P.E.R.C. NO. 85-85

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-82-248-21 and CO-83-30-22

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Communications Workers of America, AFL-CIO, filed against the State of New Jersey, Department of Education. The charge had alleged that the State discharged Gregory DiGiacomo, reprimanded Hetty Rosenstein and harassed other employees in retaliation for their engaging in union activity at the New Jersey Job Corps Center. The Commission holds, however, that DiGiacomo was terminated for chronic lateness in reporting to work; Rosenstein was reprimanded for violating the Center's rules and regulations and there was no evidence that other employees were harassed.

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Docket Nos. CO-82-248-21 and CO-83-30-22

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:
For the Respondent, The Hon. Irwin I. Kimmelmann, Attorney General of New Jersey (Michael L. Diller, Of Counsel)

For the Charging Party, Ann F. Hoffman, Of Counsel

DECISION AND ORDER

On March 19 and June 14, 1982, respectively, the Communications Workers of America ("CWA") filed an unfair practice charge (Docket No. CO-82-248-21) and amended charge (Docket No. CO-83-30-22) against the State of New Jersey -- Department of Education ("State") with the Public Employment Relations Commission. The charge, as amended, alleged 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), (3), (4), (5) and (7),[1/] when on October 20, 1981, it discharged Gregory DiGiacomo,

1/ These subsections 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; (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 act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority (Continued)

allegedly in retaliation for his activities as a shop steward for CWA at the New Jersey Job Corps Center. In addition, the charge alleged that since his discharge, there have been a series of actions taken by the State designed to harass and intimidate employees in retaliation for engaging in union activities. In pertinent part, the charge alleged that Hetty Rosenstein, a CWA shop steward, received a reprimand for her protected activity.

On August 11 and 12, 1982, CWA filed a related unfair practice charge (Docket No. CO-83-30-22) against the State. This charge alleged that the State violated subsections 5.4(a)(1), (3), (4), and (7), when, at a meeting of State workers and students, its representatives falsely criticized CWA and its officials.

On August 27, 1982, the Director of Unfair Practices issued an order consolidating the two charges and a Complaint and Notice of Hearing. The State submitted an Answer admitting that it discharged DiGiacomo and reprimanded Rosenstein, but denying that it did so in retaliation for their protected activities or that it otherwise harassed any employees.

On November 22 and 23, 1982, January 20, 1983 and March 18 and 28, 1983, Hearing Examiner Joan Kane Josephson conducted hearings. The parties examined witnesses, presented exhibits, argued orally and filed post-hearing briefs. Hearing Examiner Josephson subsequently left the employ of the Commission and it designated Hearing Examiner Mark A. Rosenbaum to issue a report

1/ (Continued) 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; and (7) Violating any of the rules and regulations established by the commission."

and recommended decision, pursuant to N.J.A.C. 19:14-6.4.

On October 23, 1984, Hearing Examiner Rosenbaum issued his report and recommended decision. H.E. No. 85-19, 10 NJPER ___ (¶_____ 1984) (copy attached). He concluded that the State did not violate the Act when it discharged DiGiacomo. He found that although CWA established a prima facie showing that the discharge violated the Act, the State met its burden of proving that the discharge would have occurred even in the absence of DiGiacomo's protected activity because of his chronic lateness in reporting to work. Therefore, relying on In re Bridgewater Tp., 95 N.J. 235 (1984), he recommended dismissal of that portion of the charge. With respect to the allegations concerning Hetty Rosenstein, he first concluded that oral comments directed towards her did not violate the Act since they "were not such as would tend to interfere with the exercise of protected activity by a union shop steward." However, relying on Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12229 1981) and Ridgefield Park Board of Education, P.E.R.C. No. 84-120, 10 NJPER 266 (¶15130 1984), he found that a written reprimand criticizing her for her actions on April 16, 1982 technically violated subsection 5.4(a)(1) of the Act because he found that "the letter contained statements making impermissible connections between Rosenstein's employment status and her role as an employee representative." He did not recommend a remedy, however, since the State had voluntarily removed the reprimand from Rosenstein's file. 2/

2/ The State's motion to dismiss the remaining aspects of the charge was granted at the conclusion of the charging party's case by Hearing Examiner Josephson. CWA has not excepted to this ruling.

On November 14, 1984, the State filed its exceptions. It asserts that the written reprimand did not violate the Act because it was not related to protected activity, but rather was directed towards Rosenstein's conduct as an employee. Contending that the Hearing Examiner misapplied our holding in Black Horse Pike, the State urges dismissal of the Complaint in its entirety.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate and we adopt them here.

We agree with the Hearing Examiner that the State did not violate the Act when it discharged DiGiacomo. In the absence of exceptions and applying the standard set forth in In re Bridgewater Tp., 95 N.J. 235 (1984), we agree that the State established that it would have discharged DiGiacomo even in the absence of his participation in protected activity. We further agree with the Hearing Examiner's conclusion, from which no exceptions were filed, that oral comments made by the State did not interfere with Rosenstein's exercise of protected activity. Accordingly, we dismiss these aspects of the Complaint.

We now consider whether the issuance of a written reprimand to Rosenstein from the Director of the New Jersey Job Corps Center violated subsection 5.4(a)(1) of the Act. The reprimand stated:

> It has come to this writer's attention that on April 16, 1982, you exhibited behavior unbecoming a staff member of the New Jersey Job Corps Center on several occasions in less than an eight-hour period of time; further, that your behavior covered a wide range of offenses that would shock a reasonable person:
>
> (1) That you insulted and attempted to intimidate Corpsmembers, accusing them of being irresponsible and used;

(2) That you attempted to bring a visitor on Center, encouraging this visitor to ignore Center rules regarding entry, and encouraging the visitor to become belligerent to a point that endangered and embarrassed all involved.

Given that you violated some basic ethical practices, you should be advised that your behavior is not becoming to a professional educator and employee of the New Jersey Job Corps Center, and should not occur in the future.

Should you choose to continue to exhibit behavior of this nature, action commensurate with your behavior will be taken.

This case requires us to apply the principles set forth in In re Black Horse Pike Reg. Board of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). There, we said:

> A public employer is within its right 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. However, as we have held in the past, and as noted by the Hearing Examiner, the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) and In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977).
>
> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions; one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy the other's actions. However, as in this case, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. In the instant case, when Horton represented Ms. Cohen at the November 13 meeting he was not engaged in activity which was relevant to his performance as an industrial arts teacher.

> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.

Thus, public employers violate subsection 5.4(a)(1) when their agents make statements threatening or implicating an employee's job status not because of the employee's job performance, but because of that employee's conduct as an employee representative. See also Ridgefield Park Board of Education, P.E.R.C. No. 84-120, 10 NJPER 266, 267 (¶15130 1984); In re Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2. Conversely, an employee is not insulated from adverse action by his or her employer for impermissible conduct simply because the employee is a union representative. Black Horse Pike, supra; Trenton Board of Education, P.E.R.C. No. 80-130, 6 NJPER 216, 217 (¶11108 1980).

We hold, based on our application of these principles, that the reprimand did not violate the Act.

We do not find, based on our reading of the reprimand, any impermissible connection between Rosenstein's employment status and her role as an employee representative.[3/] She was not criticized for engaging in protected activity. Rather, the criticism was directed to her purported violation of established

3/ In reaching this result, we note that the charging party did not establish that the reprimand was directed against any activity protected by our Act.

regulations at the Job Corps Center and insulting and intimidation of students at the Center.[4/] Accordingly, we dismiss this aspect of the Complaint as well.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Graves was not present. Commissioner Hipp concurred in that part of the decision dismissing the Complaint regarding DiGiacomo, but dissented from that part of the decision dismissing the Complaint regarding Rosenstein.

DATED: Trenton, New Jersey
February 25, 1985
ISSUED: February 26, 1985

4/ We do not decide whether the discipline was imposed with proper cause or whether the dispute is moot because of the State's subsequent removal of the reprimand from her file.

H. E. No. 85-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-248-21

COMMUNICATIONS WORKERS OF
AMERICA,

Charging Party.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent,

-and-

Docket No. CO-83-30-22

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends a finding that the State Department of Education would have terminated a CWA shop steward even in the absence of his protected activity, and thus did not violate N.J.S.A. 34:13A-5.4(a)(3) nor, derivatively, 5.4(a)(1). The Hearing Examiner recommends a finding that the State Department of Education committed a technical violation of N.J.S.A. 34:13A-5.4(a)(1) when its agent issued a written reprimand to another CWA shop steward which made impermissible connections between her employment status and her role as an employee representative. Consistent with Commission case law, the Hearing Examiner does not recommend an affirmative remedy, since the State had removed the reprimand from the employee's file in voluntary settlement of her grievance.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 85-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

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-and- Docket No. CO-82-248-21

COMMUNICATIONS WORKERS OF
AMERICA,

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STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,

Respondent,

-and- Docket No. CO-83-30-22

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

Appearances:

For the Respondent
Hon. Irwin I. Kimmelman, Attorney General
(Michael L. Diller, D.A.G.)

For the Charging Party
Ann F. Hoffman, Counsel, C.W.A.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On March 19, 1982, and as amended June 14, 1982, the Communications Workers of America ("Charging Party" or "CWA") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the State of New Jersey, Department of Education ("State") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections

5.4(a)(1), (3), (4), (5) and (7) [1/] when it terminated one employee and harassed another due to their activities as shop stewards at the New Jersey Job Corps Center which was operated by the State Department of Education.

On August 11, 1982, and as amended on August 12, 1982, CWA filed a charge with the Commission alleging that the State had engaged in unfair practices within the meaning of the Act and specifically subsections 5.4(a)(1), (3), (4) and (7) when in August, 1982, the Job Corps Center Director publicly ridiculed one of the shop stewards. [2/]

It appearing that these allegations, if true, might constitute unfair practices within the meaning of the Act, an Order Consolidating Cases and a Complaint and Notice of Hearing were issued on August 27, 1982. The State filed an Answer on September 13, 1982, in which it denied the charges.

Hearings were held before Hearing Examiner Joan Kane Josephson on November 22 and 23, 1982, January 20, March 18 and 28, 1983, at which time all parties were given opportunities to present evidence, examine and cross-examine witnesses and argue orally.

1/ These subsections 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; (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 Act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (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; (7) Violating any of the rules and regulations established by the commission."

2/ During the hearing the State made various motions to dismiss many additional allegations in the charges. CWA did not contest these motions, which were granted (TIII at pp. 1-14). Accordingly, the undersigned renders neither factual findings nor analysis with respect to the dismissed allegations.

Hearing Examiner Josephson subsequently left the employ of the Commission and the Commission designated the undersigned to issue a report and recommendations on the record as made, pursuant to N.J.A.C. 19:14-6.4. For good cause shown, and noting the Charging Party's consent, the undersigned granted the Respondent's request for an extension for the filing of briefs. Both parties have filed briefs and responsive letter briefs, the last of which was received on September 6, 1984.

Based upon the entire record, the undersigned makes the following:

Findings of Fact

1. The State of New Jersey, Department of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The CWA is a public employee representative within the meaning of the Act and is subject to its provisions.

3. Gregory DiGiacomo was an automobile body repair instructor at the State Job Corps Center from 1974 until his discharge in October, 1981. DiGiacomo testified that between October 1980 and October 1981, he was a union shop steward, first for CWA's predecessor majority representative, the State Employees Association ("SEA") and then for CWA (TI at pp. 14 and 77). 3/ The State contended and proved that DiGiacomo was not a contractually designated shop steward for either SEA or CWA (TIII at pp. 22-23). However, DiGiacomo did participate in various union activities, including

3/ TI refers to the Transcript of November 22, 1982; TII refers to the Transcript of November 23, 1982; TII to the Transcript of January 20, 1983; TIV to the Transcript of March 18, 1983, and TV to the Transcript of March 28, 1983.

meetings, grievance processing, leafletting and picketing (TI at pp. 26, 83-6, 95, 130 and 147). Herman Kimbrough, then Director of the Center, was aware of DiGiacomo's union activities and once criticized DiGiacomo about "damn grievances" that had been filed (TI at pp. 16-20, 30 and 118-119).

4. DiGiacomo was late for work on numerous occasions. [4/] DiGiacomo testified that he was late three days per week on the average (TI at p. 48). On January 30, 1981 and March 25, 1981 DiGiacomo received evaluations which were critical of his tardiness. (Exhibits CP-7 and 8 respectively). Gregory Motus, DiGiacomo's supervisor, testified that DiGiacomo's chronic tardiness was compounded by his frequent failure to give prior notice, or prepare complete lesson plans for substitutes to deliver. As a result of DiGiacomo's tardiness and omissions, students either wandered through the Jobs Corps compound or were supervised by teachers who could not teach without complete lesson plans. Motus discussed these problems with DiGiacomo; following a period of improvement, DiGiacomo returned to a pattern of tardiness and omissions (TII at pp. 62-71).

5. In April, 1981 the State decided to terminate DiGiacomo (TIII at pp. 84-86; R-34 and 35). However, in June 1981, DiGiacomo went on disability leave and did not return to work until October 1981, whereafter he was informed of his termination (CP-14, TI at pp. 39-42).

6. Hetty Rosenstein was an instructor in the basic education department at the Job Corps from May 1980 to October 1982. There was contradictory evidence as to whether Rosenstein was a

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4/ The State introduced DiGiacomo's time cards which indicate that he was late 62 times between January 9, 1981 and June 26, 1981 (R-6 through 18).

shop steward for SEA or CWA. Rosenstein testified that she was elected as an SEA shop steward in October 1980 and a CWA shop steward in May 1981 (TII at p. 4). CWA introduced a State of New Jersey Grievance Procedure Form (CP-2) dated March 10, 1981, which lists Rosenstein as an SEA shop steward. The State introduced evidence that Rosenstein was not an officially designated shop steward for CWA until March 19, 1982, when she was designated as a CWA shop steward pursuant to contractual procedures. 5/

Whether or not Rosenstein was officially designated from the State's perspective, it is clear that Rosenstein, her fellow workers and the Center's management either felt she was, or treated her as a shop steward (see, e.g. TIII at pp. 108-109; TIII at p. 51; TV at p. 56). In her capacity as a defacto shop steward, as well as after official designation pursuant to contract, Rosenstein participated in various union activities including grievance processing and hearings, leafletting and picketing.

7. Rosenstein testified that during her tenure as shop steward several management employees evidenced anti-union behavior. Rosenstein testified that Terri Grey, Assistant Director of the Center and first step grievance representative for management, once responded to Rosenstein's inquiry about several grievances as follows: "I'll hear the grievances when I am good and ready." (TII at p. 7). Rosenstein later testified that in April, 1981, Grey refused to sign Rosenstein's evaluation form. Rosenstein testified that when she asked Grey for her reason for not signing the form,

5/ Both the State-SEA contract (Exhibit R-28) and the State-CWA contract (Exhibit J-1) contain provisions which detail the procedures to be utilized in designating which employees will be shop stewards.

Grey replied:

> You're always asking me questions and you're always causing me problems....Well, I don't think you should be involved with any other teachers....Just be involved with yourself. (TII at p. 14).

Rosenstein also testified that in August, 1982, Gregory Motus approached her and asked, "What are you planning now? What kind of trouble are you bringing?" (TII at p. 43). Motus confirmed that he made such comments, but contended that they were made in a "joking manner" (TIII at p. 108).

8. On February 11, 1982, Ralph Knotts, who had just become the Center's new director, introduced himself to Rosenstein, whom he was meeting for the first time, as "Ralph Rosenfeld" or "Ralph Rosenstein" (TI at p. 162; TII at pp. 70-72; TIV at p. 18). Knotts testified that he was hired in February 1982 to "straighten the program out," and that his first priority was to meet with key personnel, including Rosenstein, to discuss problems at the Center. The discussions resulted in various policy initiatives (TIV at pp. 11-34).

9. On April 16, 1982, a Center guard required Richard Rogers, president of CWA Local No. 137, to produce identification before permitting him to enter the Center's property. Rogers had earlier in the day received Knott's permission to enter the center's property. A Center regulation required that all visitors produce identification before being permitted entry. [6/] This regulation was promulgated by Director Knotts in response to security problems which he had identified, and was published in several bulletins to

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6/ A sign setting forth this requirement was erected at the Center's main gate on April 16, 1982.

employees prior to the Rogers incident (TIV at pp. 70-80; R-50, 51, 52, 53 and 56A-F).

10. Rosenstein played an active role in the April 16, 1982 picketing. During the picketing Rosenstein got into a discussion with Alphonso Scott, administrative assistant to Knotts, the main gate security guard and others concerning the requirement that Rogers produce identification. Rosenstein and Scott met later that day after a meeting with students; Rosenstein testified that Scott stated: "You're up to something....You have a hidden agenda." (TII at p. 27). On April 16, 1982, Scott sent Knotts a memorandum concerning the security gate event which was critical of Rosenstein's actions (R-58). On April 20, 1982, Scott sent Knotts a memorandum concerning his contact with Rosenstein after the meeting with students (R-62).

11. On April 20, 1982, Rosenstein received a written (CP-16) reprimand from Knotts criticizing her for her activities on April 16, 1982. 7/ The reprimand was to be placed in her personnel

7/ The reprimand stated:

> It has come to this writer's attention that on April 16, 1982, you exhibited behavior unbecoming a staff member of the New Jersey Job Corps Center on several occasions in less than an eight-hour period of time; further, that your behavior covered a wide range of offenses that would shock a reasonable person:
>
> (1) That you insulted and attempted to intimidate Corpsmembers, accusing them of being irresponsible and used;
>
> (2) That you attempted to bring a visitor on Center, encouraging this visitor to ignore Center rules regarding entry, and encouraging the visitor to become belligerent to a point that endangered and embarrassed all involved.
>
> Given that you violated some basic ethical practices, you should be advised that your behavior is not becoming to a professional educator and employee of the New Jersey Job Corps Center, and should not occur in the future.
>
> Should you choose to continue to exhibit behavior of this nature, action commensurate with your behavior will be taken.

file. On May 10, 1982, Rosenstein filed a grievance over the reprimand. Following a May 21, 1982 grievance hearing, Knotts on May 24, 1982, ordered that the reprimand be removed from her file (TIV at p. 93). Rosenstein subsequently discovered that a different reprimand had been placed in her file. 8/ This latter reprimand was a rough draft of the reprimand actually sent to Rosenstein and was not intended to be circulated to anyone nor to be placed in her file. At Rosenstein's request, the draft was removed from her file (TII at pp. 112-113).

Analysis

I. Did the State violate N.J.S.A. 34:13A-5.4(a)(3) and, derivatively, 9/ N.J.S.A. 34:13A-5.4(a)(1) when it discharged Gregory DiGiacomo?

For the Charging Party to prevail on an (a)(3) charge, it must prove by a preponderance of the evidence that it has met the "causation test" enunciated by the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), which adopted the analysis of the National Labor Relations

8/ This reprimand was similar to the one given to Rosenstein except that it contained the following criticism in addition to the two contained in the previous reprimand:

> (1) Several staff complained that you were insulting to them in your attempt to get support for your agenda....
>
> (3) That you willfully and wantonly attempted to discredit the New Jersey Job Corps Center through media....

9/ The Charging Party did not argue, nor did it prove an independent violation of subsection (a)(1) with respect to DiGiacomo.

Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), enforced 622 F.2d 899, 108 LRRM 2513 (CA1 1981), cert. denied 455 US 989, 109 LRRM 2779 (1982). 10/ The "test" involves the following requisites in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the Respondent's adverse employment decision and; (2) once this is established, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of protected activity. Mt. Healthy City School District Board of Education v. Doyle, 492 US 274 (1977).

With respect to the first aspect of the (a)(3) test, the Charging Party proved that, while DiGiacomo was not a contractually designated shop steward, he engaged in extensive protected activity, with management's knowledge, in the year preceding his discharge. In support of an inference that this protected activity was a "substantial" or "motivating" factor in his discharge, DiGiacomo testified that Herman Kimbrough, Center Director and signatory of DiGiacomo's termination notice (CP-14), admonished DiGiacomo for the filing of "damn grievances." (See Finding of Fact No. 3) Kimbrough did not testify nor did the State otherwise rebut DiGiacomo's testimony. Accordingly, in view of DiGiacomo's unrebutted testimony and his extensive protected activity, as well as the timing of all of the above, the undersigned concludes that the Charging Party has established a prima facie showing

10/ The Board's analysis was adopted by the United States Supreme Court in NLRB v. Transportation Management Corp., ___ US ___, 113 LRRM 2857 (1983).

sufficient to support an inference that DiGiacomo's protected activity was a "substantial" or "motivating" fact in his discharge.

As noted above, the burden in an (a)(3) case shifts from the Charging Party who makes a prima facie showing, supporting an inference of improper employer conduct, to the Respondent, which has the burden of proving that the adverse employment action would have occurred even in the absence of the protected activity. The record reveals that the Respondent has clearly met this burden. Through documents and testimony, the State demonstrated that DiGiacomo was a chronically tardy employee who failed to give notice of such tardiness or to prepare complete lesson plans for substitute teachers in anticipation of his tardiness. He was warned repeatedly, orally and in writing, yet his work habits did not ultimately change (See Finding of Fact No. 4).

While the Charging Party argues that DiGiacomo had been late throughout his eight year career with the Job Corps, and that the State's sudden preoccupation with timeliness was pretextual, this argument does not comport with the evidence. The record clearly reveals that the Job Corps Center installed a time clock for the first time in July, 1980, and thereafter management began to vigorously enforce timeliness requirements (TIII at pp. 121-126). Similarly, the undersigned concludes that the Charging Party was not the victim of disparate treatment with respect to enforcement of timeliness requirements; of two individuals cited for comparison by the Charging Party, the Charging Party offered no evidence as to the tardiness of one, and evidence as

to the other was effectively rebutted by the State (TIII at pp. 80-81 and 119).

Accordingly, the undersigned recommends that the Charging Party's allegations that the State violated N.J.S.A. 34:13A-5.4(a)(3) and, derivatively, (a)(1), should be dismissed.

II. Did the State violate N.J.S.A. 34:13A-5.4(a)(1) through its conduct with respect to Hetty Rosenstein? 11/

An independent violation of subsection (a)(1) of the Act occurs when an employer engages in activities which, regardless of the direct proof of anti-union animus, tend to interfere with, restrain or coerce an employee or employees in the exercise of rights guaranteed to them by the Act, provided that the actions taken by the employer also lack a legitimate and substantial business justification. In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). "It is immaterial under subsection 5.4(a)(1) that [the actions do] not actually coerce an employee or [are] not illegally motivated; it is the tendency of the employer's conduct to interfere with employee rights, not its result or motivation, which is at issue." Ridgefield Park Board of Education, P.E.R.C. No. 84-120, 10 NJPER 266, 267 (¶15130 1980)(footnote ommitted). See also, In re Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), affirmed, App. Div. Docket No. A-1642-82T2.

In reviewing independent (a)(1) claims, the Commission has indicated a delicate balance between employer and employee rights:

11/ It is not clear from the charge that the Charging Party seeks a finding of an (a)(3) allegation with respect to Rosenstein; indeed the Charging Party did not brief the issue. Assuming, arguendo, such a claim, the undersigned finds that the State did not violate subsection (a)(3) as to Rosenstein, since there was no adverse employer action taken which discriminated against Rosenstein. Although a letter of reprimand was originally placed in Rosenstein's personnel file, it was subsequently removed. See discussion infra.

> 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. However..., the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer....
>
> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible cirticism may be appropriate and even legal action...may be initiated to halt or remedy the others actions. However, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. Black Horse Pike Reg. Bd/Ed, P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981) (citations omitted).

Thus, in Black Horse Pike, the Commission found that the public employer violated subsection (a)(1) by placing two letters in the personnel file of a union activist, because the letters criticized the individual for protected activity irrelevant to his teaching position.

In the instant matter, the Charging Party alleges that both oral and written comments by the State and its agents tended to interfere with Rosenstein's exercise of protected activity. Focusing first on the oral comments, the undersigned finds that the nature, timing and circumstances of the comments were not such as would tend to interfere with the exercise of protected activity by a union shop steward. The comments were made by management employees who either

disagreed with Rosenstein's positions or conduct in several labor-management disputes (See comments by Grey, Finding of Fact No. 7) or sought to glean information regarding future union activity from Rosenstein (See Statements by Motus and Scott, Finding of Fact Nos. 7 and 10). 12/ Significantly, none of the statements resulted in any written material concerning Rosenstein, nor were they uttered before groups of unit members, nor did they implicate or threaten Rosenstein's job status because of her conduct as an employee representative. Accordingly, the undersigned finds that the totality of this oral conduct, under the circumstances presented, did not tend to interfere with Rosenstein's exercise of protected activity. Compare Laurel Springs Board of Education, 3 NJPER 228 (1977).

Turning to the written reprimand from Knotts criticizing Rosenstein for her activities on April 16, 1982, the undersigned finds that the letter contained statements making impermissible connections between Rosenstein's employment status and her role as an employee representative. Black Horse Pike and Ridgefield Park, supra. The statements tended to interfere with, restrain or coerce Rosenstein in acting as an employee representative, and constitute a technical violation of subsection 5.4(a)(1).

Under all the circumstances of this case, however, the undersigned does not believe that the Commission should order affirmative relief to remedy the technical violation. The State did not take further action against Rosenstein; to the contrary, the State removed the

12/ However indefensible and unnecessary, Knott's introduction of himself to Rosenstein as "Ralph Rosenstein" is unrelated to protected activity. Comments by Lynn Preston (TII at pp. 44-46) and Adib Lidawi (TII at p. 40) also do not bear consideration here, since Preston was a Federal employee and Lidawi was a unit member. Neither individual was established at hearing as an agent or representative of the State within the meaning of N.J.S.A. 34:13A-5.4(a).

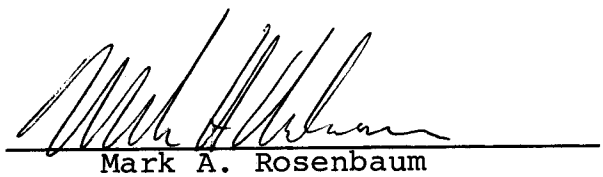
reprimand from Rosenstein's file in voluntary settlement of her grievance. In similar circumstances, the Commission has previously found a technical violation, but deemed affirmative relief to be unnecessary and unwarranted. Ridgefield Park, supra; Middletown Township, P.E.R.C. No. 84-100, 10 NJPER 173 (¶15885 1984). 13/

RECOMMENDED ORDER

The undersigned recommends that the Commission ORDER that:

1. All aspects of the Complaints concerning Gregory DiGiacomo should be dismissed.

2. A technical violation of N.J.S.A. 34:13A-5.4(a)(1) be found against the State for the reasons set forth above, but no affirmative relief should be ordered.



Mark A. Rosenbaum
Hearing Examiner

DATED: October 23, 1984
Trenton, New Jersey

13/ Given the above recommendations, the undersigned does not reach the procedural issues raised by Respondent at the outset of its post-hearing brief.