

P.E.R.C. NO. 88-133

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE CITY OF NEWARK, .

Respondent,

-and-

Docket No. CO-H-87-359

FRATERNAL ORDER OF POLICE,
LODGE NO. 12,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by the Fraternal Order of Police, Lodge No. 12 against the City of Newark. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act when it transferred police officer Nicholas Ricigliano because he filed a grievance. The Chairman, in agreement with a Commission Hearing Examiner and in the absence of exceptions, finds that the charge was not proved by a preponderance of the evidence.

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Appearances:

For the Respondent, Alison L. B. Jones, of counsel

For the Charging Party, Markowitz & Richman, Esqs.
(Joel G. Scharff, of counsel)

DECISION AND ORDER

On June 5, 1987, the Fraternal Order of Police, Lodge No. 12 ("FOP") filed an unfair practice charge against the City of Newark. 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

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (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."

transferred police officer Nicholas Ricigliano from the Emergency Bureau to the Prisoner Detention Bureau in retaliation for Ricigliano's filing a grievance concerning one person patrols in the Emergency Bureau.

On July 23, 1987, a Complaint and Notice of Hearing issued. On August 24, the City filed its Answer. The City admitted that it transferred Ricigliano, but denied it was because he filed a grievance.

On September 21, 1987, Hearing Examiner Lorraine H. Tesauro conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally.

On May 16, 1988, the Hearing Examiner recommended that the Complaint be dismissed. H.E. 88-57, 14 NJPER ____ (¶ 1988). She determined that the FOP did not prove that Ricigliano had been transferred because of his protected activity.

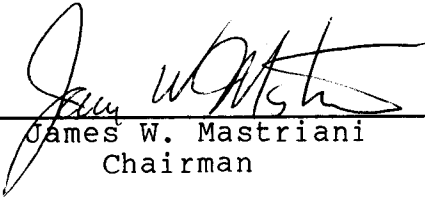
The Hearing Examiner served her report on the parties and informed them that exceptions were due on or before May 30, 1988. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-7) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree that the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
June 8, 1988

H.E. NO. 88-57

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

In the Matter of

THE CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-H-87-359

FRATERNAL ORDER OF POLICE,
LODGE NO. 12,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss a complaint based on an unfair practice charge the Fraternal Order of Police Local No. 12 filed against the City of Newark. The charge alleged the City violated the New Jersey Employer-Employee Relations Act when it transferred Officer Nicholas Ricigliano in retaliation for the filing of grievances in his behalf. The Hearing Examiner finds that the FOP did not prove by a preponderance of the evidence that the City's actions were commensurate with the standards set forth in In re Bridgewater.

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.

H.E. NO. 88-57

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

In the Matter of

THE CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-H-87-359

FRATERNAL ORDER OF POLICE,
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Charging Party.

Appearances:

For the Respondent, Alison L. B. Jones
of counsel, City of Newark

For the Charging Party, Markowitz & Richman
Joel G. Scharff of counsel

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 5, 1987, the Fraternal Order of Police Lodge No. 12 ("FOP") filed an unfair practice charge against the City of Newark ("City"). The charge alleges 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

^{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

Footnote Continued on Next Page

transferred Officer Ricigliano from his assignment in the emergency bureau to his assignment at the prisoner detention bureau. The FOP alleges that the transfer was made in retaliation for the grievances Ricigliano filed against the City and his designated superiors in the emergency bureau concerning a new policy reducing two man patrols to one man patrols. The FOP alleged that such action interfered with the exercising of his protected rights.

On July 23, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 19, 1987 the City filed its Answer. The City admitted that it transferred Ricigliano but denied it was because of his protected activities.

On September 21, 1987, I conducted a hearing in Newark, the parties examined witnesses and introduced exhibits. At the conclusion of the hearing the parties made closing arguments and waived the filing of post hearing briefs^{2/}.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. Nicholas Ricigliano is a member of the FOP and has been employed for the past 23 years by the City of Newark Police

1/ Footnote Continued From Previous Page

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."

2/ "T-1, etc." is the transcript dated September 21, 1987 received in this office January 21, 1988.

Department. Ricigliano has been assigned to various divisions within the department over those 23 years. He worked in the emergency bureau for a total of ten years beginning 1971 to 1977 and again from 1984 to 1987.

2. Throughout 1986 Ricigliano indicated several times to his superiors and on occasion to Chief Golba (T-54, T-71, T-68, and T-70) that the emergency bureau's working conditions were inadequate. Ricigliano notified FOP about the conditions and requested the organization file an official grievance. The FOP filed this grievance approximately February 1987 (T-16). The City failed to respond to this grievance.

3. On April 6, 1987, the City notified Ricigliano that he was to be transferred to the prisoner detention bureau effective immediately. The prisoner detention bureau is in the same division as the emergency bureau (T-61). According to Thomas M. Armenti, captain and commanding officer in the emergency bureau, Ricigliano's transfer was a one for one exchange (T-61), inter-departmental and did not warrant a written request (T-61).^{3/}

^{3/} Ricigliano served six years with the emergency bureau under Captain Armenti's command (T-47). In 1978 Ricigliano was transferred to the West District emergency bureau because of a personality conflict with Captain Armenti (T-47). Prior to serving under Captain Armenti's command, he served under Captain Citriella (T-68) in the patrol division. This assignment carried some occasional problems and eventually resulted in a transfer to another squad under another superior.

4. Throughout the year 1986, Ricigliano objected several times to work assignments, but never refused them. Although Armenti and Lieutenant Durantino ^{4/} acknowledged that Ricigliano never refused to perform his job functions, they indicated his frequent complaints deteriorated the morale of the other officers at the bureau (T-67). Lieutenant Durantino indicated that Ricigliano was a disruptive influence and the other officers refused to work with him (T-68).

5. Captain Armenti was assigned to the emergency bureau from July 14, 1986 to July 6, 1987 (T-52). On four or five occasions throughout Armenti's one year assignment to the emergency bureau, Ricigliano approached him concerning a shortage of personnel and voiced his dissatisfaction with certain job functions (T-54). His main complaint concerned changing flat tires, which is, and always has been, a function of the emergency bureau (T-57).

At one point Ricigliano advised Armenti that he was filing a grievance (T-56). The grievance concerned the shortage of personnel, the working conditions and a request for additional manpower. In the course of conversation Ricigliano asked Armenti "what would happen if I refused to change a flat tire?" Armenti responded, "I would have to order you" (T-58). And further, "if I

^{4/} Lieutenant Durantino served as acting captain during 1985 and part of 1986. Lieutenant Durantino was the supervisor of the bomb squad and is now supervisor of personnel for the emergency bureau (T-53). Ricigliano served under his command for a short period and voiced the same complaints at that time

worked in a unit where I did not prefer doing that type of work I would leave the unit. I would request a transfer" (T-58). He was not suggesting a transfer but indicating what should be done if an employee is unhappy with his working conditions. There was no paper work initiated subsequent to that conversation especially since Ricigliano made it very clear that he was not interested in a transfer (T-59).

6. Throughout 1986, Armenti and Durantino notified Deputy Chief Smith, their bureau superior (T-60), of Ricigliano's problems. They spoke to Smith several times concerning the deterioration of the morale of the other officers. They indicated that they had asked other men to work with Ricigliano and they all replied in the negative (T-60).

Durantino and Armenti indicated that in approximately December 1986 they discussed with Smith a possible transfer for Ricigliano because of this morale problem. They orally communicated their request to Deputy Chief Smith because he has the authority to determine inter-departmental transfers (T-70).

At that juncture, Deputy Chief Smith made the determination that Ricigliano would be transferred but this could not be accomplished without a designated replacement due to the manpower shortage. Smith determined that although Ricigliano would remain within the division, he would be transferred to the prisoner detention bureau, one of the four bureaus within this special operating division (T-60). In April, when the transfer was

decided, there was the availability of a one for one exchange of personnel (T-61).

7. Although Armenti and Durantino recommended a transfer for Ricigliano, Deputy Chief Smith is the only superior with authority to effectuate a transfer.

Armenti and Durantino's recommendation to transfer Ricigliano took place somewhere between December of '86 and January of '87 (T-68). Policy indicates that it is not customary for an inter-departmental transfer to be in writing. Durantino stated there were no actions taken to effectuate a transfer in December because there was a serious personnel shortage (T-71).

8. The parties stipulated that the salient provisions in the collective bargaining agreement for 1985-86 (Exhibit J-1) and the prior agreement concerning the grievance procedures are the same throughout both agreements. The grievance procedure is Article IV and management rights are found in Article XXII.

Article XXII, Section (b) of the party's contract (J-1) provides:

"The City...retains and reserves unto itself without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this agreement by the laws and constitutions of the State of New Jersey and of the United States, including, but without limiting the generality of the foregoing, the following rights '(b) to hire all employees and, subject to the provisions of law, to determine there qualifications and conditions for continued employment, or assignment and promoting transferred employees.'"

9. Ricigliano has been and is a good officer. He never refuses to do work as assigned (T-54), and is always willing to participate in instructional courses that would improve his performance as an officer. Although some testimony indicated that Ricigliano was not received well by the rest of his officers (T-60), there was no evidence of any negative performances by him. Accordingly, I find he is a rational police officer, respected by his superiors and there is no merit to a claim of negative productivity.

DISCUSSION AND ANALYSIS

The parties stipulated that the issue was whether Officer Ricigiliano was transferred from the emergency bureau of the police department into the prisoner detention bureau on April 6, 1987 because he exercised his rights under the Act and under the grievance procedure in J-1.

In re Bridgewater Tp., 95 N.J. 235 (1984) (Bridgewater) sets forth the standard to determine whether an employer has illegally discriminated against employees in retaliation for exercising union activity:

"the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating or substantial factor in the employer's decision, mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action." Transportation Management, _____ U.S. _____, 103 S. Ct. at 2474, 76 L.Ed. 2d at 675. Once the prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of the

evidence that the same action would have taken place even with the absence of the protected activity. Bridgewater at 244.5/

The charging party has met the first two elements.

Ricigliano engaged in protected activity and the City indicated that it was aware of such activity.

This case now focuses on the final element: was the City hostile to such activity? I find that the evidence demonstrates that it was not.

The differences between Armenti and Ricigliano are not based on union-animus, rather, I find that it stems from a personality conflict between the two. The essential point is this: Armenti and Ricigliano are aiming towards the same goals and performing the job functions as required.

The FOP claimed that Ricigliano was transferred subsequent to the filing of a grievance. There is sufficient information indicating that Ricigliano constantly complained concerning working conditions or personnel shortages throughout 1985 and 1986. The record contains little evidence that Armenti and Durantino's actions were in retaliation for Ricigliano's filing of the grievance. I find that the transfer is not directly related to Ricigliano's exercising his rights under the Act.

5/ Fairview Board of Education, P.E.R.C. No. 87-107, 13 NJPER 542 (¶18200 1987). The Commission dismissed a complaint based on an unfair practice charge alleging that a teacher was transferred from one school to another to discourage her from exercising her protected rights. The Commission used the referenced analysis.

There is a history of hostility between Ricigliano and Armenti stemming from Ricigliano's numerous work related complaints. I find the transfer was not due to anti-union animus. I make this finding because of the following factors:

1. Under Bridgewater no violation would be found unless the charging party proves by a preponderance of the evidence on the entire record that the protected conduct was the substantial or motivating factor in the employer's adverse action to employee terms and conditions of employment. See Middletown Tp. P.E.R.C. No. 88-25, 13 NJPER 747 (¶18282 1987) (Middletown).

The record would not support a finding that the employer violated the Act if it can prove, as an affirmative defense, that the action would have taken place even absent the protective conduct. This defense however need not be considered unless the charging party has shown that anti-union animus was a motivating or substantial reason for the adverse action.^{6/}

2. Bridgewater requires hostility in addition to the adverse personnel action. The record refers to incidents of personality conflicts involving Ricigliano and former superiors resulting in Ricigliano being transferred. Those transfers were not related to any grievances. If there was hostility, it was as a result of a personality clash, not as a result of the exercise of protected activity.

^{6/} See Bridgewater; In re Wright-Line, 251 NLRB 150, 105 LRRM 1169 (1980); and Middletown.

The FOP's evidence encompasses at the very least, an entire year of complaints. There is no evidence that Ricigliano was discouraged from engaging in protected activity. Although the timing between the grievance filing and Ricigliano's transfer might raise a question of retaliatory action, it is clear to me that Ricigliano's actions and the department's actions have been stretched out over a year. While Ricigliano feels the City's actions demonstrated anti-union animus, the FOP fails to establish a nexus between his actions that occurred over a year long period and the City's actions. The two are very remote in time as they relate to the transfer. The FOP did not prove that any related City action was adverse to the exercise of Ricigliano's protected rights.

The record shows that Ricigliano made his dissatisfaction known throughout the department. Consequently, his continuous objections concerning department policies and job functions of the emergency bureau deteriorated the relationships between Ricigliano and the other officers. Armenti and Durantino stressed in their discussion with Deputy Chief Smith the importance of maintaining the morale of the other officers while noting that Ricigliano's constant retorting was wearing down the morale.

Armenti and Durantino indicated on several occasions that there was a manpower shortage. Consequently, the City implemented a change in manpower for responding to calls. The policy changed two man responses to one man responses. This caused Ricigliano even more concern about his working conditions.

There is little support in the record for the FOP's claim that it suffered as a result of exercising its protected activities.

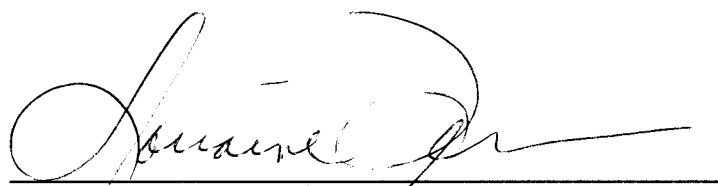
In light of the above I conclude that the FOP has failed to prove, by preponderance of the evidence, that the City violated section 5.4(a)(1), (3) and (4) and I recommend that the charge be dismissed. Bridgewater.

CONCLUSIONS OF LAW

The City did not violate the New Jersey Employer-Employee Relations Act when it transferred Nicholas Ricigliano.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Complaint be dismissed.



Lorraine H. Tesauro
Hearing Examiner

DATED: May 16, 1988
Trenton, New Jersey