

P.E.R.C. NO. 2009-57

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(JUVENILE JUSTICE COMMISSION)

Respondent,

-and-

Docket No. CO-2007-040

COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 1040,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the Hearing Examiner's recommended decision and finds that the State of New Jersey did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (3), when it reassigned a CWA shop steward and Teacher 1 from a test assessor position to a classroom assignment. In the absence of cross-exceptions, the Commission adopts the Hearing Examiner's recommendation that the Juvenile Justice Commission violated 5.4a(1) of the Act when an administrator referred to the teacher as a "shop steward" or "Mr. Shop Steward" in a meeting unrelated to Association business.

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.

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(JUVENILE JUSTICE COMMISSION)

Respondent,

-and-

Docket No. CO-2007-040

COMMUNICATIONS WORKERS OF AMERICA,  
LOCAL 1040,

Charging Party.

Appearances:

For the Respondent, Anne Milgram, Attorney General  
(Sally Ann Fields, Senior Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys  
(Jason Jones, of counsel)

DECISION

On August 6, 2006, Communications Workers of America, Local 1040 ("CWA") filed an unfair practice charge against the State of New Jersey (Juvenile Justice Commission) ("JJC"). The charge alleges that the JJC violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3) and (7)<sup>1/</sup> when it reassigned CWA shop steward Ed Nomejko

---

<sup>1/</sup> 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of (continued...)"

in retaliation for protected activity and independently violated 5.4a(1) when a JJC manager referred to Nomejko as a "shop steward" or "Mr. Shop Steward" in a meeting to discuss his safety and security concerns.

On May 7, 2007, a Complaint and Notice of Hearing issued on the 5.4a(1) and (3) allegations. On May 24, the JJC filed an Answer denying that it violated the Act and asserting several defenses.

On February 13, April 8, and April 29, 2008, Hearing Examiner Patricia Taylor Todd conducted a hearing. The parties examined witnesses and introduced exhibits. On February 2, 2009, the Hearing Examiner issued a decision recommending that we find that the JJC did not violate 5.4a(1) and (3) of the Act when it reassigned Nomejko from performing educational testing to a classroom assignment. H.E. No. 2009-6, \_\_ NJPER \_\_ 2009. She found that Nomejko was reassigned as part of an initiative of the JJC's Department of Education to place the most qualified teachers in classrooms rather than performing non-teaching functions. The Hearing Examiner did find that the JJC independently violated 5.4a(1) when Juvenile Medium Security

---

1/ (...continued)  
employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act." . . . [and](7) Violating any of the rules and regulations established by the commission."

Facility ("JMSF") Administrator Sheila Thomas referred to Nomejko as a "shop steward" or "Mr. Shop Steward" in a meeting to discuss his safety and security concerns.

On February 24, 2009, the CWA filed exceptions to the Hearing Examiner's recommended decision. On February 27, the JJC filed an answering brief responding to the CWA's exceptions.

We have reviewed the record. We adopt the Hearing Examiner's findings of fact (H.E. at 1-39), including her credibility determinations. We affirm the Hearing Examiner's decision.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation of 5.4a(3) 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.

It would be an unfair practice for a public employer to transfer or assign union officers for the purpose of retaliation or coercion of employees' rights. See Local 195, IFPTE v. State, 88 N.J. 393, 419 (1982). Here, the Hearing Examiner found that CWA did not meet its initial burden under Bridgewater. While she

found that it was undisputed that Nomejko was engaged in protected activity in his position as a CWA shop steward and that some JJC managers knew of this activity, the Hearing Examiner did not find that CWA met its burden of proving hostility to Nomejko's protected activity, or that hostility to protected activity motivated Nomejko's reassignment. She found that Nomejko was reassigned as part of the JJC's realignment of its teaching staff that was announced prior to the grievances that Nomejko filed. The Hearing Examiner did not find a sufficient nexus between the timing of the reassignment and Nomejko's protected activity to support an inference of hostility.

In its exceptions, CWA argues that the Hearing Examiner's finding that the JJC's representatives were not hostile toward Nomejko's protected activity was arbitrary, capricious and unsupported by the credible evidence. Specifically, it points to the alleged statements of Marie Kraus, the JJC's Employee Relations Manager and Thomas Flanagan, Executive Deputy Director, that Nomejko "was twisting people's arms to file grievances" challenging an absenteeism memorandum; that Flanagan approached Nomejko regarding the absenteeism memorandum grievances and said "what are you doing?"; that Flanagan was unhappy when the grievances were resolved and the memorandum was rescinded; and that Sheila Thomas, JMSF Administrator referred to Nomejko as "Mr. Shop Steward" in a meeting regarding safety concerns. It

further contends that the timing of the reassignment supports a finding that Nomejko was reassigned in retaliation for engaging in protected activity.

We reject these exceptions. The record as a whole supports the Hearing Examiner's findings that:

Kraus did not make the "arm twisting" comment;

Flanagan merely advised Nomejko that someone had said that Nomejko was signing other people's names on the absentee memorandum grievances;

Flanagan asked Nomejko, "How are you doing?" rather than "What are you doing?"; and

Flanagan was not happy with the grievance settlement because it was his opinion the settlement did not solve the attendance problem.

Additionally, the record supports the Hearing Examiner's finding that Nomejko's June 1, 2006 reassignment was part of an overall staff realignment plan that was drafted in early 2005 by Jack Amberg, who was then Director of JJC's Department of Education, and presented to CWA on April 19, 2005, which was well before the March 16, 2006 attendance memorandum that was the subject of the grievances filed by Nomejko. The record further supports the Hearing Examiner's finding that the timing of Nomejko's reassignment and his grievance activity was at best coincidental. Moreover, the decision to reassign the teachers, including Nomejko, was made by Margie Brown, who became Director

of Education on February 1, 2006 after Amberg retired. There is no evidence in the record that Amberg or Brown was aware of Nomejko's grievance activity.

The Hearing Examiner's conclusions were based upon her assessment of witness credibility. We will not disturb those findings. We may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. N.J.S.A. 52:14B-10(c); Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006) (absent compelling contrary evidence, Commission will not substitute its reading of the transcript for the Hearing Examiner's credibility determinations). The Hearing Examiner is required to consider all evidence and where testimony conflicts, to determine which testimony is more credible. The Hearing Examiner specifically did not credit that Kraus or Flanagan made the alleged statements. She further found that Flanagan's dissatisfaction with the medical grievance settlement was due to his interest in achieving the managerial goal of reduced absenteeism and did not lead to an inference of animus against Nomejko. The record actually established that Flanagan, Kraus and Nomejko had a

generally cooperative relationship. Absent compelling evidence to the contrary, we will not disturb the Hearing Examiner's overall finding that Nomejko was transferred as part of the overall staff realignment of teachers at JJC. See City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶ 11025 1980).

We adopt the Hearing Examiner's recommendation that the State of New Jersey (Juvenile Justice Commission), did not violate 5.4a(1) and (3) when it reassigned CWA shop steward and Teacher 1 Ed Nomejko from a test assessor position to a classroom assignment and dismiss those allegations.

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exhibition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint or coercion is unnecessary. The tendency to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, a party asserting an independent violation of 5.4a(1) must establish that the employer engaged in some action that would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.



In the absence of cross-exceptions, we also adopt the Hearing Examiner's recommendation that the State of New Jersey (Juvenile Justice Commission), independently violated 5.4a(1) of the Act when JMSF Administrator Sheila Thomas referred to CWA Shop Steward Ed Nomejko as "a shop steward" or "Mr. Shop Steward" in a derisive manner in the presence of JJC education supervisor Tom Sawyer at a meeting conducted after Nomejko's reassignment that was called to address a safety and security concern on or about June 15, 2006.

ORDER

The State of New Jersey, Juvenile Justice Commission is ordered to:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly when JMSF Administrator Sheila Thomas referred to CWA Shop Steward Ed Nomejko as "a shop steward" or "Mr. Shop Steward" in a derisive matter in the presence of JJC Education Supervisor Tom Sawyer at a meeting concerning a safety and security concern on or about June 15, 2006.

B. Take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by

the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations are dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Colligan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: April 30, 2009

Trenton, New Jersey

**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 employees in the exercise of the rights guaranteed to them by the Act, particularly when JMSF Administrator Sheila Thomas referred to CWA Shop Steward Ed Nomejko as "a shop steward" or "Mr. Shop Steward" in a derisive matter in the presence of JJC Education Supervisor Tom Sawyer at a meeting concerning a safety and security concern on or about June 15, 2006.

Docket No. CO-2007-040

NJ STATE JUVENILE JUSTICE COMMISSION

(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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"