner issued his Recommended Report and Decision

1/ The Director determined that one man units are inappropriate under the Act, DUP No. 79-12, 5 NJPER 13 (¶10007 1979) and no complaint was issued on negotiations issues, covered by N.J.S.A. 34:13A-5.4(a)(2), (5) and (6). DUP No. 79-12 was affirmed by the Commission, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979).

on March 23, 1979, designated as H.E. No. 79-37, a copy of which is attached and made a part hereof. Exceptions were filed by the Chief on April 5, 1979.

The Hearing Examiner recommended dismissal of the Complaint concluding that the Borough's actions in commissioning an independent study of the police department and issuing directives to the Chief based on that study were management prerogatives, thereby not concerning terms and conditions of employment. We have considered the exceptions and find them to be without merit.

It is urged that the reports arising out of the study were directed specifically at the Chief. Suffice it to say that an employer may legitimately be concerned with all aspects of its operations and an action aimed at a specific employee may only be illegal if improperly motivated. The only allegation is that it was undertaken in retaliation for the Chief's attempting to negotiate a contract, and that is not a protected activity for a purported one-man unit. PERC No. 79-42, supra.

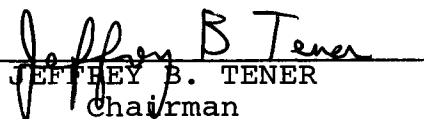
Assuming arguendo that the Chief is a public employee, the record indicates that the employer did all that is required regarding the grievance hearing granted to the Chief. Twp. of West Windsor v. PERC, 78 N.J. 98 (1978) established more results only from a negotiated agreement, and as there was no majority representative with which to negotiate herein, the Borough had no duty to follow any particular procedure. Therefore, the Hearing Examiner had no need to make findings of fact as to the form of the grievance hearing beyond that the Chief was allowed to present his grievance.

Having determined that the independent study was legitimate and not illegally motivated, there was also no need for the Hearing Examiner to determine whether the directives were "demeaning" to the Chief. Even assuming that they were, no basis was ever presented by the Chief for concluding that a violation of the Act occurred. The Hearing Examiner correctly noted that an action must adversely affect terms and conditions of employment to be a violation of the Act, and characterization of something as "demeaning" does not meet the burden of proof to show a violation either of §(a)(1) or (a)(3). There was no evidence to support the alleged violation of §(a)(4). All aspects of the charge were considered and rejected by the Hearing Examiner, and the record and applicable precedent warrants affirmance.

ORDER

For the foregoing reasons and upon the entire record herein, it is hereby ORDERED that the complaint is dismissed in its entirety.

BY ORDER OF THE COMMISSION


JEFFREY B. TENER
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Hipp, Newbaker and Parcels voted for this decision. None opposed.

DATED: Trenton, New Jersey
April 26, 1979
ISSUED: May 1, 1979

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

In the Matter of

BOROUGH OF SHREWSBURY,

Respondent,

- and -

Docket No. CI-79-12-36

RAYMOND MASS, CHIEF OF POLICE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the Chief of Police against the Borough alleging, inter alia, that the Borough interfered with, restrained and coerced the Chief of Police in his right to negotiate and file grievances, and by having conducted a confidential survey by the Wackenhut Corporation to discredit the Chief and/or coerce him, and thereafter by issuing demeaning and onerous directives against the Chief which affected his terms and conditions of employment, etc. The Hearing Examiner concluded that the Borough was acting within the scope of its governmental functions and managerial prerogatives when it commissioned the Wackenhut Corporation to study and survey the Police Department and make recommendations. Thereafter, when the Borough issued 19 directives to the Chief of Police, based upon the Wackenhut Report, it was also exercising its managerial prerogative as to which the Chief of Police had no standing to resist the implementation of the 19 directives and request that their implementation be stayed.

The Public Employment Relations Commission on January 17, 1979 had issued a decision in this matter precluding the prosecution by the Chief of Police of unfair labor practice charges alleging a refusal by the Borough to negotiate with the Chief of Police and reducing an agreement to writing and signing it on the ground that the Chief of Police as a one-man unit is not appropriate for collective negotiations and has no standing to negotiate collectively under the New Jersey Employer-Employee Act, as amended: P.E.R.C. No. 79-42, 5 NJPER 45.

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.

STATE OF NEW JERSEY
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Appearances:

For the Borough of Shrewsbury
Reussille, Cornwell, Mausner & Carotenuto, Esqs.
(Martin M. Barger, Esq.)

For Raymond Mass, Chief of Police
Douglas J. Widman, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 28, 1978 by Raymond Mass, Chief of Police (hereinafter the "Charging Party" or the "Chief") alleging that the Borough of Shrewsbury (hereinafter the "Borough" or the "Respondent") had 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 the Borough, inter alia, interfered with, restrained and coerced the Chief in his right to negotiate and to file a Notice of Impasse and grievances, and by having conducted a confidential survey by an independent security agency to discredit the Chief and/or coerce him, and thereafter by refusing to negotiate in good faith and by issuing demeaning and onerous directives against the Chief which affected his terms and conditions of employment, all of which is alleged to constitute domination and interference with the Chief as an employee organization and discrimination against the Chief with respect to his terms and conditions of employment and, further, by discriminating against the Chief because he filed a Notice of Impasse with the Commission and, finally, by refusing to reduce a negotiated agreement to writing

and sign such agreement, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (6) of the Act. ^{1/}

It appearing that certain of 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 December 7, 1978 with respect to alleged violations of Subsections (a)(1), (3) and (4) of the Act only. ^{2/} Pursuant to the Complaint and Notice of Hearing, hearings were held on March 12 and 13, 1979 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the hearing both parties argued orally and waived the filing of post-hearing briefs.

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 after consideration of the oral argument of the parties, the matter is

1/ These Subsections prohibit employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

"(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.

"(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ Contemporaneously, on December 7, 1978, the Director of Unfair Practices refused to issue a Complaint with respect to alleged violations of Subsections (a)(2), (5) and (6) of the Act principally on the ground that the Chief as an individual lacked standing as a one-man unit: 5 NJPER 13; (Exhibit C-3). The Director of Unfair Practices relied on his earlier decision in Borough of Jamesburg, 4 NJPER 398 (1978). The Charging Party appealed the decision of the Director of Unfair Practices and it was affirmed by the Commission on January 17, 1979, P.E.R.C. No. 79-42, 5 NJPER 45 (Exhibit C-4).

appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

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

2. Raymond Mass, Chief of Police, is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Raymond Mass has been Chief of Police for 21 years. Originally he was in the collective negotiations unit of PBA Local 39, which has had a contract with the Borough for several years. Under date of May 19, 1976 the Borough Clerk informed PBA Local 39 that the Borough Council had decided that the Chief must be removed from the PBA Local 39 collective negotiations unit because of the grievance procedures in the Police Ordinance (J-2). Accordingly, the 1976-77 agreement between PBA Local 39 and the Borough was amended to reflect the fact that the Chief was not in the collective negotiations unit of PBA Local 39 (J-1).

4. Under date of October 10, 1977 the Borough and the Chief entered into a collective negotiations agreement covering the Chief as a one-man unit, which was effective during the term January 1, 1976 through December 31, 1977 (CP-4). This document was received in evidence for historical purposes only inasmuch as the Complaint issued in this matter in no way pertained to collective negotiations since a one-man unit was deemed inappropriate. ^{3/}

5. At the instance of Robert G. Minehardt, Chairman of the Police Committee of the Borough Council, it was decided by the Police Committee that there existed a need for an outside independent study and evaluation of the operations of the Borough Police Department. At a meeting of the Borough Council on April 10, 1978, ^{4/} a resolution was adopted authorizing the expenditure of \$3000 for a study

^{3/} An objection to several attempts by the Charging Party to adduce testimony with respect to negotiations for a successor agreement to CP-4, supra, was sustained and, thereafter, counsel for the Charging Party made an offer of proof for the record. It is noted that certain of the minutes of the Borough Council, which were admitted in evidence without objection, make reference to negotiations with the Chief with respect to a successor agreement. However, for purposes of decision, the Hearing Examiner is ignoring any references in the Council minutes to such negotiations.

^{4/} All dates hereinafter are in 1978 unless otherwise indicated.

of the Police Department by the Wackenhut Corporation (CP-14).

6. Under date of April 21 counsel for the Respondent sent a letter to the Wackenhut Corporation containing ten questions which the Police Committee of the Borough Council requested be considered in the study and evaluation by Wackenhut of the Borough Police Department (CP-23).

7. Under date of May 18 Wackenhut consultants Charles E. McCarthy and Douglas D. Weaving submitted their "Special Reports" as a result of their study and evaluation of the Borough Police Department. The Report of Mr. McCarthy addressed itself to the questions submitted to Wackenhut by the Police Committee under date of April 21 (CP-23). The Report of Mr. McCarthy was received in evidence as R-1 and the Report of Mr. Weaving was received in evidence as R-2.

8. Based upon the Report of Mr. McCarthy of Wackenhut (R-1) the Police Committee of the Borough Council drafted 19 directives to the Chief for immediate implementation and the implementation of these directives was approved by the Borough Council on June 12 (CP-15).

9. Under date of June 13 a letter enclosing the 19 directives was sent to the Chief by the Mayor, Joseph F. Dennis, and Mr. Minehardt (CP-1). The Chief acknowledged receiving the letter and directives on June 14.

10. Thereafter the Chief requested of Mr. Minehardt that the directives be rescinded and he requested a copy of the Wackenhut Report (CP-3). Mr. Minehardt refused both requests (CP-5). Under date of June 20 the Chief filed a written grievance with respect to the directives, addressed to Mr. Minehardt, in which the Chief included his comments on the 19 directives, indicating that he could and was complying with seven of them (CP-6).

11. The Chief's grievance was discussed and considered by the Police Committee at a meeting on June 30 and under date of July 5 the grievance was denied (CP-16A). The Chief appealed the adverse decision of the Police Committee (CP-16B) and at the Chief's request a public meeting of the Borough Council was scheduled for July 18 to discuss the grievance. (CP-16E).

12. At the said public meeting counsel for the Respondent outlined the procedures to be followed in hearing the Chief's grievance. The minutes (CP-18) reflect that the Chief and his counsel were permitted to make a presentation of the Chief's grievance with frequent references being made to the Chief's collective negotiations agreement (CP-4). At the conclusion of the public meeting the Council decided to release a copy of the Wackenhut Report to counsel for the Chief.

An answer to the remainder of the grievance was to be provided within 14 days. A request by the Chief to stay the 19 directives in the interim was denied.

13. At the next meeting of the Borough Council on July 24 (CP-20) the Council noted that half of the grievance had been granted inasmuch as a copy of the Wackenhut Report was earlier released to the Chief's counsel. A stay of the implementation of the 19 directives was denied and counsel for the Respondent was requested to advise counsel for the Chief of the action of the Borough Council. This was done by letter dated July 26 (CP-21).

14. Thereafter the instant charge of unfair practices was filed by the Chief on August 28 and nothing material has occurred since that time.

THE ISSUE

Did the Respondent Borough violate Subsections (a)(1), (3) and (4) of the Act when it commissioned the Wackenhut Corporation to do a study and survey of the Police Department and thereafter, based on the Wackenhut Report, issued 19 directives to the Chief, the implementation of which the Borough has refused to stay?

DISCUSSION AND ANALYSIS

Positions of the Parties

At the commencement of the hearing the Hearing Examiner elicited from counsel for the parties their positions on the alleged violations by the Borough of Subsections (a)(1), (3) and (4) of the Act, viewed in the light of the decision of the Director of Unfair Practices (C-3) and the Commission's decision affirming the Director (C-4). The Hearing Examiner noted, with respect to Paragraph one of the charge of unfair practices (C-1), that the Director of Unfair Practices refused to issue a complaint "with respect to those aspects of Section 5.4(a)(1) which arguably could derive from a claimed violation of Section 5.4(a)(2), (5) and (6)." (C-3, p.6).

In response to the foregoing, counsel for the Charging Party, with respect to Subsection (a)(1), stated that this Subsection protects the Chief in his "attempt to negotiate" as well as the processing of a "grievance". Counsel for the Respondent urged that no reference for negotiations can be included within this alleged Subsection violation, but he did concede that a "grievance" could be the subject thereof.

With respect to Subsection (a)(3), counsel for the Charging Party alleged discrimination against the Chief by the Borough with respect to his terms and conditions of employment, namely, the refusal to grant the Chief a raise, the commissioning of the Wackenhut Report and the timely failure to release it to the Chief and, finally, interfering with the Chief's authority. Counsel for the Respondent stated that the Wackenhut Report speaks for itself, as do the 19 directives, and that there has been no discrimination by the Borough against the Chief with respect to his terms and conditions of employment.

Finally, with respect to the Subsection (a)(4) allegation, counsel for the Charging Party urged that the filing by the Chief of the Notice of Impasse and his signing of a grievance together with the Borough's filing of a "CU" (Clarification of Unit) petition brought the Chief within this Subsection. Counsel for the Respondent countered that the "CU" was filed by the Borough with respect to the Chief's alleged status as a managerial executive and that this was abandoned after the Jamesburg decision (footnote 2, supra).

During the course of the hearing counsel for the Charging Party several times urged that the commissioning of the Wackenhut Report and the issuance of the 19 directives to the Chief were "demeaning" to the Chief. This was perceived by counsel for the Charging Party to be a violation of the Act. ^{5/} In his oral argument, at the conclusion of the hearing, counsel for the Charging Party argued that the minutes of a closed meeting of the Borough Council of May 8, 1978 (CP-30) indicate that the Wackenhut Report and the 19 directives were issued by the Borough as a "lever in negotiations" with the Chief, and that this was a violation of the Act without specifying the Subsections involved. Counsel for the Respondent denied any such purpose on the part of the Council and stated that the 19 directives were not demeaning but rather constituted the reasonable exercise of management prerogatives on the part of the Borough.

^{5/} Although contending that the Wackenhut Report and the 19 directives were "demeaning" to the Chief, counsel for the Charging Party did not indicate exactly what Subsections of the Act were involved in this regard. The Hearing Examiner assumes that the Charging Party includes the foregoing within Subsections (a)(1) and (3) of the Chief's charge of unfair practices.

The Respondent Borough Did Not Violate The Act When It Commissioned The Wackenhut Report and Thereafter Issued 19 Directives To The Chief Which It Refused To Stay

As the above Findings of Fact of the Hearing Examiner indicate, the only conceivable issue for disposition herein is the Chief's complaint about the commissioning of the Wackenhut Report and the 19 directives which were issued on the basis of it and the Borough's refusal to stay their implementation. The contention of the Charging Party that the Wackenhut Report and the 19 directives were utilized by the Borough as a "lever in negotiations" is rejected inasmuch as the Commission, in sustaining the Director of Unfair Practices, has precluded the Hearing Examiner from considering any evidence or contentions bearing on "negotiations" between the Chief and the Borough.

The Hearing Examiner will first consider the contention of the Charging Party that the Wackenhut Report and the 19 directives were "demeaning" to the Chief. No precedent has been cited by the Charging Party as to how an action of the Borough, even assuming it "demeaning", can be an unfair practice under the three Subsections of the Act here involved. The Hearing Examiner finds and concludes that, irrespective of whether or not the Chief perceives or proves that an action of the Borough is "demeaning" as to him, such a result cannot conceivably be an unfair practice under any Subsection of Section 5.4(a) of the Act.

Subsections (a)(1) and (3) of the Act involve interference with, restraint and coercion of public employees in the exercise of rights guaranteed to them by the Act and discrimination in regard to terms and conditions of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act. There is no possible interpretation of the rights guaranteed by these Subsections which would permit a finding and conclusion that "demeaning" actions of the Borough as to the Chief constitute a violation as alleged.

The Hearing Examiner further finds and concludes that when the Borough appropriated funds and commissioned a study and survey of the Borough Police Department by the Wackenhut Corporation it was exercising a governmental function or managerial prerogative. So, too, was the promulgation of the 19 directives to the Chief, which were prepared by the Police Committee of the Council and thereafter approved by the Mayor and Council, the exercise of a governmental function or managerial prerogative. The New Jersey Supreme Court has held that such actions on the part of a political subdivision of the State is even beyond the pale of collective negotiations, assuming that a collective negotiation's representative was

herein involved, and clearly does not concern terms and conditions of employment. ^{6/}
 Thus, the Chief obviously had no authority or standing to resist the implementation
 of the 19 directives, or to request a stay of implementation of the directives. ^{7/}

The foregoing findings and conclusions of the Hearing Examiner dispose of
 any contentions that could be made by the Charging Party that Subsections (a)(1) and
 (3) of the Act have been violated. The Hearing Examiner further finds and concludes
 that no evidence was adduced by the Charging Party which could possibly form the basis
 of a violation by the Borough of Subsection (a)(4) of the Act, which is specifically
 limited by its terms to discrimination against an employee because he has "signed or
 filed an affidavit, petition or complaint or given any information or testimony
 under this Act."

For the foregoing reasons, the Hearing Examiner will recommend dismissal
 of the allegations in the Complaint that the Borough has violated Subsections (a)
 (1), (3) and (4) of the Act.

* * * *

Upon the foregoing, and upon the record in this case, the Hearing Examiner
 makes the following:

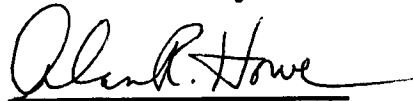
CONCLUSIONS OF LAW

The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(1), (3)
 and (4) when it commissioned the Wackenhut Report and thereafter promulgated 19
 directives to the Chief, the implementation of which it refused to stay.

RECOMMENDED ORDER

The Respondent Borough not having violated the Act, supra, it is HEREBY
ORDERED that the Complaint be dismissed in its entirety.

Dated: March 23, 1979
 Trenton, New Jersey


 Alan R. Howe
 Hearing Examiner

^{6/} See State of New Jersey v. State Supervisory Employees Association 78 N.J. 54,
 67 (1978), citing with approval Dunellen Board of Education v. Dunellen Education
Association, 64 N.J. 17 (1973), Burlington County College Faculty Association v.
Board of Trustees, 64 N.J. 10, 14 (1973) and Lullo v. International Association
of Fire Fighters, 55 N.J. 409, 440 (1970).

^{7/} It is noted that the Chief filed a "grievance" over the implementation of the
 directives, and that this grievance was heard and rejected by the Police Committee
 and thereafter by the Mayor and Council. Assuming arguendo that the Chief had the
 right to present and file such a grievance under the New Jersey Supreme Court's
 holding in Township of West Windsor v. P.E.R.C. et al., 78 N.J. 98, 110, 114 (1978),
 the Borough permitted the Chief to process the grievance up to and including a
 public meeting of the Council although it ultimately denied the Chief's grievance.
 Thus, no violation of the exercise of any rights of the Chief under Subsections
 (a)(1) and (3) of the Act can possibly be found with respect to his right to pre-
 sent and process a grievance.