P.E.R.C. NO. 84-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MT. LAUREL MUNICIPAL UTILITIES
AUTHORITY,

Respondent,

-and- Docket No. CO-82-128-78

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 71, LOCAL 2268B,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Mt. Laurel Municipal Utilities Authority did not commit an unfair practice when it discharged one of its employees, the president of AFSCME, Council 71, Local 2268B. The Commission holds that even if the employee's protected activity was a substantial factor in the decision to discharge, the MUA has met its burden of proving that it would have discharged the employee in the absence of this activity.

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AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 71, LOCAL 2268B,

Charging Party.

Appearances:

For the Respondent, Barbour and Costa, Esquires (John T. Barbour, of Counsel)

For the Charging Party, Selikoff & Cohen, P.A. (John E. Collins, of Counsel)

DECISION AND ORDER

On December 3, 1981, the American Federation of State, County and Municipal Employees, Council 71, Local 2268B ("Local 2268B") filed an unfair practice charge with the Public Employment Relations Commission. The charge alleged that the Mt. Laurel Municipal Utilities Authority ("MUA") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act") specifically subsections 5.4(a)(1), (2), (3), and (4),[1/] when it discharged Local 2268B's president, James Frame,

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 (Continued)

allegedly in retaliation for his involvement in processing grievances.

On February 11, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Authority filed an Answer denying that it retaliated against Frame for his union activities.

On May 18 and June 17, 1982, Commission Hearing Examiner Joan Kane Josephson conducted hearings at which the parties examined witnesses, presented evidence, and argued orally. The parties also filed post-hearing briefs.

On April 27, 1983, the Hearing Examiner issued her report and recommendations, H. E. No. 83-37, 9 NJPER 286 (¶14134 1983) (copy attached). The Hearing Examiner concluded that Local 2268B had not met its burden of proving that Frame's protected activities were a substantial or motivating factor in his discharge. She recommended dismissal of the Complaint.

On May 23, 1983, Local 2268B filed Exceptions. Local 2268B contends that the Hearing Examiner erred in not finding that Frame's protected activity was a motivating factor in his discharge and that the MUA would not have discharged Frame absent this activity.[2/] On June 27, 1983, the MUA filed a brief urging the Commission to adopt the Hearing Examiners report.

We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence and by

1/ (Continued) to them by this act; and (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."

2/ Local 2268B also requested oral argument; that request is denied.

credibility determinations. We adopt and incorporate them here.

In East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981) the Court, following the lead of the United States Supreme Court in Mount Healthy City Bd. of Ed. v. Doyle, 419 U.S. 274 (1977) and the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980), modified, 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. den. 102 S. Ct. 1612 (1982), articulated the following standards for determining whether an employer's motivation makes a personnel action illegal under our statute. The charging party must first establish that his protected activity was a substantial, i.e., a motivating factor in the employer's decision to take that personnel action. If the charging party makes this initial showing, then the employer must go forward and establish by a preponderance of the evidence that the personnel action would have occurred even in the absence of the charging party's protected activity. The factfinder must resolve the conflicting proofs. See also In re Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 83-73, 9 NJPER 36, 37 (¶14017 1982); NLRB v. Transportation Management Corp., ___ U.S. ___, 113 LRRM 2857 (1983).

Under all the circumstances of this case, we hold that the MUA did not violate the Act when it discharged Frame. Even assuming Frame's protected activity was a substantial factor in the decision to discharge, the MUA has met its burden of proving that it would have discharged Frame in the absence of this activity. 3/

3/ We specifically reject Local 2268B's contention that the discipline of Frame was excessive when compared to the MUA's discipline of other employees. The quantity and scope of Frame's (Continued)

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Suskin & Newbaker voted in favor of this decision. Commissioner Hipp voted against the decision. Commissioner Graves was not present.

DATED: Trenton, New Jersey
September 15, 1983
ISSUED: September 16, 1983

3/ (Continued) work problems differed significantly from the work problems of other MUA employees. At the same time, the MUA's discipline of Frame, like MUA discipline of other employees, was graduated and contained specific warnings prior to discharge.

H. E. No. 83-37

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

In the Matter of

MT. LAUREL M.U.A.,

Respondent,

-and-

Docket No. CO-82-128-78

AFSCME COUNCIL 71, LOCAL 2268B,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Authority did not violate 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act by terminating one of its employees. The charging party alleged that the employee who was president of the union was discharged because of union affiliation and particularly for processing grievances. The Hearing Examiner found that the employee was terminated because of a poor work record and that his union activity was not a motivating factor that would make the personnel action illegal under the Act.

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. 83-37

STATE OF NEW JERSEY
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For the Charging Party, Selikoff & Cohen, Esqs.
(John E. Collins, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On December 3, 1981, A.F.S.C.M.E. Council 71, Local 2268B (the "Union" or "AFSCME") filed an unfair practice charge against the Mount Laurel Municipal Utilities Authority ("MUA") with the Public Employment Relations Commission. The charge alleged that the MUA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1), (2), (3) and (4), [1/] when James C. Frame, president of

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; (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."

Local 2268B was disciplined and ultimately terminated because of his union affiliation and particularly for processing employee grievances.

It appearing that the allegations of the unfair practice charge, if true, may constitute unfair practices within the meaning of the Act, on February 11, 1982 the Director of Unfair Practices issued a Complaint and Notice of Hearing. The MUA filed an Answer denying actions were taken because of Frame's union activities. Hearings were held on May 18, 19 and June 7, 1982, at which time all parties were given an opportunity to examine and cross-examine witnesses and present relevant evidence. Both parties agreed to waive oral arguments and submit post-hearing briefs. The final reply brief was received on December 9, 1982.

An unfair practice charge having been filed with the Commission, a question concerning alleged violations of the Act 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, the Hearing Examiner makes the following:

FINDINGS OF FACT

The Mount Laurel Municipal Utilities Authority is a public employer within the meaning of the Act, and is subject to its provisions.

AFSCME Council 71, Local 2268B is a public employee representative within the meaning of the Act and is subject to its provisions. James C. Frame was a public employee within the meaning of the Act employed by the MUA and subject to the Act's provisions

at the time the incidents complained of in the charge occurred.

On November 6, 1980, Frame was hired by the MUA as a Laborer/ Operator Trainee or Grade III Operator. He initially served a 90-day probationary period. He was retained at the end of this period and with other MUA employees regularly rotated weekend work and call-in duty [2/] in addition to his regular Monday to Friday work schedule.

In April 1981 Frame was elected union president for Local 2268B. While Frame served as president, there were three incidents that occurred about which grievances were filed under the collective negotiations agreement between the Union and the MUA. (J-1 in Evid.) Frame testified that it was necessary for him to act as shop steward in processing grievances because the shop steward had quit. (Tr 1-49) On cross-examination, however, Frame testified that Jim Bennett became shop steward when the prior shop steward quit. Actually the first shop steward, Jose Colon, quit because Frame didn't allow him to process a grievance when Frame dealt directly with management. Colon felt as shop steward he should have been the one to process the grievance. (Tr I-105; 128) The testimony on cross-examination is consistent with the facts because James Bennett as shop steward signed a grievance for Frame and, according to Frame's own testimony, Bennett was Frame's shop steward at a meeting he had with management which will be discussed below.

2/ Employees assigned weekend duty are scheduled to actually go in and work on these days. When assigned call-in duty, the employee takes a "beeper" home and is on 24-hour call to go in when emergency problems arise. These assignments are rotated among all employees. (Tr II-27, 28).

MUA employee John H. Venziale filed a grievance concerning disciplinary action he received following a truck accident. By letter of July 17, 1983 Russell Weiss, Staff Representative for AFSCME Council 71, the majority representative of these employees, filed a step three appeal of this grievance to MUA Executive Director Gerald B. Hankins. 3/ On August 20 Weiss again wrote Hankins concerning this matter requesting that a hearing date be scheduled. 4/

On August 23, 1981 Frame received a reprimand from the MUA Superintendent for the Water and Sewer Departments, Frederick A. Schindler. This employee warning (CP-2 in Evid.) alleges Frame left an access door open at a pumping station on August 18. On the warning notice in a space provided for employee remarks Frame wrote "To my knowledge didn't leave gate open." A copy of the reprimand was placed in Frame's personnel folder. Frame denied leaving the access door to the pumping station open and testified he felt he

3/ The grievance procedure of the contract provides three internal steps: 1) submission to the MUA Superintendent, 2) appeal to the MUA Executive Director and 3) appeal to the Municipal Utilities Authority and a fourth step to an arbitrator for binding arbitration (J-1, Article XIX).

4/ Frame testified that around the time the Weiss letters were written Superintendent Frederick Schindler told Frame to "stop making waves and carrying this union stuff too far." (Tr I-54) Schindler denied making the statement. (Tr II-209) I do not credit the Frame statement because at this point there is very little evidence that Frame was involved in this grievance. When asked if he had "any conversations with your administrators" concerning Venziale he replied: "I had mentioned it briefly with Mr. Hankins that we were still looking for the third step." (Tr I-53) He then testified Schindler made the alleged statement but did not put the statement in the context of any conversation with Schindler on this matter.

was being harassed because another employee who was not a union official was also at the job site and could have left the door open.

On September 14, 1981 a grievance was filed on Frame's behalf concerning the access door reprimand. The grievance was signed by James Frame and the union representative, James Bennett, another MUA employee who was the shop steward. (CP-4) The adjustment requested was that the warning be removed from Frame's personnel file and "harassment stopped."

Later that same day, September 14, Frame and his shop steward, James Bennett, were called into Schindler's office. Frame was handed a typed memorandum dated September 11, 1981 addressed to Frame from Schindler. This memo criticized the "quantity and quality" of Frame's work performance and his "attitude" toward work (CP-6). The memo listed the six following "problem areas":

1. Many complaints by your fellow employees about your attitude and work.
2. Questioning direct orders by supervisor.
3. Trouble remembering G.P.W. [general plant work]
4. Call in problems.
5. Cannot trouble shoot or diagnose problems.
6. Failure to do assigned work.

The memo concluded with the following:

> Accordingly, unless your work and attitude change considerably in the next thirty days, your employment will be terminated.

Frame and Bennett read the memorandum and Frame said to Schindler "What are we going to do, start playing games now, Fred?" (Tr I-78 and II-203). There was no response from Schindler and no

discussion of the substance of the memo by anyone. Frame and Bennett left the office.

On September 16, 1981 Schindler responded to Frame's grievance on the access door. The response said that Frame had acknowledged leaving the door open [5/] and denied that criticism of Frame for not performing his job properly was harassment.

Frame denied he acknowledged leaving the access door open and appealed the grievance to step two, Executive Director Hankins, requesting the same adjustment as on step one (R-1). On October 6 Hankins responded to the grievance and denied the request. Hankins indicates he reviewed the matter, and felt Frame was responsible. He noted: "I find the reprimand was justified [6/] and intended to remind you not to do it again. However you choose to charge harassment instead of improving your work performance."

On October 5 Frame returned from a worker's compensation leave. He had been injured at work and was on leave from the MUA for two weeks. On his return he was advised that the 30-day notice within which he would be terminated if his work did not improve, would begin then. (Tr II-187)

5/ This memo states that Schindler questioned Frame on this issue on August 19. The date is inaccurate because Frame was on vacation that day. Frame denied he acknowledged leaving the door open, but does not deny that Schindler discussed the matter with him. (Tr I-74, 75) There is a dispute whether Schindler questioned Frame and the other employee who worked at the pumping station that day together or separately. Schindler testified Frame admitted he left the door open at that meeting and Frame denied it. The undersigned does not feel whether Frame admitted or denied leaving the door open is an issue that need be resolved in order to reach a decision on the overall matter under discussion herein.

6/ Schindler had received a call from the police department that the door to the pumping station was open and because the station houses dangerous, expensive equipment that contained in excess of 500 volts of electricity, Schindler had the employee on call-in duty go in to lock the door.

On October 15 the third step grievance on the Venziale truck incident was to be heard before the MUA Board. AFSCME Staff Representative Robert Little, AFSCME Associate Director John P. Hemmy, James Frame and John Venziale were present. MUA attorney Ronald Bookbinder met with Hemmy and Little out in the hall, then Bookbinder met with Schindler and Hankins and the parties settled the grievance and it was not appealed further. After the Venziale matter was settled, Hemmy testified, there was a discussion with the MUA on another union matter and then Hemmy left with the Board the third step appeal to the Board of the Frame "access door" grievance.

On October 22, the acting MUA attorney, Barry J. Wendt, wrote to Frame denying the third step appeal of his grievance. The letter indicates the Board found as a "matter of fact" that he committed the violation and that the reprimand was minimal for the violation. The letter also indicated there was no evidence to substantiate the claim of harassment. (R-3) Frame had not had a hearing before either Wendt or the Board. Frame wrote to Wendt noting that under the contract he was entitled to a meeting with the Authority or its representative and requested a meeting. (CP-15)

In late October John Venziale received a notice that he was suspended and a recommendation was made that he be terminated because of some stolen rain gear.

Frame testified that around November 9 he asked Schindler if he was going to be promoted to Grade II operator because Frame believed that every employee who had worked for the Authority for a year and a couple of months (which Frame had at that time) went up

to grade 2. Frame testified that Schindler responded: "Let's see what happens with J.V.'s [Venziale] case." (Tr I-59) Schindler denied making the statement. (Tr II-210) At this point in time Frame had been given a termination notice. I do not find the testimony credible that he expected he would be promoted when he had been placed on notice twice that he might be terminated.

On November 13 Bookbinder, Hankins and Schindler met with Hemmy, Little, Frame, Venziale and Venziale's father on Venziale's suspension. Bookbinder, Hemmy and Little got together without the others to negotiate a settlement. Bookbinder then met with Hankins and Schindler and a settlement was reached. 7/ Venziale lost 15 days pay but was not terminated.

On November 20, 1981 Schindler handed Frame a three-page memorandum addressed to him dated November 19 from Hankins advising him of his termination. (CP-7) The memorandum indicates Frame was being terminated because neither his work performance nor his attitude had improved. The second and third pages of this memorandum were copies of a "Memorandum for Record" Schindler had written on November 6. Frame had not previously seen the November 6 memo. The memo lists three "problems with his work performance and attitude that have been observed" since he was given the notice that he would be terminated if his "work and attitude did not change considerably" (CP-6) and also lists the names of the employees who previously complained about Frame and the nature of their complaints. CP-6 pointed out that "fellow workers" had complained but had not

7/ When Frame described this meeting he did not testify that Hemmy and Little were present or participated in the discussion. (Tr I-57) Testimony of all other witnesses was consistent with the above, however.

listed the specific employees. This was the first time Frame knew the names of the employees who had allegedly made the complaints. 8/ On November 21, 1981 Frame was terminated. After he was terminated he attempted to check the veracity of the alleged complaints other employees had made about him. Basically the complaints of these employees were not denied. Two of the employees admitted they had complained about Frame and Frame's supervisor, George Conard, testified that the other employees had complained to him about Frame (Tr II-127-132) and also testified regarding his concerns about Frame's work performance. (Tr II-135)(Prior to Conard becoming sewer foreman, he had been active in the union and had negotiated the first two contracts between the union and the MUA.) One of the employees equivocally denied making a complaint about Frame. 9/ Frame testified the fifth employee did not want to get involved with the Frame discharge because of his own personal reasons. (Tr II-34) He was not called as a witness.

Frame denied the occurrence of one of the three incidents complained of that allegedly occurred since he received the initial warning. (CP-6) He viewed the other two events differently than Schindler had in the November 6 memorandum but did not deny their occurrence.

After Frame was discharged by the MUA he applied to the Cherry Hill Township Department of Public Works for employment. The Director Ronald Hepkin contacted the MUA to check on Frame's

8/ There is no evidence in the record that Frame made any attempt to ascertain the names of the people to whom CP-6 alluded. Frame testified he filed a grievance over CP-6 (Tr I-146) but there is no evidence that one was ever filed.

9/ The denial on direct examination (Tr II-79) became "Not that I can remember." on cross (Tr II-89).

employment record. He was aware that Frame's discharge was in litigation. He testified that Schindler told Hepkin that "once he [Frame] got involved in the Union, he had a negative attitude towards manangement. His productivity was down." (Tr II-9) Schindler did not remember making this statement (Tr II-158) but did not deny it. I credit Hepkin's testimony. On June 1, 1981 Frame went to work for the Cherry Hill Department of Public Works.

Employee warning records of other employees were placed in the record. There are 12 non-supervisory employees employed by the MUA.

One employee had three warnings: one was a reprimand for leaving work 15 minutes early, the second a one-day suspension for problems in general plant work and the third was for not performing a regular plant check for which he was suspended and it was noted "any further substandard work will result in termination." (CP-10, 11 and 12) Another employee received a reprimand for an item of carelessness in general plant work and received a warning. (PP-13) Another employee received a warning for substandard work. On that warning Schindler notes "When I questioned him later that day, he acted in a very unbecoming manner toward me." The employee received: a one-day suspension, written reprimand in his file and was informed that another such action will not be tolerated and will "result in termination." (CP-14)

DISCUSSION AND ANALYSIS

In East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981), the Court followed the lead of the United States Supreme Court in Mount Healthy City Bd/Ed v. Doyle,

429 U.S. 274 (1977) and the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980) in establishing the standards for determining whether an employer's motivation makes a personnel action illegal under our statute. The charging party must first establish that the protected activity was a substantial, i.e., a motivating factor in the employer's decision to take that personnel action. If the charging party makes this initial showing, then the employer must go forward and establish by a preponderance of the evidence that the personnel action would have occurred even in the absence of the charging party's protected activity. The factfinder must then resolve the conflicting proofs. See also Black Horse Pike Reg. Bd/Ed, P.E.R.C. No. 83-73, 9 NJPER 36 (¶14017 1982). Counsel for both parties agree that this is the test to be applied.

Frame was the president of the union and was involved in processing grievances; however, the undersigned is not convinced that this protected activity was a motivating factor in the employer taking the personnel action it did. Most MUA employees have at some time served as union officers. (Tr I-133) There were no contract negotiations during Frame's term. He testified that his tenure was different from others because he had more vigorously pursued grievances. (Tr I-124) There is evidence that shop steward Bennett assisted in grievances twice. The Venziale grievances were handled by AFSCME field representatives. Frame made one verbal procedural inquiry. Frame was not involved in any of the actual settlement negotiations and his name is not on any of the documents.

The Hepkin statement that he had a negative attitude toward management after he became involved in the union does not lead the undersigned to conclude that the MUA took action against Frame because of his union activities. To a large extent Frame's discharge was as a result of complaints against him from fellow union members when they were assigned to work with him and he did not do his fair share.

The timing of his disciplinary problems at the time he became union president was thus controlled as much by fellow employees as it was by management. His own shop steward was one of the complaining employees. The undersigned believes he was discharged for cause and not because he engaged in union activities.

The Charging Party argues that Frame's discipline was more harsh than other employees whose infractions were at least as serious. There is no evidence that any other employee had the number of problems that Frame did. It is difficult for me to compare the degree of seriousness of some of the technical sewer and water problems of different employees; however, Frame and others had similar areas of problems. Additionally, Frame's are all combined with attitude problems, e.g., refusal to follow orders. Nor is there evidence that any other employee received complaints from co-workers about their work. Venziale received an immediate 15-day suspension and was recommended for discharge for his second offense. This case was settled by the union representatives with management and Venziale was not discharged. Frame had six offenses and no suspension and was given over 30 days in

which to improve. [10/] After receiving the 30-day notice (which followed the previous disciplinary warning) Frame continued to have problems. While the first disciplinary warning (no suspension) was grieved within two weeks after it was received and that grievance was appealed by the union, nothing was filed as a result of the 30-day notice which was not acted upon for over 60 days. No grievance was filed and no attempt was made to ascertain specifically the nature of these six "problem areas."

Upon the foregoing and upon the entire record in this case, the Hearing Examiner recommends that the Respondent's conduct herein did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (4) [11/] when James C. Frame, president of Local 2268B was disciplined and ultimately terminated because of his union affiliation and particularly for processing employee grievances.

RECOMMENDED ORDER

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

Joan Kane Josephson
Hearing Examiner

DATED: April 27, 1983
Trenton, New Jersey

10/ The time was extended because he was on worker's compensation leave.

11/ The Charging Party failed to introduce any evidence of the Respondent having violated subsections 5.4(a)(2) or (4) of the Act.