H.E. No. 2012-8

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

In the Matter of

NEW JERSEY STATE, STATE PAROLE BOARD,

Respondent,

-and- Docket No. CI-2010-021

JOSEPH MARTIN,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the State of New Jersey, State Parole Board, has violated 5.4(a) 3, and derivatively (a) 1 of the New Jersey Employer-Employee Relations Act, N.J.S.A 34:13A et seq., when it sent Parole Officer Joseph Martin for a fitness for duty examination in retaliation for his engaging in activity protected by the Act. The Hearing Examiner found that the two counseling letters which the Parole Board relied upon to form the basis of its action were pre-textual and no other legitimate reason was established for ordering the examination.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that 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 Chair 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.

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Appearances:

For the Respondent,
Jeffrey S. Chiesa, Attorney General
(Julie Barnes, Deputy Attorney General, of counsel)

For the Charging Party,
Joseph Martin, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 26, 2010, Joseph Martin (Martin or Charging Party) filed an unfair practice charge (C-3)[1/] against the State of New Jersey, State Parole Board (State or Board). On February 17, 2010, Martin filed an amended unfair practice charge. Martin alleges that the State wrongfully sent him for a fitness of duty examination in retaliation for his engaging in activity protected by the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to charging party and respondent exhibits, respectively. Transcript references for the hearing are "1T" representing the transcript dated April 20, 2011.

34:13A-1 et seq. (Act). Specifically, Martin contends that the State violated N.J.S.A. 34:13A-5.4a(1), (3), (4) and (7).[2/]

On August 12, 2010, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). The Director determined that only the 5.4a(1) and (3) allegations in the charge, if true, might constitute unfair practices and dismissed all claims relating to the 5.4a(4) and (7) allegations (C-1). On September 15, 2010, the State filed its Answer (C-2) generally denying that its actions violated the Act. The hearing was conducted on April 20, 2011. The parties examined witnesses and presented documentary evidence. At the conclusion of the hearing a briefing schedule was established. On July 14, 2011, the State filed its brief. Mr. Martin did not file a brief. Upon the entire record, I make the following:

FINDINGS OF FACT

1. The State of New Jersey, State Parole Board, and Joseph Martin are, respectively, a public employer and a public employee

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2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

within the meaning of the Act during the time period relevant to this charge (1T7).

2. The only witness appearing on behalf of the Charging Party was Mr. Martin. Martin's testimony was mostly read into the record from a prepared statement which primarily followed the statement contained in his unfair practice charge.

3. At the time of the hearing, Martin was a parole officer employed by the Board. From approximately 2005 until 2006, Martin was a state-wide representative of parole officers for Fraternal Order of Police, Lodge 200. As an FOP representative, he negotiated labor issues with Jennifer Meyer-Mahoney, employee relations representative for the Board. Martin filed various complaints against the Parole Board and at times was critical of Meyer-Mahoney. Martin was also critical of the Board's head of its Equal Employment Opportunity Office, Lise-Kristen Higgins, and filed a complaint against her with the Equal Employment Opportunity Department. Additionally, Martin was critical of Division of Parole Director Thomas James and, at some time in the past, was involved in an FOP vote of no confidence regarding James and Board Chairman John D'Amico (1T8-1T9).

4. In 2006, soon after Martin resigned from his position as representative with FOP Lodge 200, Martin was injured and placed on extended sick leave. After about two months, Martin's doctor cleared him to return to work to perform light duty. Martin was

denied his request to return to light duty by the Reasonable Accommodation Committee, on which Meyer-Mahoney and Higgins sat. Martin was required to take an additional two months of sick leave until he was able to return to full duty. Martin filed a discrimination complaint with the Division on Civil Rights and a settlement was reached where he was granted two months sick leave credit plus one week's lost pay (1T9-1T10).

5. In March 2008, Martin was denied his annual step increase and, although the other members of his academy class timely received theirs, it took approximately seven months for him to receive his increase retroactively (1T10). In June 2008, Martin was denied overtime which was ultimately given him (1T10).

6. On July 3, 2008, Martin was directed to require all sex offenders assigned to his caseload to be referred for sex offender counseling. On August 8, 2008, Martin received a reminder concerning the July 3 directive. At that time, Martin questioned his supervisor concerning the directive and was told to adhere to it. Over the next two hours, Martin was directed by his supervisor two additional times to comply with the July 3 directive. Martin told his supervisor that he was not going to implement the directive until he was ordered to do so by the lieutenant. Upon discovering that the lieutenant was not available, Martin contacted the captain. On September 19, 2008, a Letter of Counsel-Insubordination/Chain of Command (R-2) was

issued to Martin by his immediate supervisor. Martin was counseled for breaking the chain of command and, since he ultimately failed to make the referral for sex offender counseling, he was warned against future incidents of failing to follow an order issued by his superior (R-2).

7. Since Martin had left his position with FOP Lodge 200, he fought many small labor battles in 2008 (1T35-1T36). In January 2009, Martin received the lowest performance evaluation in his career, even lower than the interim evaluation he received six months earlier. Prior to that time, Martin received only the highest performance ratings (1T10-1T11). Martin filed a grievance regarding the evaluations and a complaint under the Conscientious Employee Protection Act. In September 2009, Martin was transferred to a different office and again received an interim evaluation containing criticisms and a low score (1T11).

8. On March 30, 2009, in response to a complaint filed by Martin, Martin and other parole officers were advised to follow the chain of command when filing a complaint, starting with the officer's immediate supervisor. Subsequent to the March 30 directive, Martin filed a complaint with his lieutenant and simultaneously forwarded a copy to the captain. On July 22, 2009, Martin received a Letter of Formal Counseling (R-3) from his lieutenant. R-3 reiterated that Martin should follow the

chain of command. Martin was never disciplined for breaking the chain of command (1T40).

9. On or about October 2009, Martin filed a Step 1 grievance alleging that his body armor did not fit properly and was thus unsafe (R-4). On October 27, 2009, the Step 1 decision was issued denying the grievance. Martin did not appeal his grievance to Step 2 (1T34). Instead, on December 2, 2009, Martin's union representative arranged for and attended a meeting with State Parole Board Chair Yolette Ross, Division of Parole Director Thomas James, Chief of Personnel Lise-Kristen Higgins[3/] and Martin (1T44, 1T56, 1T78).

Martin complained about the Parole Division's misallocation of funds regarding equipment (1T11). In particular, Martin alleged that digital radios and ruggedized computers were budgeted and should have been supplied. Martin also wanted new body armor and a shot gun (1T11-1T12, 1T56). Martin was advised that none of the officers had shot guns and the Board did not intend to purchase them. Regarding the radios, Martin was told that the Division had purchased digital radios, and would be distributing them to employees as the analog radios no longer functioned.

3/ Lise-Kristan Higgins was promoted to Chief of Personnel on March 1, 2009 (1T46).

James agreed to look into whether a digital radio was available after the meeting.[4/] Concerning the body armor, the Board's policy was reiterated to Martin, namely that employees receive new vests every five years. Since Martin received a new vest only two years ago, he would not again be eligible for a new vest until March 2012 (1T56-1T58; R-4). Higgins characterized Martin's demeanor during the meeting as argumentative and adamant, because while Martin did not raise his voice, he interrupted repeatedly (1T68-1T69).

10. On December 2, 2009, the Board sent Martin a letter directing him to attend a fitness for duty examination on December 15, 2009 (CP-3). A fitness for duty examination determines whether an employee is psychologically capable to perform assigned duties (1T47). Employees are sent for examinations if they act abnormally in the workplace; if the employee makes unusual, uncharacteristic or inappropriate report entries; or the employee makes odd statements (1T48). Requests for a fitness for duty examination are made by the employee's supervisor(s) to the chief of personnel and reviewed by the executive director (1T48). There are no written criteria which Higgins follows when deciding whether to refer an employee for a fitness for duty examination. In this case, Martin's captain forwarded the documentation to Higgins and cited Martin's

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4/ The record does not disclose whether Martin ever received a digital radio.

continuous challenge to authority which resulted in R-2 and R-3 as the sole basis of his concern with Martin's psychological state of mind (1T50-1T51). Examination results are not shared with the employee and are only viewed by the chief of personnel and executive director and, sometimes the chair of the Parole Board (1T54-1T55). Martin never saw the examination report results (1T16). Ultimately, Martin was found to be fit for duty (1T52-1T53).

11. It appears that the December 2, 2009 letter (CP-5) directing Martin to go for a fitness for duty examination was lost and Martin's December 15, 2009 examination did not occur. On December 17, 2009, Higgins sent Martin a second letter scheduling his fitness for duty examination for December 29, 2009 (R-5). On December 22, 2009, Martin, who carries a firearm, received a memorandum from James advising him that his privilege to carry a weapon had been suspended (CP-2). Martin was then placed on modified unarmed duty until March 3, 2010 (1T53; R-6). Between December 2 and December 22, Martin made an arrest, conducted field searches and investigations, and successfully completed his annual firearms qualification (1T12). The Director of the Parole Division (James) has authority to determine whether an employee who is sent for a fitness for duty examination keeps or must relinquish his weapon (1T53).

12. Martin asked Higgins under what authority the Board could require him to go for a fitness for duty examination. She cited N.J.A.C. 4A:6-1.4. The above-cited Civil Service Rule provides in part:

> (g) An appointing authority may require an employee to be examined by a physician designated and compensated by the appointing authority as a condition of the employee's continuation of sick leave or return to work.
>
> 1. Such examination shall establish whether the employee is capable of performing his or her work duties and whether return to employment would jeopardize the health of the employee or that of other employees.
>
> 2. The appointing authority shall set the date of the examination to assure that it does not cause undue delay in the employee's return to work.
>
> (h) Failure to follow sick leave notification and verification procedures may result in a denial of sick leave for that specific absence, be considered an abuse of sick leave and/or constitute cause for disciplinary actions [CP-1].

Martin was neither continuing a sick leave nor seeking to return from sick leave at the time he was ordered to undertake a fitness for duty examination (1T13).

13. Martin appealed the Division's directive to go for a fitness for duty examination to the Civil Service Commission (1T58). On September 13, 2010, the Civil Service Commission responded stating that Martin's appeal was premature since the Parole Board had not initiated any discipline action against him.

It also indicated that the Board can require an employee to submit to a fitness for duty examination where there is a concern regarding an employee's behavior (R-1). It is Martin's view that the Civil Service letter (R-1) is irrelevant because it did not address whether the Board acted properly by sending him, in this instance, for a fitness for duty examination and was a more generalized response (1T40).

14. Higgins did not know why Martin's supervisors waited until December 2009 to ask that a fitness for duty examination be ordered. She could not independently recall any other incidents involving Martin after R-3 was issued which would form the basis of calling for Martin to attend a fitness for duty exam. She asserted that there were incidents in addition to R-2 and R-3 that were contained in his personnel file but could not specifically recall any other incidents and did not produce the personnel file (1T61, 1T65). Higgins did not know if other employees who were sent for fitness for duty examinations had previously filed grievances, however, it is not unusual for her to get grievances. She maintains that the number of grievances an employee files is unrelated to whether the employee is sent for a fitness for duty examination (1T63, 1T73).

15. Martin has a 100% conviction rate and has made hundreds of arrests during his career as a parole officer (1T17). He has

received awards for heroism, valor and other rewards. He received an award from the Narcotics Agent Association (1T17).

ANALYSIS

Martin claims that the Board's determination to send him for a fitness for duty examination was done for the purpose of retaliating against him because he was a State-wide representative of FOP Lodge 200, and because he engaged in protected activity by filing grievances.

Bridgewater Tp. V. Bridgewater Public Works Assn., 95 N.J. 235 (1984), established the test for determining if an employer's conduct is discriminatory and in violation of 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, 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 an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or its explanation has been rejected as pre-textual, 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 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 Commission to resolve.

The decision on whether a Charging Party has proved hostility is based upon consideration of all the evidence, including that offered by the Respondent, as well as the credibility determinations and inferences drawn by the hearing examiner. See, Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

In the instant case, there is no direct evidence that Martin's protected activity was a substantial or motivating factor in the Board's decision to send him for a fitness for duty examination. Thus, we look to the circumstantial evidence existing in this case. Clearly, Martin was engaged in protected activity. He served as a State-wide representative of FOP Lodge 200 and filed numerous grievances. However, Martin was an FOP representative in 2005-2006, well beyond the six-month statute of

limitation applicable to the filing of an unfair practice charge. See N.J.S.A. 34:13A-5.4c. Thus, Martin's role as FOP representative can be considered only for background purposes, but to the extent that Martin is relying on actions which arose during that period of time as forming the basis of the Board having discriminated against him, he is time barred from making that allegation and any other such claims which may have occurred prior to July 26, 2009, six-months prior to his having filed this unfair practice charge. However, the record does show that Martin filed a grievance in October 2009. Thus, Martin was engaged in protected activity, and there is no doubt that the Board knew of his activity.

On this record, I find that the Board was hostile toward Martin's protected activity. Clearly, the Board has the legal authority to send any employee for a fitness for duty examination any time it has a legitimate concern regarding an employee's behavior or psychological state of mind (R-1). Since Martin carries firearms, the Board's determination to require Martin to be examined deserves significant deference. However, the Board can not send an employee for a fitness for duty examination for an illegitimate reason. When an employee is engaged in activity protected by the Act, and such protected activity, rather than an independent, workplace-related concern, is the motivating factor in the employer's determination to sent the employee for a

fitness for duty examination; such action is, in and of itself, hostile and retaliatory.

Higgins testified that fitness for duty examinations are ordered for employees acting abnormally in the workplace. She also said the Board sought an examination for Martin because of incidents involving his challenge to authority. But Martin's "challenge to authority" occurred during those occasions when he was processing grievances or asserting other protected complaints, rather than while he was performing the duties of his job. The only two specific incidents that Higgins relied upon as justification for sending Martin for an examination were letters of counseling in which Martin did not follow the chain of command. While it is necessary for employees serving in a para-military organizational structure to follow the chain of command and failure to do so may properly result in disciplinary action, here no discipline was imposed.

Further, the first counseling letter was served in September 2008 and the second served in July 2009. In light of the time which has elapsed from the issuance of the September 2008 letter, it could not legitimately form the basis for a need to order a fitness for duty examination in December 2009. Similarly, the July 2009 counseling letter (R-3), served over four months prior to the December 2, 2009 letter (CP-5) ordering Martin to go for an examination, is also suspect. Clearly, had the July incident

resulting in R-3 demonstrated such concern over Martin's mental state, a more than four month delay in ordering a fitness for duty examination would not have taken place. The two letters taken together, given the timing and the underlying cause of the counseling (concern over following the chain of command), yield no greater support to their establishing justifiable grounds for ordering an examination. Moreover, no explanation was provided as to why it took so long for Martin's supervisors to request the fitness for duty examination.

I find, therefore, that the Board's claim that the two counseling letters formed the sole basis for justifying the fitness for duty examination is merely pre-text. Again, they are too remote in time to serve as the actual basis for the examination, and the behavior sited in the counseling letters, while potentially disciplinary, was considered minor as reflected by the fact that the letters merely represented counseling and never resulting in disciplinary action. Additionally, Martin's weapon carrying privileges were not removed for two weeks after the fitness for duty examination was ordered. Also, there are no specific criteria used to determine under what circumstances an employee is ordered to undergo a fitness for duty examination.

Higgins testified that in addition to the two counseling letters, there were also additional incidents contained in Martin's personnel file that she relied upon in reaching her

conclusion that he should go for a fitness for duty examination. However, Higgins did not remember any of the incidents specifically nor was the personnel file produced to refresh her recollection or otherwise support the accuracy of her contention. Her testimony was not credible in this regard.

Finally, a negative inference of hostility can be drawn from the timing of events. Camden Bd. of Ed., P.E.R.C. No. 2003-77, 29 NJPER 223 (¶68 2003). Here, the fitness for duty examination was ordered the same day as a meeting between Martin, his union representative and the Board's representatives (Ross, James and Higgins) to discuss Martin's concerns over, what he characterized, as the Board's misallocation of equipment funds, as well as the failure to issue him a radio, computer, new body armor and a shot gun. The meeting was protected activity. Although the Board addressed Martin's concerns at the meeting and provided a rationale for its actions, the timing suggests that the Board was hostile to Martin's complaints in that the fitness for duty examination was ordered that same day. The ordering of the examination, therefore, was more likely related to the meeting, than to the two counseling letters issued months before that the Board claimed was the sole basis for ordering the exam.

Based on the foregoing, I find that Martin's protected conduct was a substantial or motivating factor in the Board's

determination to order him to undergo a fitness for duty examination.

CONCLUSION OF LAW

The State of New Jersey, State Parole Board, violated N.J.S.A. 34:13A-5.4a(3) and, derivatively (1) when it ordered Joseph Martin to undergo a fitness for duty examination in retaliation for his engaging in protected activity.

Based on the foregoing, I recommend the following:

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the State of New Jersey, State Parole Board, cease and desist from:

A. Interfering with, restraining or coercing Parole Officer Joseph Martin in his exercise of the rights guaranteed to him by the Act, particularly by ordering him to undergo a fitness for duty examination in violation of N.J.S.A. 34:13A-5.4a(1).

B. 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, particularly by ordering Parole Officer Joseph Martin to undergo a fitness for duty examination in retaliation for engaging in activity protected by the Act.

C. The State of New Jersey, State Parole Board, take the following affirmative action:

1. Cease and desist from ordering Joseph Martin to undergo a fitness for duty examination in the future in retaliation for engaging in activity protected by the Act.

2. Post in all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A". Copies of such on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative, will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this Order.

Wendy L. Young
Hearing Examiner

DATED: March 30, 2012
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by April 10, 2012.

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing Parole Officer Joseph Martin in his exercise of the rights guaranteed to him by the Act, particularly by ordering him to undergo a fitness for duty examination in violation of N.J.S.A. 34:13A-5.4a(1).

WE WILL cease and desist from 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, particularly by ordering Parole Officer Joseph Martin to undergo a fitness for duty examination.

WE WILL cease and desist from ordering Joseph Martin to undergo a fitness for duty examination in the future in retaliation for engaging in activity protected by the Act.

Docket No. CI-2010-021 State of New Jersey Parole Board
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"