

H.E NO. 2003-19

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF COMMUNITY AFFAIRS),

Respondent,

-and-

Docket No. CO-H-98-58

C.W.A. AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based upon an unfair practice charge filed by the Communications Workers of America (CWA) against the State of New Jersey (Department of Community Affairs) (DCA). The charge alleged that the State violated the New Jersey Employer-Employee Relations Act by not promoting employees and CWA members Kenneth Butko, Manohar Lal and Arthur Miccio to the position Chief, Construction Codes and Standards in March 1997. The charge alleges that they were bypassed in favor of agency fee-payers and that the State has a "pattern" of not promoting CWA members at DCA to positions in pay range 32 and higher.

The Hearing Examiner recommends that circumstantial evidence failed to prove that the State was hostile to protected activities, pursuant to the standard set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

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Appearances:

For the RESPONDENT,
Peter Harvey, Acting Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the CHARGING PARTY,
Weissman & Mintz, attorneys
(William G. Schimmel, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 15, 1997, Communications Workers of America (CWA) filed an unfair practice charge against the State of New Jersey (Department of Community Affairs). The charge alleges that the State violated 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} by not.

^{1/} These provisions prohibit public employers, their representatives of 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
(continued...)

promoting Kenneth Butko, Manohar Lal and Arthur Miccio to the position, Chief, Construction Codes and Standards, in March 1997. CWA alleges that Lal has been a union shop steward for about five years; that Butko and Miccio have been union "members" and "activists"; and that they were bypassed in favor of agency fee payers, who were promoted to Acting Chief, Construction Codes and Standards. CWA also alleges that the State (DCA) has a "policy" of not appointing union members to positions in salary range 32 and above.

On October 19, 1998, a Complaint and Notice of Hearing issued. The State's Answer acknowledged that Lal has been a CWA shop steward and that Butko and Miccio are members of CWA. It denies any violation of the Act.

On January 29, 2001,^{2/} March 19, 2001, May 30, 2001, and April 10, 2002, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by February 11, 2003.

Based on the record, I make the following:

FINDINGS OF FACT

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- 1/ (...continued)
in the exercise of the rights guaranteed to them by this act."
- 2/ The named employees pursued appeals at the Department of Personnel in the interim after the Complaint issued and before this date and the parties attempted informal dispositions, memorialized in correspondence in the file.

1. Kenneth J. Butko has been employed by the State of New Jersey in the Department of Community Affairs (DCA) since 1972 (1T14).^{3/} He is a licensed "professional planner," conversant in land use, zoning, master plan development, etc. (1T15; CP-1).^{4/} He is not a licensed architect or engineer (1T23; 1T24). His current title is supervising program development specialist, more generically known as manager of the private new home warranty section. His salary lies in range 29 (1T14).

Sometime in the 1970's or 1980's, Butko was a CWA shop steward in DCA (1T25). In 1987, Butko took a leave of absence (presumably unpaid) from his DCA position as a "technical representative" in the Division of Community Resources and became the assistant to the trustee of CWA Local 1039 (1T16-1T17; 1T18). Butko served as an acting president for the local, which had been in receivership (1T18). Upon his return to DCA from leave, Butko observed an organizational change (1T19).

2. Arthur L. Miccio has been employed at DCA since 1973 and has been a member of CWA continuously from his date of hire (2T7). Miccio has not held union office. He has attended

3/ "T" represents the transcript of the hearing and is immediately preceded by a number designating which day of the hearing the fact was transcribed. The number(s) following a "T" refers to the page number(s) of the transcript.

4/ "CP" refers to Charging Party exhibits received into evidence at the hearing; "R" refers to Respondent exhibits and "C" refers to Commission exhibits.

"several" union meetings (1T28). Sometime in the 1980's or early 1990's, Miccio discussed certain "employment practices" with a CWA representative (2T8). Miccio filed two or three grievances against DCA regarding "promotions" between 1988 and 1997 (2T125). Miccio has no particular recollection of the grievances but believes that they were denied (2T126).

Miccio is a supervisor in the Construction Planning Approval section of DCA and his salary lies in range 30 (1T28). In 1987, a reorganization was implemented at the DCA Division of Housing and Development (1T30).

3. Mano Lal was hired at DCA in December 1985 as a principal engineer. He is now the Supervisor of the Construction Plans Approval Section for the Bureau of Local Code Enforcement, which is a part of the Construction Code "element" (see finding no. 4) (2T15-2T18).

Lal is a CWA member. He joined Local 1039's "election committee" in 1993; in 1994, he became shop steward of higher level supervisors at DCA, a position he retains (2T17).

4. In 1986, DCA housed five divisions, one of which was the Division of Housing and Development (CP-2; 4T7). Between 60% and 70% of all DCA employees were assigned to the Division, under which six "bureaus" functioned. They were: Bureau of Rooming and Boarding House Standards; Bureau of Construction Code Enforcement; Bureau of Housing and Community Development; Bureau

of Housing Inspection; Bureau of Fire Safety; and Bureau of Housing Services (CP-2; 3T87).

In the summer of 1986, then-DCA Division Deputy Director William Connolly proposed a reorganization to accommodate the substantial growth of and salary compression within the Division (4T9; CP-4). Under the proposal, the Bureau of Construction Code Enforcement would employ four "Assistant Directors" (reporting to the Deputy Director) overseeing about 25 bureaus and "offices" (CP-4; 4T12). Between 1986 and 1993, the DOP refused a DCA request to create new, permanent titles. Gregory Vida has been Director of Human Resources at DCA throughout the period and credibly testified that he appealed to DOP, seeking an "interim relief," (meaning increased compensation) for DCA employees (3T90). DOP authorized DCA to place employees in "tentative" titles - an acknowledgment that "the duties for which they are currently paid is incorrect for the duties being performed" (3T90; 4T12). A "tentative" designation means that DOP has not decided the job specifications of a proposed title but concurs that the employee currently performing certain duties is entitled to greater compensation (3T135-3T136).

On March 3, 1988, then-DCA Division of Housing and Development Assistant Director Charles Decker issued a memorandum regarding the "Recognition/Relocation of the Construction Code Element." The memorandum advised that the Bureau of Construction

Code Enforcement was replaced by the "Construction Code Element," comprised of six new "bureaus" and two "offices" (CP-5). Each bureau was led by a named "Borough Chief," "Acting Administrator" or "Acting Bureau Chief," none of which ever became approved DOP titles (CP-5; 3T92). Arthur Lange was designated as Bureau Chief of the Bureau of Construction Project Review. Peter Desch was designated as Bureau Chief of the Bureau of Homeowner Protection. William Hartz was designated as the Bureau Chief of the Bureau of Technical Services. Charles Tarr was designated as Bureau Chief of the Bureau of Code Services. Dennis Warford was designated as Acting Administrator of the Bureau of Regulatory Affairs. Lange was also designated as Acting Bureau Chief of the Bureau of Local Code Enforcement, a secondary responsibility (4T16).

DOP authorized DCA to compensate the designated Bureau Chief "somewhat more than what they were currently being paid by putting them in a tentative title," according to Vida. I credit his testimony. The process of securing the added compensation for the designated bureau chiefs was completed by the early to mid-1990's (3T95; 3T96).

5. On March 1, 1995, DOP issued a promotional announcement for the title, Chief of Construction Codes and Standards at DCA (CP-6). DOP authorized two positions of the six requested, one in the Bureau of Homeowner Protection, and the other in the Bureau of Technical Services (4T19). The range 32 title required

applicants to possess an undergraduate degree or six years of professional experience in construction project management, regulatory or code enforcement programs, etc., three years of which must have been in a "supervisory capacity." An applicant's license as a registered architect or professional engineer could substitute for an undergraduate degree and a master's degree in specified related fields could substitute for a year of nonsupervisory experience (CP-6).

6. Butko, Miccio and Lal applied for the titles, as did Desch, Hartz and others (1T21; 1T35; 3T24-3T25). Desch and Hartz were serving provisionally in the title since 1992 (4T19; 4T24). On May 11, 1995, DOP issued the "eligible/failure roster" for the title. Desch and Hartz placed first and second, respectively (R-1). Lal, Miccio and Butko were listed in the third, fourth and fifth places. A DCA Human Resources employee, Mary Ann Vogel, misfiled the application of a John Horton and DOP was informed of the error (3T102; R-2). DOP issued a "certification card," advising that applicant Horton placed third on the May 11 promotional list for Chief, Construction Codes and Standards (R-2; 3T103). Vogel wrote Horton's name in the third "rank" on the list (3T98). I infer that Lal, Miccio and Butko placed fourth, fifth and sixth on the roster.

7. Division Director Connolly received the DOP roster of ranked eligible applicants for the title, Chief Construction

Codes and Standards (4T24). He had the responsibility to promote two applicants into the title. Connolly had the discretion to choose among the top three ranked candidates, which included Horton, in addition to Hartz and Desch (3T107; 4T25; 4T26). He selected Desch and Hartz because they were the "best qualified" (4T24). Connolly informed Vida of his selections. According to Vida, "no one was bypassed, the first two on the list were recommended [and the selections were in] complete accord with DOP rules and regulations" (3T100; 3T102). I credit his testimony. Desch and Hartz were appointed to the DOP title on June 28, 1995 (3T105; R-2). No other appointments were made from the DOP list, which expired on May 10, 1998 (3T108; R-2).

8. DCA does not maintain records showing employee memberships in an employee organization (3T110). Connolly has not had access to data revealing a DCA employee's membership in CWA or another employee organization. He knows that Lal has been a shop steward (4T27; 4T38). Connolly had been provided a list of "shop stewards" (4T31). In the absence of any evidence suggesting that the list was provided outside the normal course of DCA business, I infer that Connolly possessed the list for the purpose of addressing workplace complaints concerning unit employees assigned to DCA. DCA Human Resources Director Vida testified that he would have to review a DCA employee's paycheck

stub to ascertain his or her membership in the CWA. He testified:

The way we have always determined [membership], on those rare occasions when we have looked at it, is by taking the negotiated dues amount from a pay stub . . . and making that a fraction over the gross pay, which is shown approximately half-way down the left-hand column [of the stub] If the resulting percentage is .98 of 1%, then that individual is an agency shop fee [payer]. If it is 1.1534%, then that individual is a full dues-paying member. [3T109]

Vida was not asked to describe any occasion or circumstance for checking a DCA employee's employee organization affiliation. I credit Vida's testimony and draw no negative inference about his intentions on "those rare occasions" when a DCA employee's affiliation was checked. Vida also testified that no supervisor has asked him ". . . [if a DCA employee] was a dues-paying or non-dues-paying member . . ." [3T110]. I credit his testimony.

9. On June 9, 1997, DCA issued a department-wide "Notice of Vacancy" for the title, Chief of Construction Project Review, together with another document specifying job requirements (CP-9). Among the requirements was the possession of an architect or professional engineer license. The announcement was triggered by the "provisional" appointment of Arthur Lange, who had served in the "tentative" title of Project Specialist from 1989-1997 (4T32; 4T33).

On November 1, 1997, the DOP issued a promotional announcement for the title, Chief of Construction Project Review,

in pay range 32 (CP-7). Among the requirements for the title were possession of a license as a registered architect or professional engineer, and six years of experience in code enforcement project review, three of which were to have been in "a supervisory capacity" (CP-7).

10. Butko applied for the title but was not permitted to take the written test because he did not have the required architect or professional engineer license (1T23-1T24). Miccio applied for the title and was informed by DCA and later, DOP, that he was not qualified (2T115; 2T116). He appealed to the Merit System Board and his appeal was denied (2T177). Lal also applied for the title, filing both a "letter of interest" with DCA and an application with DOP (2T31; 2T33-2T34).

11. On April 15, 1998, DOP issued a "ranking list" for the title, Chief of Construction Project Review. Six of the nine applications for the position were rejected. The three "eligibles" were Lal, with 89.560 points; Fanik Favez, with 87.190 points; and Arthur Lange, with 86.300 points (CP-10). Lal personally received a printed DOP "notification of eligibility" showing that he was ranked number one on the list which was to expire on April 22, 2001 (2T37; CP-11).

On an unspecified date, Director Connolly selected Arthur Lange for the title, Chief of Construction Project Review (4T37).

Connolly testified:

I basically evaluated whom among the three [eligible candidates] would be the best manager for the Bureau. Mr. Lange had served as a manager at the bureau chief level for about 11 years and had done in my estimation a very good job.

And that Mr. Lal had had an opportunity to serve in a management supervisory capacity one step down from bureau chief and that experience had not gone very well and suggested to me that although Mr. Lal is an excellent engineer and technician, he has his deficiencies when it comes to supervision. [4T37-4T38]

Connolly's testimony about Lange's proficiency and Lal's deficient supervisory abilities was unrebutted. I credit his testimony.

On June 8, 1998, DOP Personnel Management Analyst Bonnie Ferriolo issued a letter to Lal regarding his "status on the list for Chief of Construction Project Review" (CP-12). She wrote that the promotional examination concerned "D358 Bureau of Construction Project Review/Division of Codes and Standards." She wrote that Lal was employed in the "D357 Bureau of Local Code Enforcement/Division of Codes and Standards unit scope" and accordingly, ". . . did not satisfy the unit scope requirement and should have been declared ineligible. Since [Lal] did not satisfy this requirement, [his] name is being removed from the eligible list" (CP-12).

Lal filed an appeal with DOP and did not receive a reply (2T77; 2T78-2T79). Lal testified that he was initially hired in "section planning" which evolved into Construction Project Review

but he was never transferred (2T78). Lal believes that he is qualified to hold the title of Chief of Construction Project Review. I credit his testimony.

12. DCA employee Mitch Malec works in the Office of Construction Code Enforcement. On or about March 14, 2001, Malec was paid \$85,725.51 annually in pay range 31 (3T155-3T158). His title is assigned to the "M" unit and his salary has been approved by DOP (3T158). The parties stipulated that on October 20, 1998, DCA employee Andrew Jaskola issued an interoffice memorandum to Malec, identifying him as "Chief, Bureau of Local Code Enforcement." I do not find that Malec had been designated as a Bureau Chief by DOP; nor do I find that Jaskola was aware of Malec's title.

In April 1997, Lal issued memoranda to DCA employees in which he referred to Malec as a "Bureau Chief" (2T47; 2T49; CP-13; CP-14). In January 2001, DCA issued a "Notice of Vacancy" for a "secretarial assistant" position in the Division of Codes and Standards. The notice directs that resumes be forwarded to "Mitch Malec, Bureau Chief of Bureau of Local Code Enforcement" (CP-15). The author of the Notice did not testify at the hearing. The designation of Malec is not consistent with Human Resource Director Vida's testimony that Malec is not in a bureau chief title. I credit his testimony.

DCA employee Louis Mraw was sent an interoffice memorandum in March 1997 in which he was identified as a "Chief of Regulatory Affairs." The author of the memorandum was a "construction official" (CP-16). Mraw was never Lal's supervisor. Nor does Lal know Mraw's DOP title (2T85-2T86).

13. Sometime in 1997, Butko, Miccio and Lal complained to CWA representative Bernice Zickwolf that DCA "was not promoting union members to [titles in] range 32 and above" (3T5). Zickwolf obtained a list of DCA employees generated by the New Jersey Department of Treasury on February 27, 1998. The list purportedly shows in part "members" and "non-members" [agency fee payers] of CWA. The exhibit consists of pages 90, 96 and 103 (3T8-3T9; 3T19; CP-18). It sets forth only a relatively small number of unit employees assigned to DCA (3T24). Zickwolf conceded under oath that complete payroll records provided to CWA from that time were lost (3T27).

In or around May 2000, the State produced in discovery a list of 19 employees in the DCA Division of Housing and in the Division of Codes and Standards at pay range 32 or higher in the years 1983-1998 (3T30; 3T36; CP-19). Zickwolf testified that all 19 employees, including Desch, Hartz, Lange and Horton are "non-members" (3T32). The list also includes Director Connolly and Assistant Director Cynthia Wilk, both of whom are not included in the CWA unit (3T59; 3T61). The list excludes

employees Malec and Mraw. I infer that they are not in pay range 32 or higher.

The State moved into evidence a "spread sheet" prepared by DCA Human Resources Director Vida, pursuant to the litigation of this case (3T113; R-3). The sheet sets forth 14 named DCA employees, including Lange, Desch, Hartz, Horton, Butko, Miccio and Lal, together with a chart representing their respective "full member" or "agency shop" designations in 13 selected pay periods from August 1986 to May 2001 (R-3; 3T113-3T114). The designations were determined by the percentage of fee deduction taken from the gross total of each employee's bi-weekly pay check. The chart shows that Desch and Horton are agency fee-payers and that Hartz has been a "full member" since 1986 (R-3; R-4; 3T114; 3T115-3T116). The spread sheet also shows that Victor Bykal, a DCA employee in pay range 32, was a CWA member in around April 1995 (3T118; R-3; CP-19). The spread sheet also includes "Bonnie Watson" as a "full member" in or around February 1987. According to Vida, Watson was promoted to a (non-unit) Bureau Chief title promptly after February 1987 (3T121-3T122; R-3). Vida testified of similar facts regarding a James Dolan (3T123; 3T161).

Michael Cibenko has been employed by CWA Local 1039 for about two years (4T43). He requested from CWA in Washington, D.C. "records" of dues paid to the organization by DCA employees

in pay range 32 and higher during the 1980's and 1990's (4T52); CP-20). He received a list of 5 employees, together with their reported years of employment and handwritten notations regarding their membership in each year (CP-20). Cibenko was not sure of the author of the handwritten notations (4T49). No records pertained to Hartz; Baykal was a member from July 1992 through 1993, and from October 1994 through March 1995; Lange was a member from December 1994 through July 1995, and from December 1995 through September 1997. Watson was not a member from 1986 through 1989; no record was revealed for 1990 through 1993; and was a member from October 1994 through July 1995 (CP-20). No evidence shows the means by which DCA employee membership in CWA is report to CWA headquarters in Washington, D.C.; nor does the record indicate the reporting rate of success.

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer

knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, and the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

No direct evidence shows that Butko, Lal and Miccio or any of them were denied a promotion in 1997 or at any time in retaliation for protected conduct. I must next assess circumstantial evidence to determine if the Act was violated.

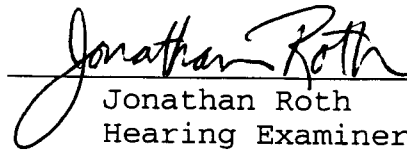
Lal is a CWA shop steward. Butko was a shop steward at some undisclosed time in the 1970's or 1980's and in 1987, he took a six-month leave of absence from DCA to assume a leadership post in the financially-troubled CWA local. Miccio is a CWA member who attended several union meetings in 30 years. I assume that the State is aware of all their protected activities.

CWA has not demonstrated that the State was hostile to protected conduct. No evidence suggests a relationship or nexus between protected conduct and the alleged adverse employment action. The 1995 and 1997 (1998, actually) promotions to Chief of Construction Codes and Standards and Chief of Construction Project Review, respectively, were decided within DOP regulations and for legitimate business reasons cited by Division Director Connolly in unrebutted testimony. Nor has CWA proved any "pattern" in which the State refused to promote a CWA member to a pay range 32 position or higher. Evidence produced by the State, as compelling as any produced by CWA, shows that CWA members were promoted to positions in pay range 32 during the relevant years. Finally, the record shows that employees Malec and Mraw were not

promoted to titles in pay range 32, regardless of the designation, "Bureau Chief" attributed to them.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.


Jonathan Roth
Hearing Examiner

DATED: April 17, 2003
Trenton, New Jersey

