

P.E.R.C. NO. 80-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF TRENTON,

Respondent,

Docket No. CO-79-127-81

-and-

P.B.A. LOCAL #11 and RICHARD
HOLDER,

Charging Party.

SYNOPSIS

The Commission finds, substantially for the reasons stated by the Hearing Examiner in his Recommended Report and Decision, that the PBA has failed to prove by a preponderance of the evidence that the transfer of Patrolman Richard Holder from the K-9 squad was motivated by his union activities as the recording secretary for the PBA and shop steward for the K-9 squad. Accordingly, the Commission dismisses the unfair practice charge in its entirety.

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Appearances:

For the Respondent, Katz, Bitterman & Dougherty, Esqs.
(Mr. Michael J. Bitterman, of Counsel)

For the Charging Party, Thomas P. Foy, Esquire

DECISION AND ORDER

On November 21, 1978, an Unfair Practice Charge was filed with the Public Employment Relations Commission by P.B.A. Local #11 and Richard Holder (the "PBA") alleging that the City of Trenton (the "City") had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Union alleges that, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3),^{1/} the City transferred Patrolman Holder from the K-9 squad in direct retaliation for the

^{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. (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."

grievances and other informal complaints which he lodged as a shop steward and the secretary of the PBA.

The charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 19, 1979. A hearing was held on August 13, 14 and 15, 1979, before Edmund G. Gerber, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Both parties chose not to submit post-hearing briefs. On October 5, 1979, the Hearing Examiner issued his Recommended Report and Decision,^{2/} which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. An extension of time to file exceptions was requested by the PBA and granted. Pursuant to that extension, exceptions were filed by the PBA on November 7, 1979.

The Hearing Examiner found that the PBA had failed to prove by a preponderance of the evidence that the transfer of Patrolman Holder from the K-9 squad was due to his union activities. The City maintained that the transfer was made because of a poor working relationship between Holder and his new training supervisor, Sgt. Fontaine, which resulted from Holder's resistance to the

^{2/} H.E. No. 80-12, 5 NJPER ____ (¶ ____ 1979).

sergeant's different philosophy of dog training. In reaching the conclusion that the PBA had not sustained its burden of proof, the Hearing Examiner noted that the key element of the case rested on an evaluation of the credibility of Fontaine versus that of Holder. The Hearing Examiner did not find Holder's testimony of his union activities to be incredible, but he also found Fontaine's testimony on Holder's unsatisfactory performance to be credible. He also noted that Fontaine's testimony regarding Holder's performance was supported by independent evidence.

The Commission, after a careful consideration of the record and exceptions, adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order substantially for the reasons stated in the Hearing Examiner's Recommended Report and Decision, which Report is attached to this decision and made a part hereof.

In its first two exceptions, the PBA alleges that the Hearing Examiner (1) failed to give sufficient weight to the complimentary testimony of several lieutenants, who were Holder's superiors, and Sgt. Albano who, as the former officer in charge of training for the K-9 squad, was Holder's immediate supervisor; and (2) failed to give sufficient weight to the evidence regarding Holder's exemplary disciplinary record during his eight-year career. The Commission notes that none of the lieutenants were directly involved on a day-to-day basis with Patrolman Holder in the training of the dogs. Further, the Commission finds ample evidence to support the Hearing Examiner's finding that Sgt. Albano's philosophic difference

with Sgt. Fontaine concerning the manner in which dogs should be trained for the squad accounted for the differences in their evaluations of Patrolman Holder. These same factors also adequately account for the lack of any disciplinary action against Holder prior to Fontaine's assuming supervision of K-9 training. Therefore, the Commission concludes that the Hearing Examiner gave proper weight to this testimony.

In its third and fifth exceptions the PBA questions the Hearing Examiner's determination concerning the credibility of Fontaine versus that of Holder. It suffices to say that it is for the trier of fact to weigh the evidence and testimony, and the Commission, absent the most compelling evidence to the contrary, will not substitute its secondhand reading of a transcript for the Hearing Examiner's judgment based upon observations of demeanor and the like. The Commission, finding a total lack of any such contrary evidence, adopts the Hearing Examiner's credibility determinations.^{3/}

In its fourth exception the PBA contends that the Hearing Examiner failed to give sufficient weight to the sequence of events leading to Holder's transfer, i.e., his presentation of numerous

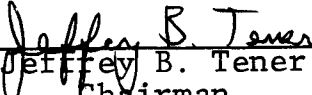
^{3/} In re Long Branch Bd. of Ed., P.E.R.C. No. 77-70, 3 NJPER 300 (1977); In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (14011 1977); In re Hudson County Bd. of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (14041 1978). It should also be noted that the Hearing Examiner did not discredit the testimony of either man, but rather found Fontaine's explanation of why Holder was transferred credible, notwithstanding Holder's testimony concerning the incidents of union activity.

grievances and informal complaints from August 22, 1977 until his transfer on November 7, 1979. In the first instance the Commission notes, as the Hearing Examiner found, that several of the grievances did not involve Sgt. Fontaine, and Holder's informal complaints were no more vociferous, and in at least one case less, than those of other patrolmen in the K-9 squad. Moreover, this chronology of events, to the extent that it does concern Sgt. Fontaine, raises only an inference of anti-union motivation. Such an inference is negated by the Hearing Examiner's and the Commission's crediting of the "legitimate business justification" for the transfer of Patrolman Holder proffered by Sgt. Fontaine.^{4/}

ORDER

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that the Complaint is dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Parcels and Newbaker voted for this decision. Commissioners Hipp and Graves voted against this decision.

DATED: Trenton, New Jersey

January 17, 1980

ISSUED: January 18, 1980

^{4/} As to the shifting burdens of proof in section (a)(3) charges see In re North Warren Regional Bd. of Ed., P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978); In re Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978); In re North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), and In re Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459 (¶4208 1978), affmd App. Div. Docket No. A-580-78 (9/24/79).

STATE OF NEW JERSEY
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Docket No. CO-79-127-81

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a charge brought by the Trenton P.B.A. against the city of Trenton. It was alleged by the P.B.A. that Patrolman Richard Holder was transferred from the K-9 squad because of his activities on behalf of the Trenton P.B.A. The Hearing Examiner found, however, that the transfer was made because of a poor working relationship between Holder and Sgt. Fontaine, the officer in charge of the K-9 squad.

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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Appearances:

For the City of Trenton
Katz, Bitterman & Dougherty, Esqs.
(Michael L. Bitterman, Esq.)

For the P.B.A. Local #11 and Richard Holder
Thomas P. Foy, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On November 21, 1978, Patrolmen's Benevolent Association Local #11 (PBA) and Patrolman Richard Holder filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the City of Trenton (City) violated §5.4(a)(1) ^{1/} and (3) of the Public Employer-Employee Relations Act (Act) by transferring Patrolman Richard Holder from the K-9 Section because of his union activities. It appearing that the allegations if true may constitute an unfair practice, a Complaint and Notice of hearing was issued on April 19, 1979, and a hearing was conducted on August 13, 14 and 15, 1979. Both parties were given an opportunity to present evidence, to cross-examine witnesses and to argue orally. ^{2/} Transcripts were received in the Commission's offices on Sep-

^{1/} Sections (a)(1) and (3) provide that employers, their representatives or agents are prohibited from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; and 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.

^{2/} Both sides were given an opportunity to present briefs in this matter; both declined to do so.

tember 18, 1979.

Richard Holder has been a police officer for the City of Trenton for eight years and was a member of the K-9 patrol from 1974 to November 1978. A number of lieutenants who were his superiors testified at the hearing that he was a good officer, that he was energetic and well motivated. Furthermore, the former sergeant in charge of the K-9 section, Sgt. Albano, was complimentary of Holder and his abilities as a police officer. On March 17, 1978, Patrolman Albano was transferred to the detective squad and Eric Medina Fontaine assumed the role of K-9 training supervisor. Fontaine testified that he had a philosophic difference from Albano from the way the dogs in the K-9 squad should be trained. The dogs of the K-9 squad were involved in a number of incidents where individuals of the general public were bitten and otherwise attacked by some of the K-9 dogs. Fontaine attributed this to their training which made making the dogs vicious and extremely aggressive. Most of the men of the K-9 corps valued this aggressiveness - they felt this made for "good strike dogs," dogs that are quick to attack without the need for specific commands. Fontaine, on the other hand, felt that the most important attribute for the dogs was their obedience to the handler; the dogs must bite only on command unless the handler is being attacked.

Fontaine testified that he initially met resistance from the police officers in the K-9 corps with his methods and that Holder specifically displayed a type of passive resistance to Fontaine's methods. Holder would never disagree with anything Fontaine would say but would refuse to cooperate. On one occasion, when Fontaine was training a dog to search out a building, he asked Holder to hide in the building. When Fontaine and the dog entered the building Holder was not hiding but standing in the middle of the room. On another occasion Holder complained of being sick during the training session, but when Fontaine suggested that Holder seek out medical attention Holder responded that he was not that sick. Fontaine felt that in the period from March, when he first assumed his duties with the K-9 division, until November, when Holder was transferred, Holder never displayed what Fontaine considered the most important element in training a dog, enthusiasm. As Fontaine described it, a dog doesn't understand language, he only understands emotions which are transmitted by the handler to the dog. Accordingly, he felt that Holder was not doing the type of work that Fontaine felt was necessary to do a good job.

Holder and the PBA, on the other hand, take the position that Fontaine's reasons for the transfer were pretextual and the real reason for the discharge was Holder's PBA activity. Holder was recording secretary in the PBA local and shop steward for the K-9 section. It was only because Holder was an active shop steward and regularly filed grievances and lodged complaints that a conflict developed between Fontaine and Holder. Holder testified he repeatedly complained to Fontaine about a number of recurring problems.

At the hearing Capt. Richard Lucherini testified that he okayed the transfer of Holder solely on the basis of Sgt. Fontaine's recommendations; he had no direct chance to observe Holder or Holder's dog and his decision was based solely on Fontaine's recommendations. The testimony of the captain was credible. Accordingly, if Holder's transfer was motivated by anti-union animus, that animus must be attributable to Fontaine.

The first allegation made by the Charging Party in its complaint concerned a grievance filed concerning K-9 patrolmen's overtime.^{3/} The grievance was filed prior to the time that Fontaine assumed his duties in the K-9 patrol. Fontaine was not a party to the grievance. Therefore it is unlikely that this grievance played a part in Holder's transfer. As to the second allegation in the complaint that concerned changing scheduling hours, Fontaine testified that he had nothing to do with scheduling, that scheduling was the function of the shift lieutenant and the testimony of the PBA's witnesses confirmed Fontaine's testimony. The grievance filed was signed by Patrolman Auletta and Holder merely forwarded this grievance to Thomas Murphy, the president of the PBA. Murphy then took this grievance directly to the chief. Murphy regularly reminded the chief of this grievance and asked him to do something about it for a period of months. There was no testi-

^{3/} In the charges filed by the PBA it was alleged that (1) on August 22, 1977, Holder filed a grievance concerning the scheduling of K-9 patrolmen's overtime; (2) Holder made numerous complaints about changing patrolmen's working hours without reasonable prior notice; (3) Holder made numerous complaints as to the lack of scheduling K-9 training particularly after Sgt. Fontaine became K-9 supervisor; (4) Holder approached Fontaine many times concerning checks for the \$2 per day stipend for the caring of K-9 dogs since those checks were issued late every month since Sgt. Fontaine took over; (5) K-9 food was issued late on numerous occasions and Holder complained of that to them; (6) a grievance was filed as to the practice of the K-9 supervisor, Fontaine, and also concerning Sgt. Fontaine working out of job title. Said grievance was submitted on September 4, 1978; (7) on November 6 Holder spoke to Fontaine about K-9 checks but Holder received no answer. On November 7 an order for transfer was issued.

mony that Sgt. Fontaine had anything to do with this grievance either.

Fontaine admitted that he had received complaints from Holder as well as all the other men in the K-9 corps concerning scheduling of K-9 training, the issuance of K-9 checks and the issuance of dog food. ^{4/} He testified that Holder complained no more than any of the other men in the K-9 squad and moreover Patrolman Auletta (who filed the grievance concerning working schedules) complained far more than Holder ever did and Fontaine believed that it was Auletta who was the union representative of K-9 corps, not Holder.

Holder however maintained that Fontaine made statements alluding to the PBA, such as "the PBA should not act as an interference with the duties of the K-9 corps."

Holder submitted a grievance that Sgt. Fontaine was working out of job title and such a grievance might cause a certain amount of resentment. It is noted however that this was the only grievance in evidence actually filed by Holder.

This case comes down to a question of the credibility of Fontaine versus the credibility of Holder. Holder and the PBA must prove their case by the preponderance of the evidence. On balance I found both men to be reasonably credible. Although Fontaine denies specific recollection of a number of incidents, he didn't dispute that they actually occurred; rather, his position is that they were trivial in nature and were not memorable. Fontaine's credibility was called into serious question on one occasion: there were a series of four evaluations of performance that he had kept but never showed to Holder. All were absolutely identical in their ratings. One of those particular evaluation sheets was supposedly for the month of November and it came out during the testimony that Holder was transferred on November 7th and the evaluations required Fontaine to spend several days evaluating the performance of the dog and his handler. But there was only one day during the month of November up until the time of Holder's transfer when Fontaine and Holder's schedules coincided. In spite of the questions raised about the validity of the evaluations, the rest of the testimony concerning Fontaine and the handling of the dogs seemed reasonably responsive and credible. As stated above there were a number of incidents which bear out Fontaine's testimony as to the quality of the K-9 dogs. One incident involved Holder. Holder had been bitten by his dog and had


^{4/} Fontaine attributed his problem with training schedules and the issuance of dog food and checks to his newness on the job.

a scar (although not a particularly obvious one) that stretched for several inches across his forehead and required a number of stitches to close. Holder testified that his dog was asleep in his living room. He went over and grabbed him by the neck to wake him up. The dog bit him coming out of its sleep. Holder maintained that any dog would bite under the circumstances. It strains credibility to believe that any dog is capable of inflicting such a severe wound on its master. As Fontaine testified, such an attack is much more likely to occur after a dog has been trained to overcome all its natural inhibitions against biting and bite spontaneously. Another example of the problems with the K-9 dogs as testified to by Fontaine was when a dog attacked a security investigator for ADT Services. After the dog attacked, its police handler could not get the dog to release its bite, an elemental part of training of attack dogs.

Fontaine's testimony concerning the underlying conflict between the two men was corroborated by independent evidence, but Holder's testimony was unsupported and concerned incidents of a relatively minor nature. Accordingly, the undersigned finds that Holder and the PBA failed to prove by a preponderance of the evidence that Holder's transfer was motivated, in part, for an unlawful purpose. Accordingly, it is hereby recommended that the Commission issue the following order.

Recommended Order

For the reasons set forth above it is recommended that the Complaint in this matter be dismissed in its entirety.


Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
October 5, 1979