P.E.R.C. NO. 84-150

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY,

Respondent,

-and-

Docket No. CI-83-45-46

GARY CONOVER,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge Garry Conover filed against the New Jersey Sports & Exposition Authority. The charge alleged that the Authority terminated Conover from his job as a pari-mutuel clerk at the Meadowlands because of his activity on behalf of Sports Arena Employees' Local 137. Even assuming, however, that animus against Conover's protected activity was a factor in his dismissal, the Commission finds that the Authority would have dismissed him anyway because of his absenteeism and tardiness problems.

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GARY CONOVER,

Charging Party.

Appearances:
For the Respondent, James H. Lockwood, Esquire

For the Charging Party, Ball, Hayden, Kiernan & Livingston, Esqs. (Margaret M. Hayden, Of Counsel)

DECISION AND ORDER

On February 16 and March 2, 1983, respectively, Gary Conover filed an unfair practice charge and an amended charge against the New Jersey Sports & Exposition Authority ("Authority") with the Public Employment Relations Commission. The charge alleged that the Authority violated subsections 5.4(a)(1) and (3) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it terminated Conover, allegedly because of his activity on behalf of Sports Arena Employees' Local 137, AFL-CIO ("Local 137"), from his job as a pari-mutuel clerk at the Meadowlands.

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; and (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."

On November 23, 1983, the Administrator of Unfair Practice Proceedings issued a Complaint and a Notice of Hearing. The Authority then filed an Answer denying that it discharged Conover for any protected activity and asserting, to the contrary, that it discharged Conover for repeated absences from work in violation of Authority rules and a previous arbitration award.

On January 26, 27, and 31, 1984, Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On March 6, 1984, the Hearing Examiner issued a report recommending dismissal of the Complaint. H. E. No. 84-48, ___ NJPER ___ (¶_____ 1984) (copy attached). He found that the Authority discharged Conover because of his absenteeism and tardiness and that Conover's protected activity was not a motivating or substantial factor in his termination.

On April 9, 1984, after securing an extension of time, Conover filed exceptions. He contends that the Hearing Examiner erred in: (1) finding (fact no. 7) that the Director of Mutuels was not hostile towards Conover because of their differences years before when the Director, then a regular employee, was a Local 137 officer; (2) finding (fact no. 14) that Conover was not treated more severely than other employees who were also frequently absent or late, but who were not terminated; and (3) concluding that Conover was discharged for absenteeism and tardiness rather than his protected activity.

On May 16, 1984, after receiving an extension of time,

the Authority filed a response supporting the Hearing Examiner's recommendation.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-6) are accurate. We adopt and incorporate them here. We specifically accept his finding that Conover did not prove that he was a victim of disparate treatment so as to suggest an inference of animus or discrimination in the discharge. 2/

The New Jersey Supreme Court has recently confirmed that this Commission has been using the proper legal standards for analyzing allegations that an employer has discriminated against an employee in order to discourage protected activity. In re Township of Bridgewater and Bridgewater Public Works Assn., 95 N.J. 235, aff'g App. Div. No. A-859-81T2 (6/21/82), aff'g P.E.R.C. No. 82-3, 7 NJPER 434 (¶12193 1981), mot. for recon. den.

2/ The record shows the following in this connection. Conover worked for two different employers -- the Meadowlands and Monmouth Park -- and historically had a problem with absences and latenesses at his Meadowlands job during the racing season at Monmouth Park. In 1981, he was terminated for this problem, but an arbitrator conditionally reinstated him provided he accept a transfer to the "extra" roster and be present for all Friday and Saturday races. In 1982, he was absent without excuse on several Saturdays and holidays during the Monmouth Park season and thus violated the condition. No other employee was subject to the terms of an arbitration award conditioning continued employment on regular attendance. One employee (Brophy) was absent several times, but was ill and later hospitalized; another employee (Schaefer) was absent nine times, received a 30 day suspension, and was later terminated; several other employees (Ryan, DeMarzo, Buckley, and Scott) were absent repeatedly and either were fired or resigned under threat of firing; one employee (Bilotta) was absent several times, but those absences were excused; and one employee (Bartoletta) was absent six times without excuse, but apparently was not disciplined.

P.E.R.C. No. 82-36, 7 NJPER 600 (¶12267 1981) ("Bridgewater"). There, the Supreme Court, in affirming the Commission's determination that an employee had been illegally transferred and demoted, articulated these standards:

> ...[T]he employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of antiunion animus is not enough. The employee must establish that the antiunion animus was a motivating force or a substantial reason for the employer's action. [NLRB v. Transportation Management, __ U.S. at ___, 113 LRRM 2857 (1983)]. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense. Id. 3/ (Slip opinion at pp. 910).

In the instant case, even if we assume that Conover has shown that his protected activity was a substantial or motivating factor in his termination, the Authority has shown that it would have terminated him for his absenteeism and tardiness regardless of his protected activity. Conover had already been terminated

3/ These standards stem from Mount Healthy City Bd. of Ed. v. Doyle, 419 U.S. 274 (1977) and were first articulated in adjudicating questions of federal constitutional violations and remedies. The National Labor Relations Board, with the endorsement of the United States Supreme Court, then applied these standards in adjudicating unfair labor practice charges. Wright-Line, Inc., 251 NLRB No. 159, 104 LRRM 1169 (1980), modified 661 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. den. 102 S. Ct. 1612 (1982) ("Wright-Line"); NLRB v. Transportation Management Corp., __ U.S. __, 113 LRRM 2857 (1983). At the same time, this Commission and the appellate courts of this state had adopted and were applying the Wright-Line standards. See East Orange; Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-73, 9 NJPER 36, 37 (¶14017 1982); In re Logan Twp. Bd. of Ed., P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), aff'd App. Div. No. A-696-82T2 (10/7/83). Bridgewater now confirms the applicability of the Wright-Line standards in the New Jersey public sector.

once for this persistent problem, and his reinstatement was expressly conditioned on a requirement of regular attendance at the Meadowlands on Friday and Saturday nights. He repeatedly failed to meet that requirement. Under these circumstances, we cannot find a violation of subsections 5.4(a)(1) and (3).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. Commissioner Graves opposed. Commissioner Butch was not present.

DATED: Trenton, New Jersey
June 25, 1984
ISSUED: June 26, 1984

H.E. No. 84-48

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

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY

Respondent,

-and- Docket No. CI-83-45-46

GARY CONOVER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate Sections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it terminated Conover in August 1982 for excessive absenteeism and tardiness. Conover had been terminated for absenteeism in July 1981 and was reinstated by an arbitrator on condition that he work Fridays and Saturdays in his position as parimutuel clerk at the Meadowlands. Conover alleged that his union activity was a substantial or a motivating factor in his discharge in 1982. The Hearing Examiner noted that the union activity was remote in time to the 1982 discharge and that Conover had failed to allege the same union activity in his 1981 discharge arbitration nor did he file an Unfair Practice Charge with the Commission at that time. The Hearing Examiner was persuaded that even if Conover had met the first part of the test in Wright Line the Respondent had demonstrated by a preponderance of the evidence that Conover would have been discharged for absenteeism and tardiness even in the absence of the exercise of protected union activity.

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.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Appearances:

For the Respondent
James H. Lockwood, Esq.

For the Charging Party
Ball, Hayden, Kiernan & Livingston, Esqs.
(Margaret M. Hayden, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 16, 1983, and amended on March 2, 1983, by Gary Conover (hereinafter the "Charging Party" or "Conover") alleging that the New Jersey Sports & Exposition Authority (hereinafter the "Respondent" or the "Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent on August 18, 1982 discharged Conover because of his concerted protected activities on behalf of Sports Arena Employees' Local 137, AFL-CIO (hereinafter the "Union"), all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. 1/

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."

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 23, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held on January 26, 27 and 31, 1984 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties waived oral argument and filed post-hearing briefs by March 2, 1984.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning an alleged violation of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record,[2/] the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The New Jersey Sports & Exposition Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Gary Conover is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Conover has been employed as a pari-mutuel clerk for 18 years at Monmouth Park and for six years at the Respondent's Meadowlands. This has resulted in his often working two jobs on the same day, first at Monmouth and then at the Meadowlands, which is known as "double dipping." This practice has been tolerated by the Meadowlands since its opening in 1976.

4. The Union and the Respondent are parties to a collective negotiations agreement covering, inter alia, pari-mutuel clerks, the most recent agreement being effective during the term January 1, 1980 through December 31, 1982 (J-1). Conover was covered by this agreement at the Meadowlands from his date of hire in August

2/ The Hearing Examiner herein denies the Respondent's Motion to Dismiss at the conclusion of the Charging Party's case in chief and will, accordingly, make findings and render a decision upon the entire record.

1976 until his termination on August 18, 1982. He has been a member of the Union for 18 years.

5. Until 1981 Conover was a "regular" pari-mutuel clerk at the Meadowlands which is defined as an employee who has worked at least 85% of the racing days in the last calendar year (J-1, p. 3). An employee who works less than 85% of the racing days is known as an "extra" employee. A "regular" employee receives fringe benefits under the agreement while an "extra" employee does not.

6. The pari-mutuel clerks are supervised by Joseph J. Malan, the Director of Mutuels. Mr. Malan was for many years a member and an officer of the Union prior to becoming Director of Mutuels for the Respondent in June 1976.

7. Conover testified that he engaged in protected activities as follows:

a. As a member of the Union Conover spoke out at union meetings, voicing his opinion and sometimes being ruled out of order.

b. In 1974, when Malan was running for reelection as President and Business Manager of the Union, Conover and three other members fielded a partial slate against a full slate headed by Malan. Conover ran for Recording Secretary. Conover lost, gaining only 1/3 of the votes needed for election.[3/]

c. At a Union meeting on a date unspecified, when a raise in pay was being proposed for Malan, Conover sought a secret ballot and was ruled "out of order."

d. Conover was elected to the Union's negotiating committee in 1980 and testified that the meetings got very heated and that there were "big arguments." Malan was present as a resource person for the Respondent in these negotiations.

e. On January 14, 1981 Conover and 11 other pari-mutuel clerks filed a group grievance (R-1), which complained about the Respondent's utilizing a junior employee in the calculating room. The grievance was rejected by the Respondent

that those who signed the grievance were not qualified for the job. The Union Shop Steward concurred in the position of the Respondent.

8. As previously found, Conover was hired as a pari-mutuel clerk at the Meadowlands in August 1976. He was hired by Malan at the suggestion of Robert Quigley, the General Manager of Racing.

9. At the Meadowlands a pari-mutuel clerk is required to report by 6:45 p.m., goes to work at 7:00 p.m. and post-time is 8:00 p.m. Article V, Section 1 of J-1 requires that pari-mutuel employees report at least 1 and 1/2-hours before post-time.

10. Conover had no problem with attendance as a result of working at both Monmouth and the Meadowlands until 1981. On April 28, 1981, prior to the start of the May 1st racing season at the Meadowlands, Conover and eight other pari-mutuel clerks were counseled that the reporting time provisions in the agreement, supra, would be enforced. Thereafter, on May 8, 1981, following incidents of lateness, the nine affected clerks were given the opportunity to transfer to the "extra" roster where they would report to work on Friday and Saturday evenings. Conover refused to transfer to the "extra" roster and thereafter was absent on six days in May, June and July, the last date being July 27th when he was terminated. Conover filed a grievance over his termination, which went to arbitration. The arbitrator directed a conditional reinstatement, namely, that Conover go on the "extra" roster and "be present for all Fridays and Saturdays" (CP-1).[4/] The award was rendered January 12, 1982.

11. In and around the time that Conover was terminated on July 27, 1981 three other pari-mutuel clerks were terminated by Malan (CP-5A, 5I and 5J). Also, between January 9 and December 7, 1981 13 pari-mutuel clerks were given final notices

be terminated (CP-5B, 5C, 5D, 5E, 5F, 5K, 5L, 5M, 5N, 5O, 5P and 5Q). The bulk of the foregoing notices were issued in May, June and July 1981.

12. On April 24, 1982 a letter was distributed to all "extra" pari-mutuel clerks, which directed them to report to work on Fridays and Saturdays and stated that this policy would be strictly enforced.

13. Conover testified without contradiction that he never missed a day at the Meadowlands from January 1982 to May 31, 1982. Thereafter he was absent without excuse on the following Saturdays and Holidays: Monday, May 31; Saturday, July 3; Monday, July 5; Saturday, July 17; and Saturday July 31, 1982. Conover also acknowledged that he reported late on the following Fridays and Saturdays: Saturday, May 1; Saturday, May 29; Friday, July 10; Saturday, July 11; and Saturday, July 24, 1982. For having violated the above policy of the Meadowlands and the condition in the arbitrator's award, supra, Conover was terminated by Malan on August 18, 1982 (CP-2).

14. Leonard Schaefer, an "extra" pari-mutuel clerk, was given a 30-day suspension on August 13, 1982 for being absent on nine Fridays, Saturdays, and holidays between May 1 and July 31, 1982 (CP-3). Schaefer was thereafter terminated for absenteeism on May 3, 1983. Conover contends that Schaefer's 1982 suspension is evidence of disparate treatment. Conover also testified that other named pari-mutuel clerks had worse attendance records than he had and were not disciplined. However, the Respondent produced documentary evidence covering the period April 24 to August 13, 1982 to rebut Conover's testimony (see R-2A, 2B, 2C, 2D, 2F though 2K, 2N, 2O, 2P compared with R-5: Conover). The Hearing Examiner finds as a fact that this documentation overwhelmingly refutes the testimony of Conover that other named pari-mutuel clerks had worse attendance records than Conover.[5/]

5/ Malan testified credibly that he did not terminate Mark Scott until December 6, 1982 (CP-4) because his attendance record was not as bad as Conover's in 1982 (compare R-5 and R-7).

15. Malan acknowledged that he has known Conover for years. He testified that Conover's activities within the Union between 1960 and 1976 were "practically nil" except for the 1974 election, supra. Malan testified, in connection with the raise which was proposed for him some years ago, that it was opposed by him as being excessive. He had no recollection of Conover having protested the increase. Malan testified further that he was present in negotiations for the Authority as a resource person and had no recollection of Conover being on the Union's negotiations committee in 1980. Malan testified credibly that he bore no ill will toward Conover for filing the group grievance (R-1, supra). Malan denied that Conover was the only one whoever filed a group grievance as testified to by Conover. Malan cited several examples. Finally, Malan testified that Conover's attendance problem at the Meadowlands occurred only during the time that both Monmouth and the Meadowlands were open when Conover "double dipped" as a pari-mutuel clerk.

THE ISSUE

Did the Respondent Authority violate Subsections(a)(1) and (3) of the Act when Joseph J. Malan, the Director of Mutuels, terminated Gary Conover on August 18, 1982 for absenteeism and lateness?

DISCUSSION AND ANALYSIS

The Respondent Authority Did Not Violate Subsections(a)(1) And (3) Of The Act When It Terminated Gary Conover On August 18, 1982 For Absenteeism And Lateness

In order for the Charging Party to prevail he must prove by a preponderance of the evidence that he has met the "causation test" enunciated, first by the Appellate Division in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981), and most recently on February 2, 1984 by the New Jersey Supreme Court in Township of Bridgewater v. Bridgewater Public Works Association, Docket No. A-5-1983. In these cases the Courts of New Jersey adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), which was also adopted by the United States Supreme Court in NLRB v. Transportation Mgt.

Corp., _ U.S. _ 113 LRRM 2857 (1983).[6/]

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 "motivating" factor in the employer's decision to discipline; and (2) once this is established, the employer has the burden of demonstrating that the same disciplinary action would have taken place even in the absence of protected activity.

Based upon the foregoing the Hearing Examiner finds and concludes that the Charging Party has failed to demonstrate by a preponderance of the evidence that the Respondent Authority by its agent, Joseph J. Malan, violated Subsection(a)(3), and derivatively Subsection(a)(1) of the Act. Basically, Charging Party's proofs fall short of making a prima facie showing sufficient to support an inference that Conover's alleged protected activities were a "substantial" or a "motivating" factor in the Authority's decision to terminate him on August 18, 1982. All of the activities testified to and set forth in Finding of Fact No. 7, supra, indicate by the time frame that they are totally remote from the events leading to his discharge in 1982. The most recent activity is January 14, 1981 when Conover and 11 other pari-mutuel clerks filed a group grievance (R-1, supra). This event was more than 18 months prior to the discharge in August 1982. It is noteworthy that the incidents of alleged protected activity occurred prior to the 1981 discharge and that Conover failed to allege protected activities as a basis for the 1981 discharge. Conover neither raised protected activities in the grievance procedure in 1981 nor did he file an Unfair Practice Charge with the Commission.

Thus, while the Hearing Examiner may consider untimely instances of protected activity as background to a finding of a violation of Subsection(a)(3) of the Act,[7/]

6/ The "causation test" had its origin in the decision of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

7/ Local 1424, IAM v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 45 LRRM 3212 (1960).

the remoteness in time in this case weighs heavily against the Charging Party in demonstrating proof of an inference that protected activity was a "substantial" or a "motivating" factor in the Authority's decision to discharge Conover in 1982.

Even if one were to assume arguendo that Conover did meet the first part of the test, supra, the Hearing Examiner finds and concludes that the Authority has met the burden of demonstrating that its determination to discharge Conover on August 18, 1982 would have taken place even in the absence of protected activities. Conover's reinstatement by the Arbitrator on January 12, 1982 was conditional, namely, that Conover "be present for all Fridays and Saturdays." Although Conover never missed a day at the Meadowlands from January 1982 to May 31, 1982 he was, thereafter, absent without excuse on five days between May 31 and July 21, 1982. Additionally, he acknowledged being late on five days between May 1 and July 24, 1982. It was for this conduct that Conover was terminated by Malan on August 18, 1982.

Conover failed to prove that he was the object of disparate treatment inasmuch as the documentary evidence offered by the Respondent overwhelmingly demonstrates that, except for Schaefer,[8/] other named pari-mutuel clerks did not have worse attendance records than Conover. The Authority had made its position clear as to all "extra" pari-mutuel clerks on April 24, 1982 when it directed them to report to work on Fridays and Saturdays, stating that the policy would be strictly enforced.

Further evidence that the Authority was even-handed in administering discipline to pari-mutuel clerks for absenteeism is evidenced by the fact that when Conover was terminated in July 1981 three other pari-mutuel clerks were also terminated in or around the same period and 13 pari-mutuel clerks were given final notice by Malan between January 9 and December 7, 1981.

Based on the foregoing, the Hearing Examiner can reach no conclusion other than to recommend that the allegations that the Respondent violated Subsections (a)(1) and (3) of the Act be dismissed.

8/ Conover points to Schaefer's 30-day suspension of August 13, 1982 as proof of disparate treatment, but "one swallow does not make a summer." Aristotle, Nicomachean Ethics.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it discharged Gary Conover on August 18, 1982 for absenteeism and lateness.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: March 6, 1984
Trenton, New Jersey