

P.E.R.C. NO. 2011-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IFPTE LOCAL 195,

Charging Party,

-and-

Docket No. CO-2008-321

STATE OF NEW JERSEY
STOCKTON STATE COLLEGE,

Respondent.

SYNOPSIS

The Public Employment Relations Commission adopts the Initial Decision of an Administrative Law Judge finding a violation of N.J.S.A. 34:13A-5a(3) in a consolidated unfair practice case filed by the IFPTE Local 195 against the State of New Jersey Stockton State College. The ALJ found that a college employee who also serves as the local IFPTE President was engaged in protected activity when he approached the Assistant Superintendent of Building Repairs regarding the hiring of temporary workers and the hiring of the Assistant Superintendent's future son-in-law. The Commission rejects the Initial Decision to the extent it found a violation of N.J.S.A. 34:13A-5a(5).

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
(Mamta Patel, Senior Deputy Attorney General and Geri
Benedetto, Deputy Attorney General, of counsel)

For the Charging Party, Oxfeld Cohen, P.C. (Arnold S.
Cohen, of counsel)

DECISION

This case comes to us by way of exceptions to the Initial Decision of an Administrative Law Judge in an unfair practice case consolidated with an appeal to the Civil Service Commission. On April 22, 2008, IFPTE Local 195 filed an unfair practice charge alleging that the State of New Jersey, Stockton State College, violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(3) and (5)^{1/}, for

^{1/} These provisions prohibit public employers, their representatives or agents from: "(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
(continued...)

issuing a ten-day suspension to Jose Santana, an employee of the College and President of the IFPTE affiliate that represents College employees, for engaging in protected activity. On December 4, the Director of Unfair Practices issued a complaint.^{2/}

Santana also appealed his suspension to the Civil Service Commission. On February 13, 2009, the CSC transmitted the appeal to the Office of Administrative Law as a contested case. The College filed a motion to consolidate the unfair practice charge with the Civil Service appeal. On October 5, Administrative Law Judge Bruce M. Gorman found that PERC had the predominant interest. A Joint Order was signed confirming consolidation of the matters and that PERC had the predominant interest. P.E.R.C. No. 2010-31, 35 NJPER 403 (¶136 2009).

We have reviewed the record. We adopt and incorporate the ALJ'S Findings of Fact (Initial Decision at 2 - 10) and summarize them as follows:

Santana works as a painter for the College and has been serving as president of the local IFPTE affiliate representing

1/ (...continued)
act. . . . [and] (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ On December 24, IFPTE filed an amendment to its charge.

College employees for the past six years. In March 2008, the College needed to repaint a home for its new vice president for administrative finance. The College directed Charles Jackson, Assistant Superintendent of Building Repairs and Santana's immediate supervisor, to hire three temporary workers so that the work on the home could be completed within a week.

On March 27, 2008, repairman Gregory Hauser informed Santana that the College planned to hire temporary workers to do the work at the home. On March 28, Santana approached Jackson about the hiring of temporary workers. Santana wanted to know the identity of the temporary workers and was particularly concerned that Jackson intended to hire his daughter's boyfriend and future son-in-law, Bryan McCracken. Santana and McCracken had previously worked together in 2007 and Santana believed McCracken to be a poor employee. The discussion deteriorated into a heated verbal exchange between Santana and Jackson in the presence of four other workers. Hauser, the only eyewitness to the exchange, testified that Santana approached Jackson and demanded to know the identity of temporary workers selected to work at the vice-president's home. Jackson refused to answer, and Santana responded by telling Jackson that one of the temporary workers better not be his son-in-law, and continued to make sharp comments about McCracken's personal life and work attitude. Jackson began to curse at Santana, and the dispute escalated into

a shouting match where both parties hurled profanities. The confrontation lasted about two minutes and ended when Santana left the paint room speak to a higher level supervisor.

Supervisors Craig David Ruggles and Tim McFadden testified that they witnessed Santana pacing outside the open door of Ruggle's office. Once invited in, Santana told Ruggles and McFadden about his confrontation with Jackson and asserted that he should be fired. Ruggles and McFadden testified that they attempted to calm Santana down, encouraged him to report immediately to the job site and to avoid further contact with Jackson.

On March 31, 2008, Jackson reported the incident to the Human Resources Department. Santana was ultimately charged with unbecoming conduct and insubordination and, on April 4, he was issued a ten-day suspension.

On July 16, 2010, the ALJ issued an Initial Decision finding violations of N.J.S.A. 34:13a-5.4a (3) and (5) and dismissing the charges of unbecoming conduct and insubordination.

The State's exceptions to the ALJ's Initial Decision assert that the ALJ: failed to give probative weight to testimony from two of Santana's supervisors; did not apply Commission law establishing the boundaries of speech that is protected by the Act; failed to analyze the evidence pertaining to the claimed violation of N.J.S.A. 34:13A-5.4a(3); and failed to conduct separate analyses of the alleged violations of N.J.S.A. 34:13A-

5.4a(3) and (5) as separate unfair practice charges. Local 195 opposes the State's exceptions and requests that Santana be made whole with back-pay and benefits.

Analysis

We adopt the ALJ's Initial Decision to the extent it found a violation of N.J.S.A. 34:13a-5.4a(3) but reject it to the extent it found a violation of N.J.S.A. 34:13a-5.4a(5). We begin with the State's exception that the ALJ did not properly analyze IFPTE's claim that the State violated N.J.S.A. 34:13a-5.4a (3). In re Tp. of Bridgewater, 95 N.J. 235 (1984) is the seminal case regarding claims of retaliation. Pursuant to 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.

The threshold question in this case is whether Santana was engaged in protected activity when he approached Jackson about the use of temporary workers and the hiring of Jackson's son-in-law. Our decisions have drawn a distinction between a union representative's protected activity and unprotected workplace

misconduct. State of New Jersey (Treasury Dept.), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001), see also Middletown Tp. Bd. of Ed. and Middletown Tp. Ed. Ass'n, P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. and notice of app. disp., 149 N.J. 35 (1997); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 2001-52, 27 NJPER 177 (¶ 32057 2001).

In State of New Jersey (Treasury Dept.), we described the difference between protected and unprotected conduct:

In negotiations and grievance discussions, management officials and union representatives meet as equals and exchange views freely and frankly. See, e.g., Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (5th Cir. 1970); NLRB v. Southwestern Bell Telephone Co., 694 F.2d 974, 112 LRRM 2526 (5th Cir. 1982); Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979); City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979). Passions may run high and epithets and accusations may ensue so courts have refused to impose a "rigid standard of proper and civilized behavior" on participants and have allowed leeway for adversarial and impulsive behavior. Crown Central, 74 LRRM at 2860. See also United States Postal Service, 251 NLRB No. 33, 105 LRRM 1033 (1980), aff'd 652 F.2d 409, 107 LRRM 3249 (5th Cir. 1981); American Telephone & Telegraph Co. v. NLRB, 521 F.2d 1159, 89 LRRM 3140 (2d Cir. 1975); Hawaiian Hauling Services, Ltd. v. NLRB, 545 F.2d 674, 93 LRRM 2952 (9th Cir. 1976); Union Fork & Hoe Co., 241 NLRB No. 140, 101 LRRM 1014 (1979). An employer may criticize a representative's conduct at such meetings, but it may not

discipline the representative as an employee when that conduct is unrelated to job performance. Black Horse Pike.

Despite the equality of participants in negotiations and grievance settings and despite the leeway allowed for impulsive and adversarial behavior, representational conduct may lose its statutory protection if it indefensibly threatens workplace discipline, order, and respect. See, e.g., NLRB v. Thor Power Tool Co. 351 F.2d 584, 60 LRRM 2237 (7th Cir. 1965); AT&T, 571 F.2d at 1161; Felix Industries Inc. v. NLRB, 331 NLRB No. 12, 164 LRRM 1137 (2000); Paper Board Cores, Inc., 292 NLRB No. 107, 131 LRRM 1644 (1989); Atlantic Steel Co., 245 NLRB No. 107, 102 LRRM 1247, 1249 (1979). See generally Hardin, The Developing Labor Law, 150-151 (3d ed. 1992). To determine whether conduct is indefensible in the context of the dispute involved, it is necessary to balance the employees' heavily protected right to representation in negotiations and grievance discussions against the employer's right to maintain workplace discipline. Southwestern Bell; AT&T. The NLRB considers several factors: (1) the place of the discussion; (2) the subject of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an unfair labor practice. Atlantic Steel Co.; Felix Industries.

[State of New Jersey (Dept. of Human Services)]

We find that Santana was engaged in protected conduct when he approached Jackson to question the hiring of temporary workers. The ALJ made several credibility determinations in finding that Santana was engaged in protected activity, and we emphasize that we may not reject or modify an ALJ's findings of fact as to issues of credibility unless we find them to be

arbitrary, capricious or unreasonable or not supported by sufficient, competent, and credible evidence in the record.

N.J.S.A. 52:14B-10(c). The ALJ found that Santana was motivated to approach Jackson out of concern over the use of temporary employees cutting into unit members' overtime and the hiring of Jackson's son-in-law who he believed to be an unsuitable employee. Protected activity may include complaints, arguments or objections relating to working conditions of employees. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454 n.16 (¶4205 1978), aff'd NJPER Supp.2d 63 (¶45 1979) (finding that a secretary engaged in protected activity when she strenuously objected to her supervisor about a change in work hours, an existing working condition that pertained to a certified negotiations unit).

The State asserts, however, that Santana approached Jackson, not because of concern about temporary workers decreasing unit workers' opportunities for overtime, but because of personal issues with Jackson's son-in-law.^{3/} The ALJ found that concern over the hiring of Jackson's son-in-law was encompassed within his concerns over the use of temporary employees. (Initial Decision at 14).

^{3/} The State cites to New Jersey Dept. of Ed., P.E.R.C. No. 85-85, 11 NJPER 130 (¶16058 1985), which is distinguishable. In that case, the employee received a written reprimand that was not related to protected activity.

The State also takes exception to the ALJ's treatment of Ruggles and McFadden's testimony and urges us to accept their characterization of Santana's behavior. The ALJ addressed this in the Initial Decision where he wrote:

The problem with Stockton's position is that the only eyewitness who testified, Gregory Hauser, stated that both men raised their voices, and both men utilized profanity. In short, Jackson and Santana engaged in a heated but equal argument. Nothing in the record allows me to differentiate Santana's conduct from Jackson's conduct. **While Ruggles and McFadden may have observed Santana in a state of extreme agitation, that conversation transpired after the argument with Jackson.** Only Hauser witnessed the actual argument, and I have already found his testimony to be credible and believable.

[Initial Decision at 16 - 17].

The ALJ did not ignore Ruggles and McFadden's testimony. He addressed it but chose to credit the testimony of Hauser, an eyewitness to the confrontation, rather than draw an inference that Santana's agitated outburst before Ruggles and McFadden established that Santana was engaged in unprotected activity when he approached Jackson. Again, we may not reject or modify an ALJ's findings of fact as to issues of credibility unless we find them to be arbitrary, capricious or unreasonable or not supported by sufficient, competent, and credible evidence in the record.

N.J.S.A. 52:14B-10(c).

Finding that Santana was engaged in protected activity when he approached Jackson, we also find ample evidence in the record to support that Jackson was aware of Santana's protected activity and was hostile toward that protected activity.

We reject the ALJ's Initial Decision to the extent it found a violation of N.J.S.A. 34:13A-5a (5). The ALJ did not engage in any analysis regarding whether a violation of N.J.S.A. 34:13A-5a (5) occurred, and the record is devoid of any evidence of such a violation.

Accordingly, we adopt the ALJ's Initial Decision to extent it found that the State violated N.J.S.A. 34:13A-5a(3). We reject the Initial Decision to the extent that it found a violation of N.J.S.A. 34:13A-5a(5). Pursuant to P.E.R.C. No 2010-31, this case shall proceed to the Civil Service Commission to determine whether the disciplinary action was warranted under Civil Service laws. If appropriate, the matter will be returned to PERC for our consideration of whether specialized relief is warranted under the Act.

ORDER

The ALJ's Initial Decision is adopted to the extent it found a violation of N.J.S.A. 34:13A-5a(3), but is rejected to the extent that it found a violation of N.J.S.A. 34:13A-5a(5). This case shall proceed to the Civil Service Commission to determine whether the disciplinary action was warranted under Civil Service

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Colligan, Eaton, Krengel and Voos voted in favor of this decision. Commissioner Eskilson voted against this decision. Commissioner Bonanni was not present.

ISSUED: May 26, 2011

Trenton, New Jersey