D.U.P. NO. 97-15

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-96-264

CWA, AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses certain allegations in an unfair practice charge filed by the CWA against the State. Specifically, it dismisses an alleged Weingarten violation, as the situation described by the CWA involved a discussion about an employee's performance, not an investigatory interview. Further, he dismisses an allegation involving the State's verification of employees' break and lunch schedules and the State's implementation of time-keeping procedures. The Director finds such actions to be managerial prerogatives.

Further, the Director dismisses allegations that the State discriminated against Hispanic employees and has violated the First Amendment of the U.S. Constitution, finding that such allegations are outside of the purview of the Act.

Moreover, the Director dismisses an allegation involving a supervisor's discussion of the charge at a union meeting. The Director notes that the supervisor's discussion was curtailed by the shop steward and that she could have lawfully discussed the charge under Black Horse Pike.

Finally, the Director issues a Complaint and Notice of Hearing with respect to the remaining allegations in the charge.

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Appearances:

For the Respondent,
Peter G. Verniero, Attorney General
(Michael L. Diller, Sr. Deputy Attorney General)

For the Charging Party,
Kathleen A. King, Representative

DECISION

On May 21, 1996, the Communications Workers of America, AFL-CIO, filed an unfair practice charge against the State of New Jersey with the Public Employment Relations Commission and on June 28, 1996 it amended its charge. The amended charge alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (5) of the Act with respect to the Administrative/Clerical Professional, Primary Level Supervisory Unit the CWA represents at the Department of Labor, Division of Vocational Rehabilitation in Hackensack. In particular, Paragraphs 4 through 7 of the charge allege that employee Loretta Harmon requested and received the CWA's

assistance in obtaining a special chair and handset necessitated by her back surgery. Thereafter, on November 30, 1995, Harmon's manager, Janice Pointer, opined to Harmon that she was bitter over the office chair incident and stated that she was "lucky to have a job" and that if she "could not accept that the office would never be perfect, perhaps she needed another environment."

Paragraphs 8 and 9 of the charge allege that Pointer reprimanded unit members in November 1995 for going outside of the "chain of command" in reporting heating and ventilation system problems. Paragraph 10 alleges that in November 1995, Pointer told Harmon to put her complaints in writing and to limit her complaint to herself. Further, Paragraph 11 of the charge alleges that at a December 1, 1995 staff meeting, Pointer informed the office that if they had any complaints they should direct them to their supervisor. Pointer further stated that the office would never be perfect and that if anyone was not happy, there was an opening in the Jersey City office.

Paragraphs 12 and 13 assert that in December 1995, employee Maria Guerrero grieved a PAR rating of "4" and that the State denied her the right to have Harmon, who became shop steward in December 1995, present in a discussion about her performance.

Paragraph 14 alleges that at a January 12, 1996 staff meeting, Pointer instructed the office staff to keep their problems and complaints "in-house," citing the restructuring occurring among State agencies. Paragraph 15 further alleges that Pointer made

several calls to the office during a January or February 1996 union meeting to determine the length of the meeting and whether employees there were adhering to their break and lunch schedules. The CWA notes that this it was not Pointer's usual practice and that it had obtained proper access in advance.

Paragraphs 16 and 17 of the charge allege that Pointer, in response to a question as to why Hispanic employee George Delgado, who was from Ecuador, was taking so long to retrieve a fellow employee for a February 1, 1996 gathering, said "you know those people from 'down there' are slow." The CWA also points out it has a grievance against Pointer and the State for failing to adequately account for the special placement difficulties of another Hispanic employee, Guerrero, and for giving her a PAR rating of "4."

Paragraph 18 alleges that at a December 1995 Christmas party that Pointer had organized, some employees had planned to open the party with a prayer without informing other employees of the planned prayer and without providing them the opportunity to leave the room prior to the prayer. Further, the CWA complains that at a January 12, 1996 staff meeting, Pointer disseminated religious material and supposedly whited out the word "prayer" throughout the material. Moreover, the CWA claims that on April 16, 1996, Pointer promoted religion in violation of the First Amendment by prompting several employees to sign a memo in support of the religious activity that the CWA had complained to the Department of Labor about.

Paragraph 19 of the charge alleges that since April 1996, Harmon has been harassed for her union activity by being required to provide medical documentation for all absences due to illness.

In Paragraph 20, the CWA claims that on February 7, 1996, Pointer issued a memorandum regarding sign-in sheets, which intentionally and maliciously distorted issues raised during a February 6, 1996 grievance meeting.

Finally, in Paragraph 21, the CWA alleges that on May 16, 1996, Pointer's superior, Vernette Richberg, attended a staff meeting to discuss the charge with unit members. Richberg's discussion was curtailed by the shop steward who reminded Richberg that it was inappropriate for her to discuss the charge with employees.

The State in its position statements of May 24 and July 30, 1996, claims the amended charge is meritless and requests that it be dismissed. Specifically, it asserts that the November 30, 1995 conversation alleged in Paragraph 7 could not constitute an unfair practice, as Pointer's statements are protected under Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

As to Paragraphs 8 and 9, the State claims it was appropriate for Pointer to advise employees that they should be going through her to resolve maintenance problems. The State also notes that Pointer did not reprimand anyone.

The State denies the allegations in Paragraph 10. As to Paragraph 11, the State claims it is simply a restatement of

Paragraph 7 and thus again asserts that the statements are protected under Black Horse Pike.

Further, the State asserts that the allegation in Paragraph 12, that Guerrero received a PAR rating of "4", cannot constitute an unfair practice. As to Paragraph 13, the State points out that under NLRB v. J. Weingarten Co., Inc., 420 U.S. 251 (1978), an employee is only entitled to have a union representative present during a meeting which is being conducted for the purposes of investigating activities or non-activities that might constitute a basis for discipline against the employee. According to the State, Weingarten does not apply to the situation alleged in Paragraph 13, as there is no reasonable basis upon which Guerrero, in a performance meeting situation, could anticipate discipline was intended.

As to Paragraph 14, the State claims that it was not Pointer's intent to imply that employees could not use the grievance procedure, in stating that complaints should initially be processed through the chain of command. The State also claims that the alleged statement involving restructuring is irrelevant.

According to the State, the claims made in Paragraphs 15 through 19 have no basis in fact. Also, according to the State, the grievance cited in Paragraph 19, as well as the Guerrero situation in Paragraph 17, have been resolved. However, the CWA disputes this.

As to Paragraph 20, the State denies that the cited memorandum "misrepresented" issues which had been discussed during

the February 6, 1996 grievance meeting. Rather, the State properly communicated with employees regarding the utilization of sign-in sheets. The State also claims the CWA fails to allege facts which specifically describe how the memorandum could be considered intimidating or distorting.

Finally, the State asserts that the allegations in Paragraph 21 fail to state an unfair practice. The State notes that the CWA acknowledges that Richberg did not discuss the unfair practice charge. The State, citing Black Horse Pike, also claims that even had she discussed the charge with employees, it would not be an unfair practice unless her comments constituted threats of reprisal or promises of gain, and the CWA makes no such allegations. The State points out that N.J.S.A. 34:13A-5.3 provides in pertinent part that "nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit...." There are three limitations to the provision, namely, the majority representative must be aware of the meeting; any changes in terms and conditions of employment must occur only through negotiations with the majority representative; and no minority organization may present or process grievances, and that these limitations were abided by with respect to the meeting.

ANALYSIS

Paragraphs 12 and 13 appear to assert that Guerrero's rights established in N.L.R.B. v. J. Weingarten Co., Inc., 420 U.S.

251 (1978) and adopted by the New Jersey Supreme Court in UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd ___ N.J. ___ (1996) were violated. Under Weingarten, an employee is entitled to have a union representative present at an investigatory interview which the employee reasonably believes might result in discipline.

However, the situation described in Paragraphs 12 and 13 does not fall under Weingarten, as it involves a discussion about Guerrero's performance, not an investigatory interview where discipline could be anticipated. Therefore, under Weingarten and UMDNJ and CIR, Guerrero did not have the right to have a shop steward present at this interview and thus no unfair practice occurred.

Paragraph 15 also does not set forth an unfair practice. It merely alleges that Pointer was verifying that employees were adhering to their break and lunch schedules, which is a managerial prerogative. See Willingboro, P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984); Butler Boro., P.E.R.C. No. 94-51, 19 NJPER 587 (¶24281 1993).

Paragraphs 16 and 17 allege that the State discriminates against Hispanic employees. This claim alleges a civil rights violation which is outside of our jurisdiction, therefore it must be dismissed. Elizabeth Ed. Ass'n and Jefferson, D.U.P. No. 95-33, 21 NJPER 245 (¶26154 1995); State of New Jersey and CWA, D.U.P. No. 94-12, 19 NJPER 520 (¶24240 1993); Marlboro Tp. Bd. of Ed. and Watson, D.U.P. No. 91-1, 16 NJPER 420 (¶21176 1990).

Paragraph 18 also must be dismissed. It alleges that Pointer violated the First Amendment of the U.S. Constitution by engaging in the illegal promotion of religion. This claim does not fall within the purview of the Act and thus we cannot consider its merits. State and CWA, D.R. 97-1, 22 NJPER ___ (¶_____ 1996); see also, State of New Jersey, D.U.P. No. 94-12.

Further, Paragraph 20 does not state an unfair practice. The implementation of time-keeping procedures, specifically the use of time sheets, is a managerial prerogative. Butler Boro. Moreover, the CWA fails to state how Pointer intentionally and maliciously distorted issues discussed at the February 6, 1996 grievance meeting so as to violate the Act.

Finally, Paragraph 21 fails to state an unfair practice. The CWA acknowledges that Richberg's discussion on its charge was, in fact, curtailed by the shop steward. In any event, under Black Horse Pike, Richberg could have lawfully discussed the charge, as long as she did not use statements that were threatening or coercive. Black Horse Pike holds:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.

See also, State of New Jersey, D.U.P. No. 92-25, 18 NJPER 327 (¶23142 1992).

Based on the foregoing, I find that Paragraphs 12, 13 15, 16, 17, 18, 20 and 21 fail to meet the Commission's complaint

issuance standard and are thus hereby dismissed. I will issue a Complaint and Notice of Hearing with respect to the remaining allegations in the charge.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: August 19, 1996
Trenton, New Jersey