P.E.R.C. NO. 83-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CI-81-46-62

FRED D. BUTLER,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge Fred D. Butler filed against the Newark Housing Authority. The charge had alleged that the Authority violated the New Jersey Employer-Employee Relations Act when it denied Butler retroactive salary increments for the years 1978-1980 and refused to grant him a six month extension of a leave of absence.

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FRED D. BUTLER,

Charging Party.

Appearances:
For the Respondent, William D. Manns, Jr., Esq.

For the Charging Party, Love and Randall, Esqs.
(John C. Love, of Counsel)

DECISION AND ORDER

On January 19, 1981, Fred D. Butler filed an unfair practice charge against the Newark Housing Authority ("Authority") with the Public Employment Relations Commission. The charge alleged that the Authority 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 (7)[1/] when it denied him retroactive salary increments for the years 1978-1980

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; and (7) Violating any of the rules and regulations established by the commission."

and refused to grant him a six month extension of a leave of absence. The charge further alleged that the Authority took these actions against Butler because he had previously prevailed on another unfair practice charge against the Authority in which he alleged that the Authority penalized him for attempting to organize the Authority's middle management employees.

On December 24, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 8, 1982, Commission Hearing Examiner Edmund G. Gerber conducted a hearing at which the parties examined witnesses and presented evidence. The parties argued orally and waived their right to file briefs.

On June 28, 1982, the Hearing Examiner issued his report and recommendations. H.E. No. 82-66, 8 NJPER 455 (¶13213 1982). He concluded that the Board did not violate the Act when it denied Butler retroactive salary increments, but did violate subsection 5.4(a)(1) when it refused his request for a six-month extension of his leave of absence. He implicitly recommended dismissal of the Complaint insofar as it alleged violations of subsections 5.4(a)(2),(3), and (7). The Hearing Examiner recommended an order requiring, inter alia, the Board to grant Butler a retroactive extension of his leave from October, 1980, the time it would have been received, to the date the instant decision issues and a prospective extension of his leave for an additional six months after the issuance of this decision.

On July 12, 1982, the Authority notified the Commission that it wished to file Exceptions, but requested an extension

of time until it received a copy of the hearing transcript. On July 16, 1982, the Commission Chairman sent the Authority a letter granting an extension, to expire seven days after the Authority received that letter. On August 2, 1982, the Authority requested an additional extension pending the court reporter's review of the transcript to ascertain if Butler's testimony had been correctly transcribed. A Commission staff member asked the Authority to check with Butler's attorney about the requested extension; the latter apparently refused to consent.

On August 27, 1982, the Authority filed its Exceptions. It acknowledged that the Exceptions were late, but stated that the court reporter had not yet certified the transcript as the Authority had requested.[2/] The Exceptions assert: (1) the Authority properly exercised its discretion when it created a new leave policy and (2) the Authority had a legitimate and substantial business justification for its new leave policy.

Butler has not filed Exceptions. He has filed a statement opposing consideration of the Authority's Exceptions.

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

In the absence of Exceptions, and based upon our review of the record, we hold that the denial of Butler's request for retroactive salary increments did not violate subsections 5.4(a)

2/ On October 4, 1982, the Commission received a letter from the stenographer inserting a corrected copy of one page of the transcript. The line which has been corrected states that "[a]t no time was I [Butler] told that the Authority was contemplating a new policy."

(1),(2),(3), or (7) of the Act. Also, in the absence of Exceptions and based upon our review of the record, we hold that the denial of Butler's request for a six month extension of his leave did not violate subsections 5.4(a)(2),(3), and (7) of the Act. We particularly express our agreement with the Hearing Examiner that the record does not evidence any anti-union animus on the part of the Authority.

We now consider whether the Authority violated subsection 5.4(a)(1) of the Act when, pursuant to a new policy, it refused to grant Butler a six month extension of a leave of absence.[3/] We hold that the Authority did not.

In a previous case between these parties, In re Newark Housing Authority, P.E.R.C. No. 81-48, 6 NJPER 499 (¶11255 1980), appeal dismissed App. Div. A-944-80T1, we set forth the standards for determining when a violation of subsection 5.4(a)(1) has occurred:

> N.J.S.A. 34:13A-5.3 guarantees and protects public employees in "the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity." N.J.S.A. 34:13A-5.4(a)(1) makes it an unfair practice for a public employer, its agents or representatives to interfere [with], restrain or coerce employees in the exercise of these rights. Proof of motive or anti-union animus [is] not [an] essential element to establish an independent violation of this subsection. In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 80-11, 4 NJPER 421 (1978); In re City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), aff'd App. Div. Docket No. A-3562-77 (unpublished opinion 1979); In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). If the action itself interferes with the employees' rights or has that tendency, it will constitute

3/ Although the Authority's Exceptions were not timely, we have an obligation, whether or not Exceptions have been filed, to review the record and determine if the Hearing Examiner's findings of fact and conclusions of law are accurate. N.J.A.C. 19:14-8.1.

> an independent violation of N.J.S.A. 34:13A-5.4(a)(1), in the absence of substantial legitimate business justification, regardless of motive or good faith. [4/]

In that case, we held that the Housing Authority violated subsection 5.4(a)(1) when it suspended Butler for five days for refusing to meet alone with his supervisors to discuss a memorandum he wrote and circulated in hopes of organizing his co-employees in the middle management ranks. Clearly, the Authority's conduct penalized Butler for his exercise of protected rights -- writing and circulating the memorandum -- and interfered with the organizational rights of other employees without any legitimate business justification.

Here, by contrast, the link between Butler's protected activity -- presumably the January, 1980 attempts to organize -- and the personnel action in question -- the September, 1980 change in policy on leaves of absence and consequent denial of his application for an additional six months leave -- is much less direct. Also, refusing to extend an employee's leave of absence, thus requiring that employee to return to work, is less likely to interfere with the rights of other employees than suspending an employee from work in the middle of an organizing effort.

The record also establishes that the Housing Authority had substantial legitimate business justification for the new

4/ See, e.g. Welch Scientific Co. v. NLRB, 340 F.2d 199, 58 LRRM 2237 (2nd Cir. 1965) and cases cited therein for private sector law on this point. The Supreme Court has commended federal decisional law in unfair practice cases arising before the NLRB for use as a guide in unfair practice cases under the New Jersey Employer-Employee Relations Act. Galloway Twp. Ass'n of Educational Secretaries v. Galloway Twp. Bd. of Ed., 78 N.J. 1, 10 (1978) and Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25 39-40 (1978) [footnote in original]. See also, Soule Glass and Glazing Co. v. NLRB, __ F.2d __, 107 LRRM 2781, 2789 (1st Cir. 1981); R. Gorman, Labor Law, p. 132 (1976).

leave policy. A new Executive Director requested this policy revision because he believed the high number of Authority employees taking prolonged leaves was hampering the Authority's operation. The indefiniteness of leaves caused confusion in budgeting for positions and in establishing an organizational hierarchy.5/

Moreover, unlike the previous case, the Authority did not single Butler out for adverse action. The new policy applied to four other employees besides Butler and continues to apply to all employees seeking extensions of leaves.

Finally, we repeat that the record is devoid of evidence of anti-union animus and that the Hearing Examiner, therefore, correctly dismissed the allegations of a subsection 5.4(a)(3) violation. While the timing of the new policy may have been suspicious, the chronology of events after the new policy was not. On September 23, 1980, the Authority's personnel director sent Butler a letter informing him of the new policy and the consequent denial of his request for an extension; he asked Butler to inform him at least five days before the expiration of his leave on October 9, 1980 of his intentions. On October 2, Butler requested clarification of the letter and five days later the personnel director sent a clarifying letter. On October 17, Butler had a hearing before the Authority's Board of Commissioners and questioned the new leave policy; the Board did not alter the policy. Three days later, Butler again asked if his request had been

5/ In addition, the new Executive Director had a philosophical reason: an employee taking a prolonged leave should not have the automatic right to come back to work.

denied; on October 22, the personnel chief again informed him by letter that it had and afforded him an additional five days to state whether he would return to work. On October 24, 1980, Butler once more requested an extension; on November 6, 1980, the Executive Director sent him a letter denying the request, and on November 20, the Board of Commissioners also voted to deny the request. On November 24, the personnel director sent Butler a letter recounting the above events and advising him once again that his request had been denied and that he should report to work or resign within five days of receipt of the letter. On December 4, Butler responded that he did not intend to resign. Because Butler did not report to work, he was terminated December 8, 1980. Thus, the Authority gave Butler every opportunity to return to work and ample notice of the consequences of failing to do so. In effect, Butler received a de facto two month extension of his leave.

Balancing all these circumstances, we hold that the Authority's legitimate business justifications for the revised leave of absence policy outweighed any attenuated tendency of the denial of Butler's request for a six month extension of his leave to interfere with his or other employees' rights. Accordingly, the Authority did not violate subsection 5.4(a)(1) and we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Butch and Newbaker voted for this decision. Commissioner Graves voted against this decision. Commissioners Suskin and Hartnett were not present at the time of the vote on this decision.

DATED: Trenton, New Jersey
November 17, 1982
ISSUED: November 18, 1982

H. E. No. 82-66

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

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CI-81-46-62

FRED D. BUTLER,

Charging Party.

SYNOPSIS

In an unfair practice charge brought by Fred D. Butler, an individual, against the Newark Housing Authority, a Hearing Examiner of the Public Employment Relations Commission (Commission) recommends that the Commission find that the Authority committed an unfair practice when it altered its own policy concerning granting of leaves of absence. This action was in response to Mr. Butler's application to have his leave of absence from the Authority extended. It was recommended however that the Commission dismiss another allegation of Mr. Butler's to the effect that the city violated his rights under the Act when it refused to grant him a retroactive salary increase. It was found that a large number of other employees who did not exercise protected rights were also denied this retroactive increase. Accordingly it was found that the increase was not motivated by the exercise of protected rights nor did the denial of retroactive increments interfere with the exercise of protected rights.

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. 82-66

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

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and- Docket No. CI-81-46-62

FRED D. BUTLER,

Charging Party.

Appearances:

For the Respondent
William D. Manns, Jr., Esq.

For the Charging Party
Love and Randall, Esqs.
(John C. Love, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 19, 1981, Fred D. Butler filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Newark Housing Authority (Authority) has engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (7) [1/] in that the Authority failed to grant an extension of a six-month leave of absence to Mr. Butler while granting such extensions to others and further failed to grant

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; (7) Violating any of the rules and regulations established by the commission."

retroactive salary increments to the Charging Party for 1978, 1979 and 1980 although said increments were granted to others. It is alleged that all these actions were designed to interfere with the Charging Party, in violation of his rights under the Act. It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 24, 1981. Pursuant thereto a hearing was held on March 8, 1982. Both parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs.

Fred Butler was an employee of the Housing Authority of the City of Newark, a public employer within the meaning of the Act. He had earlier brought an unfair practice charge concerning the Housing Authority before the Commission. See, In the Matter of Housing Authority of the City of Newark and Fred D. Butler, P.E.R.C. No. 81-48, 6 NJPER (¶11255 1980). In that proceeding the Housing Authority was found to have committed an unfair practice in violation of §5.4(a)(1). Mr. Butler had attempted to form an employee organization to represent middle management employees of the Authority. Mr. Butler and several other middle management people drafted and sent copies of a letter to some 37 middle management people employed by the Authority. After the letters were sent Mr. Butler was asked to attend a meeting with his immediate supervisor to discuss this memo. Mr. Butler declined stating that all the signers of the memo should attend together rather than just himself

in an individual meeting. The Authority interpreted Butler's refusal to attend the meeting to be an act of insubordination and suspended Mr. Butler for five days. It was held that since interrogation of employees as to the exercise of protected rights is unlawful, it was unlawful to penalize Butler for his refusal to accede to such an interrogation.

In the instant matter, Butler took a leave of absence from the Authority to assume the position of Director of the Housing Authority in White Plains, New York in April of 1980. During his absence, the Authority entered into a contract with a blue collar unit of employees within the Authority granting these employees increased wages and benefits. Shortly thereafter the Authority passed a resolution granting retroactive salary increases to "all current and active managerial and executive employees." The Authority refused to grant retroactive wage increases to any employees who were on leave of absence. Butler takes the position that this was directed, at least in part, at him because of his prior activities in attempting to establish an employee organization. It should be noted, however, that there were approximately 26 other employees who were also denied retroactive increases because of the language limiting these raises to current and active employees and this action of the Authority was subject to a civil court action in Superior Court, Docket No. L-45912-80, wherein Judge Marzulli upheld the Authority's right to deny retroactive increases to other former and otherwise inactive employees of the Authority. The only evidence adduced at the hearing to demonstrate anti-union

animus referred to an appearance by Mr. Butler before the Housing Authority to appeal his denial of this retroactive increment. After a long, protracted argument between himself and members of the Authority, the Executive Director of the Authority, Mr. Milton Buck, stood up stating, "I don't have to listen to this," and walked out of the meeting room. This evidence, even in conjunction with the prior finding of an unfair practice, does not demonstrate animus on the part of the Authority. It is apparent that Butler was one of many employees so adversely affected and nothing indicates to the undersigned that the Authority's action was in any way either related to Mr. Butler and his prior protected activities or interferes with, restrains or coerces other employees in their exercise of protected rights.

The other aspect of this matter concerns the refusal of the Authority to extend Mr. Butler's leave of absence.

Mr. Butler's leave of absence was due to expire in October of 1980. In early September he submitted a request to the Authority asking that they extend his leave of absence. According to the testimony of Mr. Howard Gottlieb, when he saw Butler's application he felt he had to revise or tighten up the Authority's policy concerning leaves of absence. He therefore recommended to the Authority that they establish a new, consistent policy concerning leaves of absence. He recommened that the Authority pass a resolution whereby leaves of absence without pay will not be granted to permanent employees for any period which exceeds six months at any one time. The only exception to the policy shall be "persons

serving as elected officials or serving in another city agency" or otherwise due to illness. The Authority adopted this policy and determined that since Butler was neither a city employee (in this matter, the Authority considered city employees to be employees of the City of Newark) nor an elected official, Mr. Butler's request was denied and after his six-month leave of absence he was terminated in November, 1980.

While again, as in the case before, there is no evidence of animus, the timing and the admitted causal relationship between Butler's request to extend his leave of absence and the promulgation of the new policy causes me to recommend that the Commission find that the Authority committed a §5.4(a)(1) violation when it promulgated this policy. According to the testimony of Mr. Gottlieb there were only three or four other employees who were adversely affected by this policy and there were a number of city employees, who because of the policy exemptions, were not affected. The inescapable question here is, if this existed as a problem before, why did the city wait until Mr. Butler applied for an extension? The causal connection here is overwhelming. There is no question that, in view of Mr. Butler's past history of being an employee association advocate and his success before this agency earlier, the actions of the Authority itself tend to interfere with and restrain the exercise of protected rights by other employees of the Authority. 2/ In re New Jersey College of Medicine and Dentistry,

2/ Proof of motive or anti-union animus are not essential elements to establish an independent violation of §5.4(a)(1).

P.E.R.C. No. 80-11, 4 NJPER 421 (1978); In re City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), affm'd App. Div. Docket No. A-3562-77 (unpublished opinion 1979); In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

Accordingly, it is hereby recommended that the Commission find that the Housing Authority of the City of Newark violated §5.4(a)(1) when it denied Fred Butler a six-month extension on his leave of absence.

It is further recommended that the Commission ORDER

1) The Newark Housing Authority to cease and desist from interfering with, restraining or coercing its employees in the exercising of their rights by refusing to grant Fred Butler a six-month extension to his leave of absence.

2) That the Newark Housing Authority retroactively grant Fred Butler an extension of his leave of absence running from October 1980 to the date of the Commission's decision in this matter and further running six months into the future beyond the date of the Commission's decision.

3) Post at all places where notices to employees are customarily posted, copies of the notice marked Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Authority's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days.

Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

4) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Authority has taken to comply herewith.

Edmund G. Gerber
Hearing Examiner

Dated: June 28, 1982
Trenton, New Jersey

Recommended Posting
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 our employees in the exercising of their rights by refusing to grant Fred Butler a six-month extension to his leave of absence.

WE WILL retroactively grant Fred Butler an extension of his leave of absence running from October 1980 to the date of the Commission's decision in this matter and further running six months into the future beyond the date of the Commission's decision.

NEWARK HOUSING AUTHORITY
(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 Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.