P.E.R.C. NO. 2011-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent,

-and- Docket No. CI-2006-022

GARY LIPSIUS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the recommendation of a Hearing Examiner to dismiss a Complaint in an unfair practice case filed by Gary Lipsius against the State of New Jersey Department of Environmental Protection. The charge alleges that the DEP violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. when it did not reclassify Lipsius as a Site Manager in retaliation for his participation in the filing of a federal class action lawsuit against his majority representative. The Commission rejects Lipsius' exceptions and adopts the Hearing Examiner's decision dismissing the Complaint concluding that Lipsius had not presented evidence that the DEP was hostile toward his protected activity.

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, Paula T. Dow , Attorney General of New Jersey, (Geri Benedetto, Deputy Attorney General)

For the Charging Party, National Right to Work Legal Defense Foundation (W. James Young, of counsel)

DECISION

On April 1, 2010, Hearing Examiner Stuart Reichman granted the State of New Jersey, Department of Environmental Protection's motion to dismiss a Complaint based on an unfair practice charge filed by Gary Lipsius. We uphold the Hearing Examiner's dismissal of the Complaint.

Lipsius' charge alleges that the DEP violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 34:13A-5.4 (a)(3) and derivatively (1)[1/], when it

1/ 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. . . [and] (3) (continued...)

failed to reclassify him as a Site Manager in retaliation for his participation in the filing of a federal class action lawsuit against Communication Workers of America, CWA Local 1034, and the New Jersey State Treasurer for violation of non-union members' rights concerning the collection of representation fees in lieu of dues from non-members.[2/]

A Complaint and Notice of Hearing issued on June 20, 2006. On September 9 and October 6, 2009 the Hearing Examiner conducted a hearing. After the charging party finished presenting its case-in-chief on October 9, the DEP moved to dismiss the complaint. The Hearing Examiner reserved on the DEP's motion, and, for administrative efficiency, the hearing proceeded with a direct examination of the first DEP witness and then concluded. On April 1, 2010, the Hearing Examiner dismissed the complaint concluding that Lipsius had not presented evidence that the DEP was hostile toward his protected activity.[3/] The Hearing Examiner also concluded that DEP's determination not to

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1/ (...continued)
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/ This charge was initially consolidated with CI-2006-23 which was later withdrawn.

3/ "T1" refers to the transcript of the September 9, 2009 hearing, "T2" refers to the transcript of the October 6, 2009 hearing and "T3" refers to the transcript of the April 1, 2010 hearing.

reclassify Lipsius' position was based on a directive from the Department of Personnel to conduct a broad title review of the Hazardous Site Mitigation Specialist title series, including the Site Manager title. The Hearing Examiner issued his decision granting the motion to dismiss on the record.

The Hearing Examiner cited the following as the relevant factual background:

> In the early nineties, Mr. Lipsius served as a shop steward in Local 1034, Communication Workers of America or CWA. He began questioning Local 1034's officers about financial accounting issues. As he delved more aggressively into fiscal matters, Mr. Lipsius found himself being ostracized from local activities and distant from local officials.
>
> In 2002, Lipsius established the website pertaining to Local 1034's finances and disclosing officers' salaries. Mr. Lipsius became persona non grata at Local 1034. Ultimately, Mr. Lipsius withdrew from membership in CWA.
>
> Mr. Lipsius and others brought a federal class action lawsuit against CWA and the State of New Jersey. In effect, the lawsuit claimed that the State and CWA were wrongfully deducting representation fees in lieu of dues or agency shop fees from Mr. Lipsius and other employees' salaries.
>
> In December 2004 the lawsuit was settled pursuant to a settlement agreement executed by plaintiff's attorney and attorneys for the CWA and the State of New Jersey. Neither the Department of Environmental Protection, or D.E.P., nor any of D.E.P's managerial officers were named in Mr. Lipsius' federal lawsuit.

> In or about April 2003 Mr. Lipsius filed a classification appeal with the Department of Personnel, D.O.P., alleging that he was working out of title. On June 28, 2005, the D.O.P issued a final administrative action . . . including that the position of Mr. Lipsius is properly classified as a Site Manager a D.E.P. title, and directed D.E.P. to either assign Mr. Lipsius duties and responsibilities commensurate with his permanent title of Hazardous Site Litigation Specialist-1, HSMS-1, or reclassify his position to the Site Manager title.
>
> On the basis of D.O.P's June 28, 2005 order,. . . and from numerous emails included in the record, it is clear that during the month of July D.E.P fully intended to promote Mr. Lipsius to the Site Manager title. However, on July 27, 2005, D.O.P. issued another order . . . stemming from an appeal begun in January 2005 by other HSMS employees wherein D.O.P. directed D.E.P. to review the appropriateness of the job specifications and open competitive examination requirements for the entire HSMS titles series before proceeding with any open competitive examinations to fill vacancies in that title series.
>
> On July 29, 2005 D.E.P. sought a time extension to implement the D.O.P's order . . . concerning Mr. Lispius' classification appeal in light of D.O.P.'s subsequent directive . . . . Thus, the effectuation of Mr. Lipsius' appeal was put on hold. During this same time period Mr. Lipsius' success in his reclassification action became known to similarly situated DEP employees and became the object of their attention.
>
> In July 2005 in anticipation of Mr. Lipsius' reclassification the D.E.P. ordered the reassignment among employees of many Superfund cases which were considered the most complex cases. This was implemented as the result of the D.O.P. reclassification order . . . finding that the most complex

> cases needed to be assigned to employees in the Site manager title leaving less complex cases for the HSMS title series.
>
> However, upon closer review D.E.P discovered that Superfund cases were not necessarily the most complex cases consequently simply assigning Site Manager Superfund cases did not result on Site Managers being assigned a caseload of the most complex cases, D.E.P. then realized that a deeper and more time-consuming review would be required to comply with [the DOP's directive to review the HSMS title series].
>
> On or about July 31, 2005 a CWA Local 1034 representative sent D.E.P. employees an e-mail . . . advising them that he had reserved a conference room in the D.E.P. building for August 2, 2005 to discuss the Site manager title and the issues concerning reassignment and redefining caseload. The e-mail stated, and I quote, "I have had some preliminary conversations with management about the problems and concerns I have heard from various members so far. But I want to have a large group meeting and frank conversation before dealing with the issue more formally."
>
> On August 2, 2005 CWA LOCAL 1034 convened a meeting among D.E.P. employees who had an interest in Mr. Lipsius' reclassification action. In response to an employee's speculation that Mr. Lipsius was, in fact, going to be placed into the Site Manager title, the Local 1034 representative responded that such result was not necessarily correct in that Mr. Lipsius might have duties taken away rather than be classified into the Site Manager position. . . .
>
> It was subsequent to this August 2nd meeting that Mr. Lipsius was advised by the Department that a global review of titles was taking place causing the effectuation of his reclassification to the Site Manager title to be delayed pending its completion. On August

> 23, 2005 Mr. Lipsius was advised by the Director of the Division of Remediation Management and Response that in accordance with the final administrative action issued by the D.O.P on July 28, 2005 . . . the Department has decided to remove higher level duties identified by D.O.P during their classification review rather than proceed with the reclassification of Mr. Lipsius' title into the Site Manager position. While the Division Director told Mr. Lipsius of the D.E.P's decision, it appears he's always been in favor of reclassification.
>
> [T3: 3-19 to 8-13].

Lipsius filed the following four exceptions to the Hearing Examiner's dismissal of the complaint:

> 1. The Hearing Examiner erroneously found that the DEP was not hostile to Gary Lipsius' protected activity and that it had a valid, non-pretextual reason for its adverse action, despite the volume of evidence supporting the opposite conclusion.
>
> 2. The Hearing Examiner erroneously found no evidence to infer that the Division Director "was in any way influenced by Local 1034 officials to handle Mr. Lipsius' reclassification in a manner that was contrary to his interest or protected rights" despite the wealth of evidence on this issue.
>
> 3. The Hearing Examiner improperly considered N.J.A.C. relevant to sanitize union involvement in this reclassification case where the Charging party had not requested union assistance or representation, counsel had warned the Respondent of the likelihood for illegal retaliation, and the union representative instructed members that there is no cause for union involvement.
>
> 4. The Hearing Examiner erroneously used testimony from the Respondent's case-in-chief as a basis for the ruling on the motion to

> dismiss, and which testimony Charging Party was not allowed to cross-examine because of the Hearing Examiner's ruling dismissing the case.

The DEP responds that there was no evidence that would lead to a legitimate inference that the DEP was hostile to Lipsius' protected activity or that the DEP and CWA colluded in any way to deny Lipsius a reclassification.

ANALYSIS

Lipsius' unfair practice charge asserts a violation of N.J.S.A. 34:13-5.4a (3) and derivatively (1). In making a determination on a motion to dismiss, all of the evidence supporting the charging party's allegations are accepted as true and the charging party is afforded the benefit of all inferences that can reasonably be deduced from that evidence. Dolson v. Anastasia, 55 N.J. 2, 5 (1969). Dismissal of a claim is appropriate when a rational fact-finder can not conclude from the evidence that each essential element of that claim is present. Pitts v. Newark Bd. of Ed., 337 N.J. Super. 331, 340 (App. Div 2001).

Lipsius' first exception asserts generally that the evidence supported that his reclassification was denied because the DEP was hostile to his protected activity, and that the stated reason for the denial was pre-textual. We reject this exception. The Supreme Court set forth the standard for determining whether an employer violates N.J.S.A. 34:13a-5.4(a) (3). Pursuant to In re

Tp. of Bridgewater, 95 N.J. 235 (1984), 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.

Lipsius engaged in protected activity when he filed the federal lawsuit against the CWA and the State Treasurer, as well as when he chose to withdraw from membership in the CWA. Lipsius asserts that the State Treasurer being named in the federal lawsuit in his capacity for actions he took on behalf of the DEP supports an inference that DEP was hostile to his protected activity. However, the Treasurer's role in the agency shop process was simply as a transfer agent deducting agency shop fees from employees' paychecks and delivering those fees to the employee organization. DEP had no involvement in the lawsuit. The record is devoid of evidence that the DEP was hostile as a result of the State Treasurer being named in the federal law suit.

Lipsius' claim that the DEP's stated reason for not reclassifying his position was pretextual is also not supported in the record. The evidence established that the July 27, 2005

directive from DOP to DEP was to institute a global review of the HSMS title series. The directive was received from the DOP while Lipsius' reclassification application was pending. Lipsius has not claimed that the DOP's order was motivated by any hostility against him.

Lipsius' second and third exceptions stem from his assertion that the CWA and the DEP colluded to prevent his reclassification in retaliation for his protected activity. We reject these exceptions. Lipsius cites to the August 2, 2005 meeting as an example of the alleged collusion. With regard to why that meeting was scheduled, Lawrence Quinn, a Site Remediation Technical Specialist who testified on behalf of Lipsius, testified as follows:

> My recollection is the meeting was convened because - - basically because of two things, that there was - - word had gotten out that Gary had been successful on his proceeding - - I'm not sure exactly what proceeding - but he achieved a victory in his efforts to get the Site Manager title. He has won some kind of victory in the course of that. And I recall at the time management's response to that initially was that Superfund cases in the office were being transferred from a number of individuals within the office to, I guess, people who were already in the Site Manager title. And that process has started. People were taking boxes of files on Superfund sites and moving them out of their offices. And I believe in response to those events, I don't know if somebody contacted the union and asked for a meeting to talk about this, but that's why the meeting was set up.

[T1: 72-5 to 21]

The testimony of Lipsius' witness revealed that the meeting was being held to discuss management's response to Lipsius' reclassification application and specifically the reassignment of Superfund cases and the impact of such reassignment on employees. Moreover, the evidence revealed that the meeting was run by a CWA representative who was not a State employee and that there were no members of DEP management present at the meeting. The CWA representative responding to an attendee's question that Lipsius' classification might still result in having duties removed rather than being placed in the Site Manger position is not conduct from which a negative inference of hostility can be drawn. At the time of the meeting, Lipsius' reclassification application was still pending. Nor is the testimony that CWA asked the DEP to hold off for 30 days with regard to reclassifications and the transferring of cases from different case managers to others conduct from which a negative inference of hostility can be drawn. To the extent the evidence showed that there was communication between CWA and the DEP regarding Management's response to Lipsius' reclassification application and specifically the reassignment of Superfund cases, the Hearing Examiner took administrative notice of regulations which he found to support the involvement of majority representatives as active participants in classification issues affecting union members.

The Hearing Examiner took notice of N.J.A.C. 4A:3-3.3(f) which requires in state service that state departmental representatives addressing job classification issues provide notice to affected and potentially affected employee representatives upon submission of classification matters to DOP, N.J.A.C. 4A:3-3.9(c)which allows classification appeals to be filed by an employee's union representative and N.J.A.C. 4A:3-3.9(c)(2) which similarly includes the participation of an employee representative in the classification process. The evidence showed that DEP's communication with CWA demonstrated appropriate interaction between an employer and a majority representative concerning classification issues affecting employees in the unit and did not constitute collusion. Lipsius' counsel stated on the record that he did not oppose the Hearing Examiner taking administrative notice of the above cited regulations.

Finally, Lipsius' fourth exception asserts that the Hearing Examiner erroneously relied on testimony from the sole DEP witness as a basis for the dismissal of the complaint, and that his counsel did not have an opportunity to cross-examine that witness. We reject this exception. Lipsius cites to a portion of the record in which the Hearing Examiner, in setting forth the factual background of the case and describing that in DEP deciding how to handle Superfund cases, it "discovered that Superfund cases were not necessarily the most complex cases,

consequently simply assigning Site Manager Superfund cases did not result in Site Managers being assigned a caseload of the most complex cases. DEP then realized that a deeper and more time-consuming review would be required to comply with [the DOP's directive to evaluate the HSMS title series]." The cited portion of the transcript was part of the factual background of the case and was not a fact relied on by the Hearing Examiner in making his determination that the DEP had not been hostile to Lipsius' protected activity. There is no evidence of hostility toward Lipsius' protected activity in the record. Accordingly, Lipsius has not met his burden of proof under Bridgewater.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners, Bonanni, Colligan, Eaton, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: April 28, 2011

Trenton, New Jersey