

P.E.R.C. NO. 97-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CI-H-94-44

LUCY GARCIA-DODSON,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Lucy Garcia-Dodson against the Newark Housing Authority. The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act when it terminated Garcia-Dodson from a Risk Manager position for her union organizing activities. The Commission finds that anti-union animus was not a substantial or motivating factor in the charging party's termination or the Authority's failure to find her another position.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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LUCY GARCIA-DODSON,

Charging Party.

Appearances:

For the Respondent, Frank L. Armour, General Counsel,
Newark Housing Authority (Elio R. Mena, of counsel)

For the Charging Party, Lucy Garcia Dodson, pro se

DECISION AND ORDER

On February 2, 1994, Lucy Garcia-Dodson filed an unfair practice charge against the Newark Housing Authority. The charge alleges 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) and (3), ^{1/} by terminating her from a Risk Manager position for union organizing.

On March 8, 1994, a Complaint and Notice of Hearing issued. On March 23, 1994, the Authority filed an Answer denying that it violated the Act.

^{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."

On July 12 and 13 and September 14, 15 and 16, 1994, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs.

On January 16, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 96-12, 22 NJPER 164 (127086 1996). She found that Garcia-Dodson was terminated because she was a provisional employee who did not rank high enough on a civil service list to retain her position permanently and because she was not qualified for any other available positions.

On April 3, 1996, after an extension of time, Garcia-Dodson filed exceptions. She argues that the Authority's explanations for her termination were pretextual; she had a variety of experience and was qualified for many positions but that the Authority did not conduct a search to transfer her; she was not interviewed for the Risk Manager position; the employee selected for that position was not qualified; the Authority has failed to prove that it was required to terminate her rather than promote or transfer her; and the Authority was not obligated to select the other employee over her. She also argues that the Hearing Examiner erred in finding that:

1. she gave false information on her application for the Risk Manager position;
2. a search was conducted by the Assistant Executive Director and Insurance Manager for other available positions and her experience was limited to the field of insurance and risk management;

3. Authority Personnel Officer Joseph Mennella mailed her Exhibit R-4, a May 10, 1993 letter, notifying her that a list was issued against her title and that she might be discharged;

4. Karl Harris was her supervisor when she approached him on May 8, 1993;

5. Authority Chairperson Gloria Cartwright, Commissioner Zinnerford Smith, Executive Director Harold Lucas, and Personnel Officer Joseph Menella knew nothing about her organizing;

6. union organizer Mary Higgins did not have personal knowledge of whether Authority management officials knew of her organizing;

7. she was not demoted when she was assigned to be supervised by Karl Harris;

9. she filed an improper address, and the Authority was forced to choose someone (for the Risk Manager job) ranked higher on the list due to veteran's preference; and

10. Authority management informed her that she would be terminated because of her ranking on a civil service list.

The Authority did not file an answering brief.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 2-14) with the following modifications.

We add to finding no. 4 that by letter of August 6, 1991, Exhibit R-2, Garcia-Dodson was notified that her appointment to the

Risk Manager position was provisional pending appointment from a New Jersey Department of Personnel ("DOP") certification list.

We add to finding no. 5 that by letter of July 26, 1992, Exhibit R-7, mailed to her Kendall Park home, Garcia-Dodson was encouraged to apply to take the exam for the Risk Manager position, and notified that she would be terminated if she did not.

We add to finding no. 7 that Garcia-Dodson had received a copy of the February 2, 1992 initial certification list issued for Risk Manager, Exhibit R-1. She knew that her address on R-1 was listed as Newark, but she did not correct the address to reflect Kendall Park (4T107-4T112).

We correct finding no. 8 to show that, consistent with Exhibit CP-7, Garcia-Dodson listed her Kendall Park home address to question number 7 on the civil service application. She only listed the Authority's Newark Address to question number 5. We credit Garcia-Dodson's testimony that she did not omit her home mailing address from the civil service application (4T56-4T57; CP-7).

We add to finding no. 11 that Cahill was selected without taking a written examination (1T83). We further add that because of Garcia-Dodson's seventh place ranking on the revised DOP certification list, Exhibit R-3, she was not interviewed for the Risk Manager position. The Authority usually interviews only the first three ranked individuals, particularly when they include veterans (3T26; 3T77-3T79; 3T122).

We add to finding no. 20 that although Garcia-Dodson discussed union organizing with Harris, he considered the subject insignificant and paid it little attention (1T101).

We add to finding no. 23 that in Garcia-Dodson's personnel file was a letter of August 26, 1993, Exhibit No. R-5, addressed to her at her home address signed by the Authority's Assistant Personnel Officer, Larry Howell, notifying her that DOP had issued a list for her job title; that the Authority was obligated to appoint an eligible candidate from the list; and that it could result in her discharge (4T147).

We add to finding no. 25 that in Garcia-Dodson's personnel file was a letter of October 19, 1993, Exhibit No. R-6, addressed to Garcia-Dodson at her home address, signed by Personnel Officer Joseph Mennella, notifying her that the Authority had been mandated to appoint an eligible candidate to her position, and that she was therefore, terminated effective November 5, 1993 (4T148-4T149).

We correct finding no. 26 to reflect that Garcia-Dodson did not file an improper address, but had listed both her work address and her home address on her DOP application (CP-7).

Garcia-Dodson's exceptions were accompanied by numerous documents that had not been admitted into evidence. Those documents are not part of the record and cannot be considered.

The Hearing Examiner made specific credibility determinations which we have no basis to displace. She found, among other things, that Garcia-Dodson received Exhibit R-4 in May 1993

notifying her that a list was issued against her title and she might be discharged; that Abraham knew about Garcia-Dodson's organizing in September 1993; that union organizer Higgins did not know if management officials at the Authority knew about Garcia-Dodson's organizing; and that Garcia-Dodson was not demoted by being assigned to Karl Harris.

In her exceptions, Garcia-Dodson argues that the Hearing Examiner erred in not crediting Abraham's "contradictory testimony," and she argues that Abraham had knowledge of her organizing in September 1993. Garcia-Dodson misread the Hearing Examiner's factual findings. The Hearing Examiner credited Garcia-Dodson's testimony that Abraham knew of her protected activity in September 1993. The Hearing Examiner refused to credit Abraham's testimony contradicting Garcia-Dodson on that point.

Garcia-Dodson also argues that Terry Ridley, the Authority's senior associate counsel, gave contradictory testimony at the hearing. The Hearing Examiner, in finding no. 19, found that Ridley was aware of Garcia-Dodson's organizing and that he had declined her request to support the organizing effort because he believed it would be a conflict for him as the Authority's labor attorney. Immediately following that finding, the Hearing Examiner, in footnote 7, noted that Ridley, at the hearing, denied that he had discussed her organizing with Garcia-Dodson, but said he had that discussion with another organizer, Gwen Nelson (3T7-3T8). The Hearing Examiner credited Garcia-Dodson's recollection of the

conversation and found Ridley had made the statements to her. Garcia-Dodson's characterization of this interplay as an exception to the Hearing Examiner's report, therefore, is misplaced. Garcia-Dodson agrees with the Hearing Examiner's findings.

Under the standards set out in In re Bridgewater Tp., 95 N.J. 235 (1984), the charging party must first prove that anti-union animus was a substantial or motivating factor in the adverse personnel action. Garcia-Dodson proved that she engaged in protected activity and that at least three management officials, Abraham, Harris and Ridley, knew of her activity. She even proved that there was some hostility to that activity, but she did not prove that the hostility had any bearing on her termination or the Authority's failure to find her another position.

Garcia-Dodson was ranked too low on the civil service list to be considered for the permanent Risk Manager position. Although she was originally ranked first on the list, that ranking was based on an erroneous resident's preference. The list was corrected; Garcia-Dodson was ranked seventh; and another candidate was selected. Garcia-Dodson's organizing was not a factor in that selection. Since the charging party failed to meet her burden under Bridgewater, the burden never shifted to the Authority to prove that it would have terminated her even absent her protected activity.

Similarly, the charging party did not prove that anti-union animus motivated the Authority's failure to find her an alternate position. The Authority's witnesses testified that they searched

H.E. NO. 96-12

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

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CI-H-94-44

LUCY GARCIA DODSON,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss an unfair practice charge alleging that the Newark Housing Authority terminated Lucy Garcia-Dodson, Risk Manager, in retaliation for her exercise of rights protected by the New Jersey Employer-Employee Relations Act. The Hearing Examiner finds that Garcia-Dodson failed to establish that the Authority's hostility toward her participation in a union organizing campaign was a substantial or motivating factor in her termination. The Hearing Examiner finds that the Charging Party was displaced because of a civil service list, and did not prove that there was a vacant position into which she could have been placed.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 96-12

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

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CI-H-94-44

LUCY GARCIA DODSON,

Charging Party.

Appearances:

For the Respondent,
Elio R. Mena, Esq., of counsel

For the Charging Party,
Lucy Garcia Dodson

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 2, 1994, Lucy Garcia-Dodson filed an unfair practice charge against her former employer, the Newark Housing Authority. The charge alleges that on or about November 5, 1993, the Authority terminated Garcia-Dodson because of her union organizing activities on behalf Service Employees International Union, Local 74. The Authority's actions allegedly discriminated against her and interfered with her exercise of activity protected

by the New Jersey Employer-Employee Relations Act, N.J.S.A.
34:13A-5.4(a) (1) and (3).^{1/}

On March 8, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 21, 1994, the Authority filed an Answer, asserting that its termination of Garcia-Dodson was in good faith, in accordance with state civil service rules and regulations, and not because of her union organizing activities. It denies any violation of the Act.

Hearings were conducted on July 12, 13 and September 14, 15 and 16, 1994. Both parties filed post-hearing briefs by February 9, 1995.

Upon the record, I make the following:

FINDINGS OF FACT

1. The Newark Housing Authority is a public employer within the meaning of the Act. On August 12, 1991, the Housing Authority hired Garcia-Dodson as a Risk Manager. Her duties included the purchasing of insurance and establishment of self insurance programs designed to reduce liability claims against the Authority (4T58). Risk Manager, like other "letter grade" positions, was not included in any negotiations unit.

^{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; and, (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."

2. The New Jersey Department of Personnel ("DOP") rules concerning selection and appointment of public employees are found at N.J.A.C. 4A:4-1 et seq. Relevant portions are as follows:

4A:4-1.5 Provisional appointments

(a) A provisional appointment may be made only in the competitive division of the career service when all of the following conditions are met:

1. There is no complete list of eligibles, and no one remaining on an incomplete list will accept provisional appointment;
2. The appointee meets the minimum qualifications for the title at the time of the appointment; and
3. The appointing authority certifies that failure to make the provisional appointment would seriously impair its work.

(b) Any employee who is serving on a provisional basis and who fails to file for and take an examination which has been announced for his or her title shall be separated from the provisional title.

4A:4-3.2 Order of Names on Eligible Lists

(a) The order of names on an open competitive list shall be as follows:

2. ... the order of names shall be:
 - i. Eligibles entitled to disabled veterans preference in order of their scores;
 - ii. Eligibles entitled to veterans preference in order of their scores;
 - iii. Non-veteran eligibles in order of their scores.

e. It shall be the responsibility of an eligible to keep a current address on file with the Department of Personnel.

4A:4-3.8 Corrections of Errors

(a) The Department may correct an error at any time during the life of an eligible list.

...(c) Corrections of Errors may result in a change in ranking.

3. The Authority's Personnel Policy manual states:

In accordance with the rules and regulations of the State Department of Personnel, where applicable, appointments to positions in the Authority may be made on one of the four (4) bases: temporary, seasonal, provisional or permanent.

Appointments shall be made in accordance with the State law, and rules and regulations thereunder within the categories listed above. All questions concerning the status of an employee shall be directed to the Personnel Liaison within the employee's department who shall consult with the Personnel Department.

(CP-1, p. 21)

4. Garcia-Dodson was hired by the Authority in a "provisional" status, pending her passing a DOP examination, in order to become "permanent" in her title and position (1T8, 3T35-3T36, 4T105-4T107, 5T6). If Garcia-Dodson had failed to apply or score high enough on the examination, she risked losing her job to another candidate, based upon DOP regulations. On August 6, 1991, the Authority notified her that her appointment was provisional, subject to a civil service exam (4T105-4T107, 5T8-5T10). Subsequently, as a direct result of her provisional appointment, the DOP listed the Risk Manager position in the official Job Opportunities Bulletin, inviting qualified applicants to apply (3T34, 3T80, 5T8-5T9).

5. On July 26, 1992, the Authority's personnel office requested Garcia-Dodson submit an application to DOP, and she filed an application with the DOP for the civil service exam for her title (4T55, 5T8-5T9).

6. In November 1992, the DOP notified Garcia-Dodson that she ranked number one on the certification list for Risk Manager (4T108).^{2/}

7. On February 2, 1993, the DOP issued an initial certification list for Risk Manager at the Housing Authority, ranking Garcia-Dodson number 1; John Dolak, a disabled veteran, was ranked number 2; and Roger MacCormack, a veteran, was ranked number 3 (R-1).

8. The civil service application completed by Garcia-Dodson in July 1992, asked two questions related to her address: question number 5 asked for her name and address; question number 7 asked: "If entry in block #5 is your mailing address only, enter name of street, township, city or borough in which you live (4T55-4T56, CP-7). Garcia-Dodson responded to both questions with the Authority's business address of 57 Sussex Street, Newark, N.J., although at the time, she resided in Kendall Park, N.J. (3T69, 3T83, 4T56-4T57). Candidates who reside in Newark are, by law, accorded hiring preference over non-residents for the Risk Manager position at the Newark Housing Authority (3T70, 5T53-5T54). See, N.J.A.C. 4A:4-2.11 "Residence Standards"

9. Between February 2 and 26th, 1993, Personnel Officer Joseph Mennella, realized that DOP had an incorrect home address for

^{2/} The exam was in the form of an evaluation and ranking of applicants' education and experience, rather than a formal test. N.J.A.C. 4A:4-2.2(a)5.

Garcia-Dodson (5T60-5T63, CP-7). On February 26, 1993, a meeting was held at which these responses were questioned and discussed by Garcia-Dodson, Mennella, Johnson Abraham, the Authority's Assistant Executive Director; and Wendell Wilson, the Authority's Chief of Labor Relations (4T56-4T47, CP-7). At the meeting, Garcia-Dodson was concerned about the importance of her address in a hiring decision (5T62-5T63).

10. Although the February 2nd certification list stated: "Required Date of Disposition: March 30, 1993," this list was not finalized by March 30th (3T69-3T70, R-1). Instead, the DOP corrected her home address and on August 26, 1993, issued a revised certification list for Risk Manager at the Housing Authority, ranking Garcia-Dodson as number 7 (3T26-3T27, 3T69-3T70, 5T64, R-3). Ranking higher than her on this second list were one disabled veteran, two other veterans, and three non-veterans (R-3).

The DOP gives preference in appointments to disabled veterans, followed by veterans and finally non-veterans (3T27, 3T42-3T43, 3T64, 3T69-3T70, 3T81, 3T85).^{3/} The appointing authority can choose from among the top three interested candidates, but, by law, may not bypass an interested disabled veteran (3T27, 3T85-3T86). Interested veterans may be bypassed only if another veteran is chosen. Non-veterans may be chosen if no disabled or

^{3/} N.J.A.C. 4A:4-3.2

other veterans are interested in accepting the appointment (3T86, 3T121-3T123).^{4/}

11. James Cahill, Jr., a veteran and the number three ranked candidate on the revised certification list, was interested in the Risk Management position and was offered the position (3T27, 3T70, 3T86, 3T122).

12. Certain Housing Authority positions are filled without using civil service certifications (3T84). For example, where there is no current list, the Authority can advertise locally and hire the best qualified person to fill positions on a temporary or provisional basis (3T84, 3T124-3T135). N.J.A.C. 4A-4-1.5

13. In the past, the Authority has transferred and promoted employees whose continued employment was threatened by the promulgation of civil service lists (3T55). Where an employee is about to be displaced by higher ranking candidates on the list, the Authority's practice is to review available openings and assess the affected employees' qualifications for placement in those openings (3T55, 3T86-3T87). For example, Anthony Tanelli, a provisional warehouse supervisor who was about to be displaced, was laterally moved into a vacant position comparable in responsibility and requiring similar experience to his prior title (3T89). Dalton Barrett, who had been in the Housing Department, was assigned to the acting Department head position because he had the necessary

^{4/} N.J.A.C. 4A:4-4.8

experience (3T89-3T90). At the time Garcia-Dodson was terminated, a search was conducted by Johnson Abraham, Insurance Manager Karl Harris, and the personnel office, but no appropriate openings were available. All of Garcia-Dodson's experience had been in the insurance and risk management field (3T51, 3T87, 3T93, 5T47-5T48).

14. On May 10, 1993, Mennella sent Garcia-Dodson a letter informing her that a certification list was issued against her title and that the Authority was compelled to implement the list, including a discharging her from employment (R-4).^{5/}

Union Organizing Activity

15. In Spring 1993, at about the same time that the civil service list issues were unfolding, the letter grade employees began to seek a union for negotiations with the Housing Authority (4T25, 4T29). These employees had not received any salary increases for one and a half years (3T72, 4T29). In early August 1993, Mary

^{5/} Garcia-Dodson testified that she had not been notified until much later, on October 20, 1993, of the possibility of losing her job ((4T79, 4T105). I do not credit this testimony, however, because the Personnel Officer testified that no "returned" mail was present in her official personnel records, indicating that none of the mail sent to Garcia-Dodson had been returned undeliverable to her Kendall Park address (5T9-5T10). An earlier letter, dated July 26, 1992, which I infer Garcia-Dodson did receive, from Ayirebi Assante, Assistant Personnel Officer, states: "We would like to assure you that passing the test has several advantages including the possibility of acquiring permanency in your title. However, the Authority will be compelled by NJDP to terminate your appointment if you fail to take this exam." Emphasis added (R-7, 4T55). Although Garcia-Dodson denied having seen this letter, her testimony was equivocal and she did file the application "at Assante's request" (4T55, 4T126-4T127).

Higgins, an organizer for S.E.I.U. Local 74, was contacted to organize these employees (4T25-4T26). Garcia-Dodson attended organizing meetings and was one of five core organizers who formed a committee, planned, canvassed others' interest and promoted the union (4T26, 4T31-4T32). Garcia-Dodson was an avid union supporter (4T28, 4T31). Higgins observed that Garcia-Dodson's co-workers were surprised at her participation in the organizing effort. Garcia-Dodson had to make clear that she was not a "management spy" (4T26-4T27). Higgins believed the Housing Authority's employees were apprehensive about forming a union and that the committee members wanted to keep their identities secret because of their fear of retaliation by the Housing Authority (4T28, 4T35, 4T43).

16. Sometime between August and November 1993, the organizers wrote to all letter grades about the union organizing effort (4T39-4T40). However, in late September 1993, when the Authority implemented a 6 percent salary increase for letter grade employees, interest in the union began to wane (4T29-4T30, 4T76-4T77). Employees were reluctant to sign cards (4T30, 4T77).

17. In September 1993, the Authority granted the letter grade employees a 6 percent increase in accordance with its past practice of granting increases after concluding negotiations with its unionized employees. It had recently completed these other negotiations (3T71-3T72).

Knowledge and Hostility

18. Johnson Abraham, Assistant Executive Director, first knew of Garcia-Dodson's organizing activity in September 1993. Garcia-Dodson and Abraham met in late September 1993, after the 6 percent salary increases had been distributed to the letter grades, and Abraham suggested that Garcia-Dodson should stop her [union organizing] activity because all letter grades had been granted retroactive salary increases (4T95-4T96).^{6/}

19. Terry Ridley, Senior Associate Counsel, became aware of Garcia-Dodson's organizing activity sometime in the Spring or Summer 1993. Garcia-Dodson had a list of names to solicit regarding their interest in a union; Ridley was on her list. In early September 1993, she spoke with him in the legal department on the Housing Authority's second floor (4T73-4T74). She asked for his support and he declined, stating that it would be a conflict of interest for him to participate because he was the Authority's labor attorney (4T74-4T75).^{7/}

^{6/} In earlier testimony, Abraham stated he was not aware of Garcia-Dodson's involvement in any union organizing activity, however, the Authority did not specifically rebut Garcia-Dodson's testimony about this September 1993 conversation with Abraham, and I do not credit his contradictory testimony (3T125).

^{7/} Ridley disputed that he and Garcia-Dodson had this conversation. He recalled having this exact conversation with Gwen Nelson, another one of the employees organizing a union. I credit Garcia-Dodson's version of this event. Neither party called Nelson and it is unlikely that Garcia-Dodson would recall the exact conversation that occurred between Ridley and someone else. Garcia-Dodson recalled the event specifically and confidently. Ridley's recollection was tentative.

20. Sometime after May 8, 1993, Garcia-Dodson approached Karl Harris, her supervisor, about forming a union (1T90, 1T96). But Harris never discussed Garcia-Dodson's union organizing activity with anyone else employed at the Authority and never recommended that she be fired because of this activity (1T00, 1T105).

21. Gloria Cartwright, Chairperson of the Authority's Board of Commissioners; Zinnerford Smith, Commissioner; Executive Director Harold Lucas and Joseph Mennella knew nothing about Garcia Dodson's union organizing activity (3T103-3T104, 3T108, 3T116, 3T69).

22. Higgins recalled that Garcia-Dodson told her that management of the Housing Authority "had to know that (she) was part of the unit (organizers) because of the actions that were taking place" (4T32). Higgins knew of no written communications from Garcia-Dodson to the union or herself prior to November 1993.^{8/}

23. In July 1993, Garcia-Dodson was reassigned to the newly appointed Insurance Manager, Karl Harris (1T89, 1T96,

^{8/} I do not find as a fact that anyone at the Authority knew of Garcia-Dodson's union organizing activity based on this witness' testimony; Higgins did not appear to have first-hand knowledge or evidence of what the Authority management knew, she based her inferences on Garcia-Dodson's impressions. Higgins never saw or met Garcia-Dodson on Housing Authority property, but stated she knew Garcia-Dodson had addressed the executive director or assistant executive directors (4T35-4T36). Higgins also testified that Garcia-Dodson told her she had approached some of the department directors in August 1993, but these directors were never identified or called as witnesses to corroborate this alleged fact (4T36-4T37, 4T66).

4T71-4T73). She had reported to the Assistant and Executive Director's offices (3T120, 4T55, 4T58).^{9/}

24. The Authority's Board of Commissioners consists of appointed members who act as the board of directors (3T99, 5T67). At monthly public meetings the Commissioners consider and vote on the Authority's personnel report, a compilation of proposed actions: hiring, terminations, promotions, salary increases, etc. (3T47-3T48, 3T109-3T110, 4T18-4T19, 5T67-5T68). Prior to the public meeting, the Board reviews the personnel report at a closed work session. The Authority staff who prepare the personnel report are present at the work session to discuss the proposals (3T39, 3T48, 3T99-3T100, 3T109, 3T112, 4T18). Because there are up to one hundred personnel actions to be voted on each month, only a few are discussed or questioned (3T108).

25. Cartwright, the Board Chairman, did not attend the working session on or about October 19, 1993, at which Garcia-Dodson's termination was discussed, but recalled that she learned prior to the public meeting that the reason for the termination had to do with a civil service matter (3T101-3T102, 3T107). Cartwright did not question the propriety of terminating

^{9/} Although Garcia-Dodson testified that she was demoted by this reassignment, I do not find this to be the case. She admitted that her title was not changed and she did not suffer any loss in pay. No evidence showed that job duties were taken from her because of this reassignment. And, finally, Mennella, the Personnel Officer knew of no "demotion" of any Risk Manager (3T94).

Dodson (3T107-3T108). The Board had instructed the staff to insure that the Authority not subject itself to the penalty of a payroll disapproval resulting from a conflict with the DOP (3T116). Cartwright voted to approve the termination of Garcia-Dodson based on the representation by the Authority's personnel director that DOP rules required it (3T104). Neither Cartwright nor Board Member Smith recalled any specific discussion about the Garcia-Dodson's termination (3T108, 3T112). Neither Cartwright nor Smith knew of a performance evaluation of Garcia-Dodson, or believed that Garcia-Dodson's performance was problematic (3T101, 3T104, 3T106, 3T112, 3T115).

26. Harold Lucas, the Authority's Executive Director, knew that Garcia-Dodson was a provisional employee; that a civil service test was given, that Dodson had taken the test but filed an improper address; that the test for which she applied gave preference to Newark residents, and that when the DOP learned of her correct home address, it lowered her rank on the eligibility list (4T15-4T17). The Authority, therefore, was forced to choose someone who ranked higher on the list because of his veteran's status (4T14).

27. Abraham decided to recommend the termination of Garcia-Dodson "strictly on the advice from Department of Personnel" (3T121). He understood that when a civil service list is received, the Authority must comply with it; that veterans must be offered positions before those ranked below them (3T121-3T123). Abraham was not aware of any disciplinary actions against Garcia-Dodson from

August 1992 to November 1993 (3T125). Abraham did not receive any recommendation from Karl Harris with respect to terminating Garcia-Dodson (3T126).

28. On October 20, 1993, at a meeting with Harris, Personnel Officer Joseph Mennella, and Wendell Wilson, Garcia-Dodson was informed that her employment was going to be terminated because of a civil service list (4T78-4T79). At a regular meeting on October 21, 1993, the Authority's Board of Commissioners voted to approve her termination (5T65). Effective on November 13, 1993, Garcia-Dodson was displaced from her position by Cahill because she did not score high enough on the list (R-3).

ANALYSIS

Garcia-Dodson contends that the Housing Authority violated the Act by its discriminatory termination of her in retaliation for engaging in union organizing activity in Summer 1993. She further alleges that she was demoted to report to the Insurance Manager instead of the Acting Executive or Assistant Executive Director, in retaliation for her activities.

In re Bridgewater Tp., 95 N.J. 235 (1984) articulates the standards I must apply in analyzing these claims. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by

circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the Hearing Examiner and the Commission to resolve.

The first issue is whether the charging party was engaged in protected activity and whether the Authority's management staff knew it. I conclude that she was, and that three management employees knew of this activity. Both Garcia-Dodson's and Higgins' testimony was that she was actively involved attending organizing meetings and soliciting her colleagues' support.

Insurance Manager Karl Harris, Senior Associate Counsel Terry Ridley and Assistant Executive Director Johnson Abraham were all aware of Garcia-Dodson's organizing activity, as of August-September 1993. But Charging Party did not establish that any Authority management employee knew of her activities before July 1993.

The next issue is whether the Authority was hostile to Garcia-Dodson because of her exercise of protected activity. Here, there is no direct evidence of hostility. No one threatened Garcia-Dodson or warned that there would be repercussions because of her involvement with Local 74. Compare, City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987) (supervisor threatened charging party that he would "get even" with charging party for his protected activity)

Garcia-Dodson asserts that her "demotion" in July 1993, after the new Insurance Manager was hired, is evidence of the Authority's hostility. But I did not find that she was "demoted." She lost neither title nor salary in this reassignment. No other evidence was presented which demonstrates that this amounted to a demotion, and I do not infer a demotion based on the evidence presented.

However, I do infer anti-union animus from the unrebutted statements made in September 1993, by Assistant Executive Director Johnson Abraham, who suggested that Garcia-Dodson cease her organizing activity once the Authority had granted a retroactive

across the board salary increase to all letter grade employees. While the degree of hostility manifested by these words cannot be ascertained, such remarks made by one who could affect her employment and working conditions establish a veiled threat.

Under Bridgewater, the charging party must finally show that the anti-union feeling was a motivating force or a substantial reason for the employer's action. The mere presence of animus is insufficient. Garcia-Dodson did not meet this burden. Abraham was the only Authority manager who was hostile, but no evidence shows that he was aware of her protected activity in February 1993, six months before his hostile comment, and five months before she engaged in protected activity, when the first civil service list unravelled because of Garcia-Dodson's misrepresentation about her home address. No evidence showed that Abraham personally influenced or affected the processing of civil service certifications. Rather, I found that Abraham had relied on the personnel office's explanation of why Garcia-Dodson was going to be terminated.

Even if I had found that the anti-union animus was a motivating factor, the Authority proffered a legitimate and preemptive reason for terminating her -- the Authority's obligation to use a civil service list to make permanent appointments to its positions. Garcia-Dodson argues vigorously in her post-hearing statement that this was pretext. I do not agree.

Garcia-Dodson did not prove that the use of a civil service list to terminate her was pretext. She did show that despite the

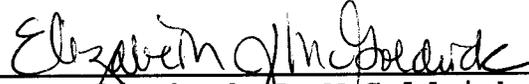
existence of any civil service list, the Authority has discretion to transfer and retain employees. She showed that in other cases where employees were about to be displaced because of the existence of a civil service list, the Authority found other positions and titles into which to transfer them, so that they were not discharged. The Authority did not deny this and it explained instances where employees so situated were placed into available vacant positions for which they qualified.

However, she did not show that at the time she was displaced there were any available openings at the Authority for which she qualified. The Personnel Officer testified credibly that a reassignment of Garcia-Dodson was considered, but there were no appropriate positions. Garcia-Dodson did not show that this was pretext, or that there was a vacant position into which she could have been placed.

Based upon all of the above, and particularly in view of the statutory and regulatory scheme which regulates civil service positions, Garcia-Dodson did not carry the burden of showing, by a preponderance of the evidence, that anti-union animus was a substantial factor in her termination from the Newark Housing Authority in November 1993. She was terminated because she did not rank high enough on a civil service list for her provisional title, and there were no other openings available at the Authority in which to place her.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.



Elizabeth J. McGoldrick
Hearing Examiner

Dated: January 16, 1996
Trenton, New Jersey