

STATE OF NEW JERSEY  
MERIT SYSTEM BOARD  
AND  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of  
KAREN HARRIGAN,

Appellant,

v.

DEPARTMENT OF TREASURY,

Respondent.

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NORA LLOYD-LAYTON,

Appellant,

v.

DEPARTMENT OF TREASURY,

Respondent.

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STATE OF NEW JERSEY,  
(DEPARTMENT OF TREASURY),

Respondent,

v.

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO,

Charging Party.

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:  
:                   JOINT ORDER  
:                   ON CONSOLIDATION AND  
:                   PREDOMINANT INTEREST

:  
:                   DOP Docket No. 2001-2564  
:                   OAL Docket No. CSV 165-01

:  
:                   DOP Docket No. 2001-2621  
:                   OAL Docket No. CSV 601-01

:  
:                   PERC Docket No. CO-H-2001-119

SYNOPSIS

The Chair of the Public Employment Relations Commission and the Merit System Board issue a joint order consolidating an unfair practice charge filed with the Commission and two disciplinary appeals filed with the Merit System Board. The consolidated case will be heard by an Administrative Law Judge. The Judge's initial decision and record will be forwarded to the Commission first to determine whether the protected activity was a substantial or

motivating factor in the discipline of the employee who is the subject of the unfair practice charge. The case will then be transferred to the Merit System Board to determine whether the disciplinary actions were for legitimate business reasons and were otherwise warranted under Civil Service laws.

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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Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General  
(George N. Cohen, Deputy Attorney General and Michael J.  
Spina, Deputy Attorney General)

For the Appellant Harrigan, Rae C. Roeder, CWA  
Representative

For the Appellant Lloyd-Layton, Jesse J. Averhart, CWA  
Representative

JOINT DECISION

Karen Harrigan was terminated by her employer, the State of New Jersey (Department of Treasury), based on charges of conduct unbecoming a public employee and violation of the public's trust. On November 2, 2000, she appealed her termination to the Merit System Board. The appeal was transmitted to the Office of Administrative Law for determination as a contested case.

On November 6, 2000, the Communications Workers of America, AFL-CIO filed an unfair practice charge against the State. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by firing Harrigan for her union activities. On March 27, 2001, a Complaint issued and the matter was assigned to a Commission Hearing Examiner.

On May 16, 2001, the employer filed a motion for consolidation and predominant interest determination under N.J.A.C. 1:1-17.1 et seq. The employer argued that the appeal and charge should be consolidated and that the Merit System Board has the predominant interest. On May 23, Harrigan and the CWA filed a response indicating that it would not oppose consolidation, but arguing that the Board and Commission should share jurisdiction in accordance with the settled practice of the two agencies.

On May 24, 2001, M. Kathleen Duncan, ALJ, scheduled oral argument on the motion and asked the parties to address whether a matter involving Nora Lloyd-Layton should be consolidated with the

other two matters. Lloyd-Layton did not file any responding papers. On July 24, oral argument was conducted.

On September 7, 2001, the ALJ issued her order consolidating cases and determining predominant interest. She concluded that all three cases arise under the same core facts and should be consolidated. She further concluded that under the principles of Hackensack v. Winner, 82 N.J. 1 (1980), the Commission should defer the exercise of its jurisdiction until after the Board has reached a final decision in the disciplinary matters. If the Board's final decision warrants such additional relief as is incidental to the fundamental remedies and such relief is available only from the Commission, then the matter would be forwarded to the Commission for consideration of any specialized relief pursuant to the Employer-Employee Relations Act. Accordingly, the ALJ ordered that the Board has the predominant interest.

Having independently evaluated the record and considered the ALJ's Order, the Board, at its meeting on October 23, 2001 and the Chair of the Public Employment Relations Commission, acting pursuant to authority delegated to her by the full Commission, on October 5, 2001 made the following determination in the matter.

The three cases should be consolidated. They involve the same core facts. Consolidation will save time and expense and avoid duplication and the risk of inconsistent results. The consolidated matter should be heard by the ALJ.

As for the predominant interest determination, we modify the ALJ's recommendation. We appreciate her thoughtful application of the principles enunciated in Hackensack v. Winner, but we believe she misunderstood how these two agencies have shared their jurisdiction in similar cases. Our sharing of jurisdiction has worked well, eliminating any jurisdictional conflict and inconsistency of results and enabling cases to proceed smoothly.

Hackensack presented a classic case of jurisdictional conflict between two agencies. The then Civil Service Commission first issued a decision concluding that the denials of appellants' promotions were not based on their union activities and that the denials were proper under Civil Service law. The Commission then issued a final decision concluding that the denials were based on their union activities and were illegal under the Employer-Employee Relations Act. On appeal, the Supreme Court concluded that the Commission should have applied principles of collateral estoppel, issue preclusion, and the single controversy doctrine, and held itself bound by the Civil Service Commission's prior final decision.

The Office of Administrative Law later adopted regulations to deal with overlapping administrative jurisdiction. See N.J.A.C. 1:1-17.1 et seq. They provide a mechanism by which these two agencies can share their jurisdiction without running afoul of any of the dangers identified in Hackensack. Our two agencies have issued several opinions in which we have agreed on how to process claims that personnel actions against Civil Service employees were

motivated by anti-union animus. See, e.g., State and CWA and Mathes, P.E.R.C. No. 2002-01, 27 NJPER 297 (¶32108 2001), OAL Dkt. Nos. CSV 3112-99, 3329-00, 5014-00, 5015-00, 7219-00, 7672-00 & 7711-00; State and CWA and Glover, P.E.R.C. No. 96-13, 21 NJPER 292 (¶26185 1995), OAL Dkt. No. CSV-10708-94. A summary of our agreed-upon process follows.

Depending on the case, either an Administrative Law Judge or a Commission Hearing Examiner designated as a Special Administrative Law Judge hears the consolidated matter. The ALJ then offers recommended findings of fact and conclusions of law to both agencies, disposing of all issues in controversy through a single decision.

The record is then forwarded to the Commission to answer the first question asked in a case involving allegations that an adverse personnel action was taken in retaliation for protected activity -- was protected activity a substantial or motivating factor in the adverse personnel action? See In re Bridgewater Tp., 95 N.J. 235 (1984). That determination is one especially committed to the Commission's expertise. If the Commission finds that the charging party has not proved that protected activity motivated the adverse personnel action, it will dismiss the unfair practice charge and forward the record to the Board so that it can determine whether Civil Service law has been violated. If the Commission finds that protected activity was a motivating factor in the personnel action, it will forward the record to the Board so that it can then answer

the second question asked by Bridgewater -- has the employer proven that it would have taken the same action even absent the protected activity? That question is answered by the Board in conjunction with its separate determination as to whether there was cause for the adverse personnel action under the Civil Service Act. It is important to recognize that no unfair practice will be found in consolidated cases before the Board has answered the second question posed by Bridgewater.

This sharing of jurisdiction avoids the danger of inconsistent administrative determinations addressed in Hackensack. There is no possibility that a personnel action will be held to constitute an unfair practice while being simultaneously upheld under Civil Service law. Only if the Board finds a violation of both statutes will the matter be returned to the Commission for any specialized remedial action.

The ALJ appears to have thought that the Commission would be making a final determination on whether an unfair practice had been committed independent of the Merit System Board's determination on whether the discipline was justified under Civil Service law. Because that approach would present the possibility of conflicting results, it has been rejected by the two agencies. The joint approach we have followed in numerous cases has worked well. It allows for the application of the expertise of each agency, but avoids the danger of conflicting results. We adopt that approach in this case.



JOINT ORDER

The Merit System Board appeals and the Public Employment Relations Commission Complaint are consolidated for hearing before an Administrative Law Judge. The ALJ will first offer recommended findings of fact and conclusions of law to both the Public Employment Relations Commission and the Merit System Board, disposing of all issues in controversy through a single initial decision under N.J.A.C. 1:1-18.3 and consistent with N.J.A.C. 1:1-17.8(a); and


Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to the Commission to determine whether Harrigan engaged in activity protected under the New Jersey Employer-Employee Relations Act and whether that activity, if protected, was a substantial or motivating factor in the contested disciplinary action; and


The Commission's decision and the complete record will then be sent to the Merit System Board which will then determine whether the disciplinary actions were for legitimate business reasons and were otherwise warranted under Civil Service laws; and

If appropriate, the matter will be returned to the Commission for its consideration of whether specialized relief is warranted under its Act.

DECISION RENDERED BY THE  
MERIT SYSTEM BOARD ON  
OCTOBER 23, 2001

DECISION RENDERED BY THE CHAIR  
OF THE PUBLIC EMPLOYMENT  
RELATIONS COMMISSION ON  
OCTOBER 5, 2001

  
Janice Mitchell Mintz  
Commissioner  
Department of Personnel

  
Millicent A. Wasell  
Chair  
Public Employment Relations  
Commission