

P.E.R.C. No. 91-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and-

Docket No. CO-H-88-219

AFSCME COUNCIL 52, LOCAL 3476,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of West Orange violated the New Jersey Employer-Employee Relations Act by prohibiting non-attorney representatives from AFSCME Council 52, Local 3476 from representing unit employees at departmental disciplinary hearings unless they sought prior permission from the hearing officer.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and-

Docket No. CO-H-88-219

AFSCME COUNCIL 52, LOCAL 3476,

Charging Party.

Appearances:

For the Respondent, Matthew Scola, attorney

For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On March 1, 1988, AFSCME Council 52, Local 3476 filed an unfair practice charge against the Township of West Orange. The charge alleges that the Township violated subsections 5.4(a)(1), (2), (3), and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,^{1/} by refusing to allow a non-attorney

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (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."

union representative to appear at a disciplinary hearing on behalf of an employee in AFSCME's negotiations unit.

On October 12, 1988, a Complaint and Notice of Hearing issued. On December 28, 1988, the employer filed an Answer incorporating an earlier statement of position. It asserts that non-lawyers must seek the hearing officer's permission before acting as legal representatives of employees at disciplinary hearings.

On March 29, 1989, Hearing Examiner Lorraine Tesauro conducted a hearing. The parties examined one witness and introduced exhibits. They waived closing arguments but filed post-hearing briefs.

On May 23, 1990, the Hearing Examiner issued her report and recommendations. H.E. No. 90-53, NJPER (¶ 1990). She concluded that the employer violated subsection 5.4(a)(1) when it refused to allow the employee the right to be represented by a non-attorney union representative at a disciplinary hearing. She recommended that the employer be ordered to cease and desist from such illegal conduct and to post a notice of the violation. She also recommended that the subsection 5.4(a)(2), (3) and (5) allegations be dismissed.

On June 4, 1990, the employer filed exceptions. It asserts that the union representative could have advised and counselled the employee, but could not have acted as a legal representative, i.e., questioned witnesses and presented evidence, without permission of the hearing officer.

We have reviewed the record. The Hearing Examiner's

findings of fact (H.E. at 2-4) are generally accurate. We incorporate them with these additions and modifications.

We add to finding no. 2 that before the hearing, Delo identified himself as an authorized union representative orally and with his union card (T31).

We clarify finding no. 3 to show that the discussion about Casolaro's representation occurred before the hearing (T18).

We add to finding no. 4 that Delo does not normally contact the other party before a hearing (T38). Furthermore, the Township objected to Delo's representing Casolaro primarily because Delo did not seek prior permission from the hearing officer.

In the absence of exceptions, we dismiss the subsection 5.4(a)(2), (3), and (5) allegations. Nothing in the record supports a finding of pervasive employer control or manipulation, see North Brunswick Tp. Bd. of Ed. P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980), hostility to the exercise of protected rights, see In re Bridgewater Tp., 95 N.J. 235 (1984), or repudiation of a negotiated grievance procedure, see State of New Jersey (Dept. of Treasury), P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988).

The parties agree that Casolaro was entitled to a representative at the disciplinary hearing. But they disagree as to who could have served as that representative. The employer contends it had to be an attorney unless a non-attorney representative had been granted permission from the hearing officer. AFSCME argues that our Act entitled Casolaro to a non-attorney agent of the

majority representative.

It is well-settled that public employees are entitled to representatives of their own choosing in contract negotiations and administration and that a public employer normally cannot object to a majority representative's choice of an agent to discharge these functions. N.J.S.A. 34:13A-5.3; Dover Tp. Bd. of Ed., P.E.R.C. No. 77-43, 3 NJPER 81 (1977). The rights of public employees in this area track those of private sector employees. See General Electric Co. v. NLRB, 412 F.2d 512, 71 LRRM 2418, 2421 (2d Cir. 1969); Auto Workers v. NLRB (Fitzsimmons Mfg.), 670 F.2d 663, 109 LRRM 2810, 2812 (6th Cir. 1982); see also New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Our Act does not require that a non-attorney agent of the majority representative secure permission to represent an employee in a departmental disciplinary hearing or any other proceeding.

The employer's reliance on New Jersey Court Rule 1:2-1(e) and N.J.A.C. 1:1-5.4, 5.5 & 5.6 is misplaced. These rules concern appearances before the Office of Administrative Law, not at departmental disciplinary hearings.

Although it does not control here because it covers state, rather than local, service, N.J.A.C. 4A:2-3 et seq. sheds light on the role of union representatives in departmental disciplinary hearings required by civil service regulations. It specifically provides that non-attorney union representatives can present evidence and examine witnesses at such hearings. Employees need not seek permission to invoke this right.

We conclude that the Township of West Orange violated subsection 5.4(a)(1), when it denied Louis Casolaro the right to a

non-attorney union representative at a departmental disciplinary hearing.

ORDER

The Township of West Orange is ordered to:

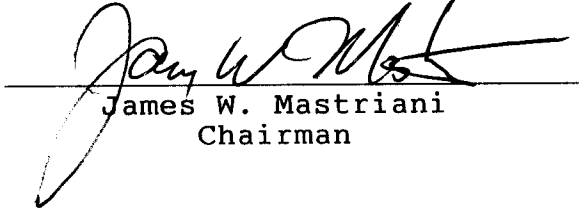
A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by prohibiting non-attorney representatives from AFSCME Council 52, Local 3476 from representing unit employees at departmental disciplinary hearings unless they seek prior permission from the hearing officer.

B. Post in all places where notices to employees are customarily posted, copies of the notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

C. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Smith, Wenzler, Johnson, Ruggiero, Reid and Bertolino voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
August 13, 1990
ISSUED: August 15, 1990



NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE



PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by prohibiting non-attorney representatives from AFSCME Council 52, Local 3476 from representing unit employees at departmental disciplinary hearings unless they seek prior permission from the hearing officer.

Docket No. CO-H-88-219

TOWNSHIP OF WEST ORANGE

(Public Employer)

Dated: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 90-53

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

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and-

Docket No. CO-H-88-219

AFSCME COUNCIL 52, LOCAL 3476,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Township of West Orange violated subsection 5.4(a)(1) when it refused to allow an employee the right to union representation at a disciplinary hearing because the representative was not an attorney. The hearing examiner dismissed the alleged violations of 5.4(a)(2), (3) and (5).

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
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and-

Docket No. CO-H-88-219

AFSCME COUNCIL 52, LOCAL 3476,

Charging Party.

Appearances:

For the Respondent, Matthew Scola, Esq.

For the Charging Party,
Oxford, Cohen, Blunda, Friedman, Levine & Brooks, Esqs.
(Sanford R. Oxford, Esq.)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 1, 1988, AFSCME Council 52, Local 3476 ("AFSCME") filed an unfair practice charge against the Township of West Orange ("Township"). The charge alleges that the Township violated subsections 5.4(a)(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq., ("the Act")^{1/} by refusing to allow a non-attorney union representative

^{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. (2) Dominating or interfering with the formation, existence or administration of

to appear at a disciplinary hearing on behalf of an employee in AFSCME's negotiations unit.

The Complaint and Notice of Hearing issued on October 12, 1988. A hearing was held as scheduled on March 29, 1989, in Newark, New Jersey, at which time the parties examined witnesses and presented exhibits. Closing arguments were waived and the parties filed post-hearing briefs. Upon the entire record I make the following:

FINDINGS OF FACT

1. AFSCME Council 52, Local 3476 represents a wall-to-wall unit of Department of Public Works ("DPW") nonsupervisory personnel in the Township of West Orange (Joint Exhibit - 1, "J-1") (T15).^{2/} AFSCME was certified in 1987 as the majority representative for this unit and collective negotiations were continuing as of the date of hearing (T5,16).

2. Arthur Delo has been an AFSCME staff representative for eight years. He represents the membership at disciplinary hearings,

1/ Footnote Continued From Previous Page

any employee organization. (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. (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/ "T" refers to transcript of March 29.

civil service hearings, grievances and negotiations (T14). Delo has been personally involved in many negotiations sessions and disciplinary and/or grievance hearings (T14,15).

3. Louis Cassellano,^{3/} is a member of the negotiations unit (T16). The Township suspended Cassellano for five days for alleged insubordination. AFSCME grieved the disciplinary action. The Township later scheduled a disciplinary hearing concerning the suspension.^{4/}

Delo attended the hearing. John McCann, the Department of Public Works Director conducted the hearing (T9). At the hearing, Matthew Scola, the Township attorney, asked Delo whether he was an attorney, the purpose of his presence and in what capacity he was to represent Cassellano (T17). Delo responded that he was not an attorney, but it was his "understanding of the law that [I] certainly had a right to represent Mr. Cassellano in every way." (T17). The Township did not allow Delo to sit as a representative for Cassellano (T17,18). The parties agree that the Township refused to allow Delo to represent Cassellano because Delo was not an attorney (T18,19). Delo never represented that he was an attorney (T34).

3/ The proper spelling of the grievant's name is Cassellano (C-2) but throughout the transcript it is spelled Casolaro.

4/ The union attorney indicated in the opening statement that this was a "disciplinary hearing...was only a five day suspension, and therefore, unappealable to Civil Service"(T5). The grievant received a two day suspension at the conclusion of this hearing.

4. The Township had no prior knowledge of Delo's intention to appear and represent Cassellano at the disciplinary hearing (T29).^{5/} After Delo indicated he would represent the grievant, Scola made it very clear that the Township objected to Delo's representing the grievant because he was not an attorney (T31).^{6/}

5. After an incident causing the police to get involved (T24), the Township allowed Delo to attend the hearing on behalf of Cassellano but only in a "non-participatory" manner (T20,21,24 & 25).

6. This was the first hearing AFSCME was ever engaged in in West Orange and as of March 29,1989, there had not been any hearings after February 9, 1988 (T33).

ANALYSIS

The Charging Party ("AFSCME") alleges a violation by the respondent employer ("Township") of sections 5.4 (a)(1), (a)(2), (a)(3), and (a)(5). The issue concerns the employer's refusal to permit a union representative to represent a member at a disciplinary hearing because the union representative was not an attorney.

^{5/} AFSCME does not usually contact the other party because it is a "given that some representative of AFSCME will be there to represent the grievant or discipline" (T38).

^{6/} Director McCann determined that Delo would not be able to represent the grievant at the proceedings (T32).

Section 5.4 (a)(1) prohibits an employer from interfering with an employee's rights under the Act. It must be proven that the employer's actions tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification. The charging party need not prove an illegal motive. UMDNJ - Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp. P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). The respondent's actions appeared to interfere with the employee's rights to a fair and just disciplinary hearing. The hearing was not terminated, but the Township limited Cassellano's rights by prohibiting Delo, the union representative, from properly representing Cassellano.

AFSCME argues that the Weingarten doctrine required the employee to allow its representative to participate in the hearing. Under Weingarten,^{7/} an individual is provided the right to have union representation available at any investigatory interview that the employee reasonably believes could lead to discipline. The Commission has adopted that rule. See NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

Weingarten recognizes an employee's rights at "pre-discipline" investigation. This incident took place at a point when the discipline had already been imposed. The protective rights

^{7/} See NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975); and East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part Dkt. No. A280-79 (6/18/80)

of our Act as founded in N.J.S.A. 34:13A-5.3^{8/} inherently gives an employee the right to representation when exercising his/her rights as guaranteed under the Act.

The Weingarten rule contemplates that the union representative will safeguard not only the particular employee's interests, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not impose punishments unjustly.

Although Weingarten does not necessarily give a union representative the right to participate in a post discipline proceeding, it does give the representative the right to be present and serve in an advisory capacity. The Township voted to restrict Delo's capacity at the hearing to attending without participating or advising (T18,25 and 35).

N.J.A.C. 1:1-5.4, in conformity with R. 1:21-1 (e), provides for non-lawyers to represent individuals at certain hearings. Included in the list are " union representatives in Civil Service cases."^{9/} The Township argued these individuals must receive permission to appear in Civil Service cases through a special process or application and charges that Delo never requested permission nor notified the Township of his intended participation.

8/ Specifically paragraph 2: "Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations."

9/ N.J.A.C. 1:1-5.4 (a).

The union argued it has an obligation to represent its membership properly. Any alteration of that right violates the Act.

In NJ Dept. of Human Services v. IFPTE Local 195, P.E.R.C. No. 90-47, 15 NJPER 540 (¶20223 1989), the Commission found a violation for refusing to allow a union representative at a Civil Service discipline hearing. Here, the Township argued that the representative had to be an attorney, not that he could not be represented.^{10/}

The Township's actions interfered with the union's inherent right to properly represent its membership. N.J.S.A. 34:13A-5.3 states in part:

"...A majority representative of public employees in an appropriate unit shall be entitled to act for...all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership...."

Accordingly, I recommend that the Commission find that the Township violated 5.4(a)(1) of the Act when the Township refused to allow Delo, a union representative, to represent an employee at a disciplinary proceeding.

Next to consider is whether the Township violated subsection 5.4 (a)(2). In North Brunswick Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶ 11095 1980), the Commission said:

^{10/} New Jersey Court Rules do not require all representatives to be lawyers. There are certain circumstances, i.e. Civil Service hearings, that provide for non-lawyers to represent individuals.

With regard to the Board's alleged violation of section (a)(2), the Education Association has not presented any additional facts to support this allegation, other than the Board's refusing to negotiate with its chosen representatives. While the Board's conduct does, in a sense, "interfere" with the Education Association's ability to collectively negotiate, it does not constitute pervasive employer control or manipulation of the employee organization itself, which is the type of activity prohibited by section (a)(2). Duquesne Univ. [198 NLRB No. 117], 81 LRRM 1091 (1972)...Kurz-Kasch, Inc. [239 NLRB No. 107], 100 LRRM 1118 (1978)...6 NJPER at 194,195.

AFSCME's representation of Cassellano was never questioned. The respondent strongly objected that a non-lawyer was representing an individual at a disciplinary hearing. Based on these proffers, the Hearing Examiner does not find a violation of subsection 5.4 (a)(2).

Cases of alleged retaliation for protected conduct are governed by In re Bridgewater Tp., 95 N.J. 235 (1984). The charging party must prove that the protected activity was a substantial or motivating factor in the employer's adverse action. An employer must know of this activity and be hostile toward the exercise of protected rights. Proof that anti-union animus motivated the personnel action may be counteracted by the employer proving that the adverse action would have been taken even absent the protected conduct.

The record does not support a conclusion that the employer's actions, through Scola or McCann, demonstrated hostility toward AFSCME within the meaning of Bridgewater. Although the respondent may have overreacted by not allowing Delo to represent one of his members because he was not a lawyer, nothing in the record warrants finding a subsection 5.4 (a)(3) violation.

AFSCME alleges a violation of subsection 5.4 (a)(5).^{11/}

No evidence or argument supports this allegation.

If an employer or a majority representative repudiates a negotiated grievance procedure, it violates our Act. CWA v. State of NJ, Dept. of Treasury, P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 418 (¶15191 1984); Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028, 103 LRRM 2241 (7th Cir. 1980). AFSCME argued that Cassellano was not permitted to be represented at a disciplinary hearing which resulted from a grievance. There are no proofs that the respondent refused to process any grievances nor were there any proofs that the continuing negotiations were halted by the respondent's actions. Delo stated that although there still was not a collective bargaining agreement, the negotiations were continuing "ad nauseum" (T16). At worst, the respondent's actions interfered with the majority representative's right to represent a negotiations unit employee at a hearing. Accordingly, I find there is nothing in the record that supports finding a violation of subsection 5.4 (a)(5).

Based on the above, I conclude that the respondent Township violated subsections 5.4 (a)(1) when it refused to allow an employee

^{11/} This subsection prohibits public employers, their representative or agents from: "(1) 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."

the right to union representation at a disciplinary hearing. Further based on the above, I do not find any violations of subsections 5.4 (a)(2),(3) or (5).

RECOMMENDED ORDER

I recommend the Commission ORDER:

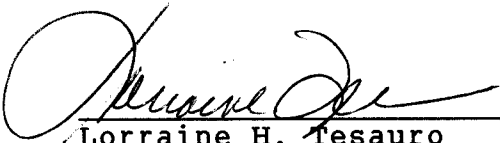
A. That the Township of West Orange Cease and Desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by prohibiting non-attorney union representatives from representing the negotiations unit employees at disciplinary hearings.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials..

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

B. That all other allegations be dismissed.



Lorraine H. Tesauro
Hearing Examiner

DATED: May 23, 1990
Trenton, New Jersey

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of their rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by prohibiting non-attorney union representatives from representing the negotiations unit employees at disciplinary hearings.

Township of West Orange

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James W. Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08625 (609) 292-9830.