

P.E.R.C. NO. 81-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT
OF HUMAN SERVICES, ET AL.),

Respondent,

-and-

Docket No. CI-79-18-42

ELEANOR GATTONI,

Charging Party.

SYNOPSIS

In an unfair practice case, the Commission dismisses a complaint alleging that the State's discharge of a nurse, who was a shop steward, was made in retaliation for her exercise of protected rights. The Commission found that although the Charging Party had established a prima facie case, the State's discharge of the Charging Party, which was upheld in a Civil Service Commission decision, was made for legitimate "business" reasons and was not shown by the Charging Party to have been improperly motivated. The Hearing Examiner also had recommended that the complaint be dismissed but did so on the basis that a determination on the merits by PERC would be duplicative of the Civil Service Commission's findings, a position not endorsed by the Commission.

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Appearances:

For the Respondent, The Honorable John J. Degnan,
Attorney General of New Jersey (Michael L. Diller,
Deputy Attorney General, of Counsel)

Eleanor Gattoni, pro se

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission by Eleanor Gattoni on October 19, 1978, alleging violation of the New Jersey Employer-Employee Relations Act (the "Act") by the State of New Jersey (the "State"). Specifically Ms. Gattoni, a nurse formerly employed by the State of New Jersey, alleged that her discharge was the result of false charges brought by her supervisors in retaliation for her exercise of protected rights as shop steward. This course of conduct was alleged to constitute a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4).^{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;
(continued)

It appearing that the allegations, if true, might constitute an unfair practice within the meaning of the Employer-Employee Relations Act ("Act"), the Director of Unfair Practices issued a Complaint and Notice of Hearing on December 15, 1978. Prior to initiation of a hearing, it was brought to the Commission's attention that an action regarding Gattoni's discharge was already pending before the Civil Service Commission, and a hearing had been commenced. The Commission's proceeding was therefore held in abeyance pending completion of the Civil Service litigation as per Hinfey v. Matawan Bd. of Ed., 77 N.J. 1514 (1978) and Hackensack v. Winner, 82 N.J. 1 (1980). A Civil Service Hearing Officer's Report issued on July 26, 1979 which upheld the charges but recommended modifying the penalty from discharge to a 60-day suspension. The Civil Service Commission adopted the findings of fact but, contrary to the recommendation, upheld the discharge.

Upon receipt of the Civil Service decisions the PERC Hearing Examiner made the preliminary determination that there were still issues which warranted a hearing before PERC. He therefore convened a hearing at which both parties were given a full opportunity to examine witnesses, present evidence and argue orally. The State also submitted post-hearing briefs.

On June 17, 1980 the Hearing Examiner issued his

1/ (continued)

(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."

Recommended Report and Decision, H.E. No. 80-50, 6 NJPER ____ (¶ ____ 1980), a copy of which is attached hereto and made a part hereof. Notwithstanding his preliminary determination, the Hearing Examiner recommended that the complaint be dismissed on the basis of Hackensack v. Winner, supra. He concluded that this Commission is bound by the determination of Civil Service that the incidents of misconduct charged against Ms. Gattoni warranted her discharge. He, therefore, believed that any decision by PERC would be unnecessarily duplicative and should not be made.^{2/}

We do not agree with the Hearing Examiner's recommended conclusion that Hackensack v. Winner requires that this Commission refrain from making any ruling with respect to Ms. Gattoni's discharge. Rather we believe that his preliminary conclusion that there were issues which were appropriately before PERC for determination was correct.

The Hearing Examiner made certain preliminary findings of fact. These included findings that the Civil Service hearing officer refused to allow the State to introduce into evidence the grievances that Gattoni had submitted over the years as not relevant to the Civil Service proceeding, and that no findings of fact were made in that proceeding relating to

^{2/} Both the State and Ms. Gattoni filed exceptions to the Hearing Examiner's decision. The State, although not adversely affected by the Hearing Examiner's decision, filed exceptions arguing that the Hearing Examiner's decision should be a decision on the merits. This is somewhat inconsistent with its original position in its brief to the Hearing Examiner that Hackensack prohibits the Commission from asserting jurisdiction over the matter given the Civil Service decision.

Gattoni's general conduct as an employee or as a shop steward. We agree with his conclusion that PERC is bound by the Civil Service determination that the alleged incidents of misconduct did occur^{3/} and that such misconduct will sustain a discharge. However, neither the Civil Service Hearing Officer, nor that Commission, ever ruled upon what motivated the State to take the action against her. If, as Ms. Gattoni alleged herein, the motivation for the filing of the misconduct charges was to discriminate against her for the exercise of her protected right to file grievances, an unfair practice may have been committed and that issue is within PERC's jurisdiction, and has not been litigated in any other forum.^{4/}

^{3/} At the PERC hearing Ms. Gattoni did not dispute that the incidents occurred, rather she attempted to offer explanations for her conduct.

^{4/} This is not to say that such an allegation could not have been litigated in the Civil Service proceeding as a violation of the Civil Service Law. See Hackensack v. Winner, supra. However, given our Hearing Examiner's conclusion that this issue was not litigated in the Civil Service proceeding, it is not duplicative for it to be considered by PERC.

The recent adoption of new rules for the conduct of contested cases by the Office of Administrative Law may further alleviate the potential for two administrative hearings arising from the same set of events. See 12 NJR 362, et seq., published July 10, 1980. See specifically, Subchapter 14 on multi-agency jurisdiction, 12 NJR 372-373. However, these rules were not in effect at the time the hearings in this case were held. While PERC's Hearing Examiner attempted to comply with Hackensack by deferring his hearing until the Civil Service Commission issued its decision, we believe that its decision did not resolve all issues necessary to make the unfair practice determination.

To determine whether an employer's discriminatory conduct toward an employee is violative of N.J.S.A. 34:13A-5.4(a)(3), the Commission must find that the act was motivated in whole or in part by a desire to encourage or discourage the exercise of protected rights. In re Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 71 (1977). The burden of proof in such cases is on the charging party to establish its case by a preponderance of the evidence. N.J.S.A. 34:13A-5.4(c) and N.J.A.C. 19:14-6.8. However, in the absence of direct evidence of anti-union motivation for a discriminatory action, such as a discharge, the charging party may establish a prima facie case by showing that the employee has engaged in protected activity (or the employer believed he or she had engaged in such activity), that the employer had knowledge of such activity and was hostile toward the exercise of such protected rights. In re North Warren Regional Board of Ed, 4 NJPER 417 (¶4187 1978) and In re Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978), aff'd App. Div. Docket No. A-4824-77 (1980) (unpublished opinion). In such situations the burden then shifts to the employer to demonstrate that a legitimate "business" justification existed for its actions. If such reasons can be demonstrated, an unfair practice will be found only if the evidence establishes that the discharge was in fact motivated in whole or in part by animosity toward the exercise of the protected

rights.^{5/} The Commission has held that where there exist valid independent grounds for the employer's actions the charging party must demonstrate by a preponderance of the evidence that the discharge was influenced by the improper motive. In re North Warren, supra and In re New Jersey (Council of New Jersey State College Locals), P.E.R.C. No. 78-55, 4 NJPER 153 (¶4072 1978), aff'd App. Div. Docket No. A-3422-77 (App. Div. 1979) (unpublished opinion).

In the instant case the Hearing Examiner found, and we agree, that Ms. Gattoni established that she was an active and outspoken shop steward; that her immediate supervisor was aware of her activities; and that she was hostile toward Ms. Gattoni because of those activities. However, the Civil Service Commission found that legitimate reasons existed for the discharge. That finding cannot be attacked in this proceeding. Thus an unfair practice occurred only if the evidence establishes that the motivation for bringing the misconduct charges against Ms. Gattoni was to retaliate against her for her protected activity. Our independent review of the record establishes that she has not sustained

^{5/} As the Commission has noted in the past, proving that an unfair practice has occurred is not necessarily the same as establishing that a particular remedy is required to effectuate the purposes of the Act. N.J.S.A. 34:13A-5.4(c). In re North Warren, supra.

her burden of proof on this essential point,^{6/} and therefore the unfair practice complaint must be dismissed.

The charges of misconduct were all proven. None of these charges related to protected activity but arose from incidents unrelated to the filing of grievances. No evidence was submitted to demonstrate that Ms. Gattoni was treated any differently from other employees similarly situated, nor that the processing of the misconduct charges by the State was tainted by the animosity borne her by her immediate supervisor for her organizational activities. In light of the Civil Service finding that there were valid independent grounds for her discharge, the failure to produce evidence of motive must lead to the dismissal of the complaint.

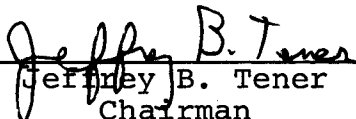
^{6/} Normally this type of finding would first be made by a hearing examiner. In this case the Hearing Examiner's application of the Hackensack decision prevented him from reaching this final question. However, no purpose would be served by remanding the matter for his recommended finding. Both parties were given a full opportunity to present their cases. Five days of hearings were held. The Hearing Examiner's preliminary ruling that PERC had jurisdiction permitted both parties to submit evidence on the motivation for the State's actions. Our reading of the record does not establish that any findings rest upon credibility judgments which could better be made by the Hearing Examiner.

The Commission has the ultimate responsibility for making findings of fact, N.J.S.A. 34:13A-5.4(c), and based upon our independent review of the record, we see no reason to remand the case.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the complaint in this matter be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Parcels and Newbaker voted for this decision. Commissioners Hipp and Graves voted against this decision.

DATED: Trenton, New Jersey
August 20, 1980
ISSUED: August 21, 1980

STATE OF NEW JERSEY
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ELEANOR GATTONI,

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SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission that they dismiss a complaint filed by Eleanor Gattoni against the Department of Human Services of the State of New Jersey. Ms. Gattoni alleged that she was discharged for her exercise of protected rights under the Public Employer-Employee Relations Act. The Hearing Examiner found that Ms. Gattoni had also brought an action before the Civil Service Commission alleging that her discharge was not in compliance with Civil Service rules and regulations. The Civil Service Commission had upheld her discharge ruling that the discharge was for just cause. The Hearing Examiner ruled that, pursuant to guidelines laid down by the Supreme Court in Hackensack v. Winner, 82 N.J. 1 (1980) PERC should defer to the ruling of Civil Service and not make their own independent judgment on the facts in this matter.

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.

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Appearances:

For the State of New Jersey (Department of Human Services)
John J. Degnan, Attorney General
(Michael L. Diller, Deputy Attorney General)

Eleanor Gattoni, Pro Se

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On October 19, 1978, Eleanor Gattoni, a nurse formerly employed by the Bureau of Long Term Care, Division on Medical Assistance and Health Services, Department of Human Services of the State of New Jersey, filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that she was interfered with and coerced by her supervisor, Betty Small, her Regional Nurse Supervisor, and Jed Spector, her Bureau Chief, in that they brought false charges against her and unfairly evaluated her in order to discharge her. Such actions, it is alleged, were taken because of her exercise of protected rights under the Act. It was specifically alleged that the Department of Human Services violated N.J.S.A. 34:13A 5.4(a)(1), (3) and (4). ^{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; (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."

It appearing that the allegations, if true, may constitute an unfair practice within the meaning of the Public Employment Relations Act (Act), the Director of Unfair Practices issued a Complaint and Notice of Hearing on December 15, 1978.

It came to the attention of the Commission that a separate action was pending before the Civil Service Commission concerning Gattoni's discharge. After consultation with the Civil Service Commission it was determined that the parties had already completed one day of hearing before a Civil Service Hearing Officer.^{2/} Accordingly, the instant action was deferred pursuant to the Supreme Court's directive in Hinfy v. Matawan Board of Education, 77 N.J. 1514 (1978).

On April 18, after the Civil Service hearing was closed, Richard Greenstein, the attorney who represented Gattoni before the Civil Service Commission, consulted with the undersigned. Greenstein said the issue of Gattoni's union activities was never raised before Civil Service. On July 26, 1979, the Civil Service Hearing Officer issued a decision recommending that the action of the Department of Human Services be modified from removal to a 60-day suspension. The decision did not make any finding as to Gattoni's activities on behalf of the union; nor were findings of fact made as to Gattoni's relationship with Small and Spector, the two supervisors who Gattoni alleged were motivated by anti-union animus. Upon review, the Civil Service Commission adopted their Hearing Officer's findings of fact but reinstated the discharge.

The undersigned made the determination that there were issues which were not resolved by the Civil Service Commission and the matter was brought for hearing in Newark, New Jersey, on September 10, 11, 12, 14 and November 14, 1979. At the hearing, all parties were given an opportunity to examine witnesses, present relevant evidence and argue orally and present briefs. Two separate briefs were filed by the Respondent and were received by March 7, 1980.

The State argued in their brief that the Supreme Court's decision in City of Hackensack v. Winner, 82 N.J. 1 (1980), should be interpreted to mean that Civil Service has primary jurisdiction over matters of employee discipline and therefore the instant complaint should be dismissed. While the undersigned completely rejects this interpretation of Hackensack, nevertheless, in this particular case, after making certain preliminary findings of fact (discussed below), the undersigned must

^{2/} November 13, 1978.

agree that the instant complaint should be dismissed in order for the Commission to act in compliance with the Supreme Court's mandate in Hackensack.

In Hackensack there were duplicate filings before the same two agencies as are involved in the instant matter. Civil Service and PERC conducted separate, independent hearings but came to opposite conclusions.

The Supreme Court laid down principles that should have been invoked to both resolve the controversy between the parties and avoid the collision between the two tribunals. The court stated in part:

"A further consideration for PERC was whether the common issue was clearly severable from the balance of the controversy and would thus have permitted non-duplicative factual and legal determinations....The single controversy doctrine constituted a further key consideration, i.e., whether the common issue could have been fairly, competently and fully tried and adjudicated together with, and as a constituent part of, all other issues in the case before one agency so that fragmented and repetitious actions would be avoided, all relevant concerns addressed and the entire controversy concluded in a single procedure." At pp. 39-40.

* * * * *

At the hearing Gattoni established that she was an active, outspoken shop steward.

It was also clear that she and her supervisor, Betty Small, had a strong personality conflict and this conflict spilled over into the areas of protected rights. Gattoni was involuntarily transferred to an office in another county and Gattoni successfully appealed the transfer and was reinstated. During Gattoni's appeal of the transfer, Small asked two employees to write to Jed Spector, their Bureau Chief, in support of her position. They wrote the following letter:

"Since coming to the Passaic County CMAV we have felt and observed a great deal of tension because of the grievances being filed by Mrs. Gattoni.

"We feel that if Miss Gattoni returned to the Passaic County office, it would cause the tension to continue and increase and interfere with the smooth and efficient functioning of the staff nurses."

Neither of the two employees who wrote this letter had at that time even met Gattoni.

Moreover, at the Civil Service hearing the State, through its Deputy Attorney General, attempted to introduce all of the grievances that Gattoni had filed during her employment with the State in support of the State's action in discharging Gattoni. The Deputy Attorney General argued, "part of Gattoni's past record and her past performance can be reflected by the number of times that there had been disagreements between the appellant and her supervisor culminating [in] grievances. In fact, she may be entitled to file many more grievances than she's had, but it's a part of our position that the appellant has filed many grievances dating back from 1972 and we are not even particularly concerned with the nature of the grievances as much as the amount of grievances that have been filed, the time that this causes, the concern and the disruption on morale, the staff time." ^{3/}

The Hearing Officer refused to allow such evidence in the record noting that "an employee may be entitled to file grievance after grievance." ^{4/} In his report there were no findings of fact which related to either Gattoni's general conduct as an employee or as a shop steward.

Rather the findings of fact were limited to the specific charges brought against Gattoni: Falsification of time records and conduct unbecoming a State employee. As to the latter charge, it was found that Gattoni was involved in an altercation at the Newark Motor Pool. Gattoni waited over an hour for a car that she had reserved the day before. While waiting she had discussions with the Motor Pool Dispatcher and made two telephone calls to her supervisor about the delay. When Gattoni finally received a car it was dirty and contained a quantity of garbage. Gattoni took the garbage from the car and tossed it through a window onto the dispatcher's desk. Some of the garbage struck the dispatcher.

As to the charge of falsification of time records, the Hearing Officer found that on February 27, 1980, Gattoni was in an automobile accident on her way to a field assignment. Gattoni arrived at her job site at 11 a.m. However, she marked her time sheet to indicate that she arrived at her work site at 8:30 a.m. On the same date Gattoni left her work prior to 4 p.m. although she indicated on her time sheet that she left work at 4:30 p.m.

On March 1, 1978, Gattoni left work at 2 p.m. but signed out on her time sheet at 4:30 p.m. She did not call for authorization to leave early on either

^{3/} Transcript of Civil Service hearing of November 13, 1978, pp. 11-13.

^{4/} Transcript of Civil Service hearing of November 13, 1978, p. 13.

February 27 or March 1 although she did call the office to notify her supervisor on the morning of the 27th that she was in an accident.

At the hearing before the undersigned Gattoni did not dispute that any of these three incidents occurred, rather she attempted to offer explanations as to her conduct. Gattoni offered substantially the same testimony in the hearing before Civil Service. The complaint against her as to the incident in the motor pool came from the motor pool personnel, not Small and the uncontested and, as to this incident, credible testimony of Small was that she was alerted to Gattoni leaving work early quite by accident.

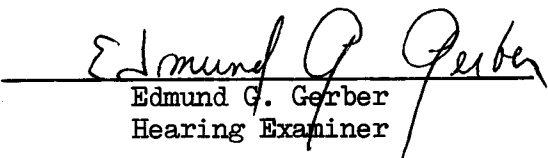
The Civil Service Commission adopted and accepted the findings of fact of its Hearing Officer but rules that:

"[T]he [Civil Service] Commission does not find circumstances which warrant a reduction in penalty. The appointing authority had rules that clearly indicated that an employee could be subject to removal for certain offenses. Appellant twice committed one of those offenses by falsifying her time sheet. The appointing authority was thus justified in removing appellant on those grounds.

"As for the incident in which appellant littered a dispatcher's desk with refuse, the Commission need not dwell upon whether or not such conduct was 'notoriously disgraceful.' It is merely sufficient to recognize the seriousness of appellant's act. The dispatcher could easily have been injured by the empty can which appellant threw on his desk. Furthermore, he was needlessly made to suffer an indignity. Such conduct on the part of appellant was unjustified and inexcusable. The Commission therefore finds that appellant's removal was merited."

Since the Civil Service Commission has found that Gattoni committed the acts of which she was accused and, in upholding her discharge, did not find her proffered excuses grounds to mitigate against the discharge, the undersigned recommends that the Public Employment Relations Commission defer from making any independent ruling. The propriety of the discharge has been litigated before Civil Service and to independently rule at this time would constitute a duplicative determination.

Accordingly, in accordance with the Supreme Court's directive in Hackensack, supra, it is hereby recommended that the Complaint in this matter be dismissed in its entirety.


Edmund G. Gerber
Hearing Examiner

DATED: June 17, 1980
Trenton, New Jersey