P.E.R.C. NO. 97-144

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,

Respondent,

-and-

Docket No. CO-H-95-251

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 1044,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO, Local 1044 against the County of Burlington. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act when it laid off Dorothy Sharp, an employability specialist, allegedly because she filed grievances. The Commission finds that the union did not prove that the employer knew of Sharp's protected activity or was hostile towards Sharp or CWA in any way.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, attorneys (Craig Bailey, of counsel)

For the Charging Party, Weissman & Mintz, attorneys (Judiann Chartier, of counsel)

DECISION AND ORDER

On January 30, 1995, the Communications Workers of America, AFL-CIO, Local 1044 filed an unfair practice charge against the County of Burlington. CWA amended the charge twice, but then withdrew the original charge and the first amendment. The second amendment alleges that the County violated subsections 5.4(a)(1), (3) and (5)[1/] of the New Jersey Employer-Employee

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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

Footnote Continued on Next Page

Relations Act, N.J.S.A. 34:13A-1 et seq., when it laid off Dorothy Sharp, an employability specialist, allegedly because she filed grievances.

The County filed an Answer. It denied that Sharp's layoff was based on her union activities and asserted instead that it resulted from a reduction in job training funding.

On July 17 and October 3, 1996, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On January 17, 1997, the Hearing Examiner issued a report recommending that the Complaint be dismissed. H.E. No. 97-17, 23 NJPER 149 (¶28072 1997). He concluded that Sharp's layoff was not motivated by any grievances (H.E. at 12-13) and that the layoff was instead based on a funding reduction, an overstaffing in Sharp's position, and Sharp's failure to take steps to obtain a certification required for her position (H.E. at 13).

On February 12, 1996, CWA filed exceptions. It excepts to certain findings of fact and to the Hearing Examiner's conclusion that the layoff was economically rather than discriminatorily motivated.

1/ Footnote Continued From Previous Page

act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On February 21, 1997, the County filed a response. It urges acceptance of the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-11) are essentially accurate. We adopt them, except as expressly modified by this opinion.

CWA asserts that the Hearing Examiner erred when he found that CWA did not present two grievances on Sharp's behalf in 1994 (finding no. 7). We reject this exception. The only written grievance in the record is the one mailed to the employer on July 25, 1995. Sharp herself did not believe she filed any grievances with the County before July 1995 (1T108). While Florence McNamara, a CWA staff representative, investigated the possibility of filing grievances on Sharp's behalf in 1994, she did not then present any grievances to management (1T145-147).

CWA also excepts to the Hearing Examiner's statements in finding no. 10 that the employer's funding for the 1994-1995 program was $4,281,866 and that the employer knew by July 1, 1995 that its funding level for the 1995-1996 program year would be $3,009,877. We modify finding no. 10 to reflect that $107,541 of the monies listed in R-1 was to be applied during the 1993-1994 program year (R-1 at 32-33); and that as of July 1, 1995, the employer knew that it would receive $2,505,162 for four of its nine programs during the 1995-1996 program year (R-2 at 3) and that it would also receive additional monies for other programs during the coming year. We add that R-1 indicates that before

July 6, 1995, George Fekete, Acting Director of the Department of Economic Development, offered to return $25,000 from the Title II Older Worker program for the 1994 program allocation. Nevertheless, we agree with the Hearing Examiner that the employer knew that its funding for the job training program would be significantly reduced for that program year and that Fekete determined in good faith to lay off several employees given those anticipated reductions. We also add that Fekete decided which employees would be laid off and that Fekete was not hostile to Sharp or her grievance. Indeed, he ultimately resolved the grievance in her favor.

In re Bridgewater Tp., 95 N.J. 235 (1994), sets forth the standards for determining whether a personnel action was discriminatorily motivated in violation of subsections 5.4(a)(1) and (3). To establish such a violation, the charging party must prove, by preponderance of evidence on the entire record, that protected conduct was a substantial and motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected rights. Id. at 246.

Applying these tests, we agree with the Hearing Examiner that Sharp's layoff was not motivated by animus towards Sharp because she filed any grievances. CWA asserts that the employer

knew of Sharp's protected activity because she filed two grievances with the employer in 1994, but the record does not support that assertion or indicate that the employer received the grievance mailed on July 25, 1995 before Fekete decided to lay off Sharp and other employees because of reduced funding. CWA also asserts that the employer was hostile towards Sharp's protected activity, but there is no evidence that Fekete was hostile towards Sharp or CWA in any way. We accordingly dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Finn, Klagholz and Wenzler voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioners Boose and Ricci were not present.

DATED: June 19, 1997
Trenton, New Jersey
ISSUED: June 20, 1997

H.E. NO. 97-17

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

In the Matter of

COUNTY OF BURLINGTON,

Respondent,

-and- Docket No. CO-H-95-251

C.W.A., LOCAL 1044,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a complaint filed by CWA alleging that the public employer violated subsections 5.4(a)(1), (3) and (5) of the Act by terminating or laying off a unit employee.

The Hearing Examiner found that the charging party proved neither knowledge of protected conduct nor anti-union animus, according to the standard in In re Bridgewater Tp., 95 N.J. 235 (1984).

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 97-17

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In the Matter of

COUNTY OF BURLINGTON,

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Appearances:

For the Respondent, Capehart & Scatchard, attorneys (Craig Bailey, of counsel)

For the Charging Party, Weissman & Mintz, attorneys (Judiann Chartier, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 30 and September 11, 1995 and on July 11, 1996, the Communications Workers of America, Local 1044, AFL-CIO, filed an unfair practice charge and amended charges against the County of Burlington. The original and first amended charge alleged that the County subjected five unit employees in the job training program to "intense hostile treatment" and unlawfully restricted their rights to union representation. The final allegation of the first amended charge is that on July 25, 1995, the County unlawfully dismissed several named unit employees including Dorothy Sharp, in retaliation for protected conduct. These actions allegedly violated subsections 5.4(a)(1), (2), (3),

(4), (5), (6) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The second amended charge alleges that the County violated subsections 5.4(a)(1), (3) and (5) of the Act when it "threatened to lay off, threatened to impose more stringent disciplinary standards, and ultimately laid off Dorothy Sharp on July 25, 1995, in retaliation for her union activities."

On February 1, 1996, a Complaint and Notice of Hearing issued. On February 15, the County filed an Answer denying the allegations, and asserting that employees were discharged "for reasons of efficiency and economy."

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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

On July 17 and October 3, 1996, I conducted a hearing at which the parties examined witnesses and presented exhibits.[2/] Post-hearing briefs were filed by December 9, 1996.

Upon the record, I make the following:

FINDINGS OF FACT

1. Dorothy Sharp was hired by the County as a senior clerk typist/receptionist on March 10, 1989 (1T15).[3/] Several months later she was promoted to "employability specialist", the position which she held until her termination on August 11, 1995 (1T16). Throughout her employment, Sharp's supervisor was Willie Williams, coordinator of the jobs training program (1T16, 2T5).

The County and CWA, Local 1044 signed a collective negotiations agreement which extends from January 1, 1995 to December 31, 1998 (R-3).[4/] Article I, "Recognition", states that the union is the "sole and exclusive bargaining agent for all full-time employees of the County of Burlington...." Article IID, "Promotion/Demotion", refers to salary adjustments on the attached guide in the event of promotion or demotion. Article VIII,

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2/ On July 17, Charging Party withdrew the original and first amended charge on the record, leaving the July 11 second amended charge as the only charge for hearing.

3/ Transcript of July 17, 1996 is referred to as "1T"; transcript of October 3, 1996 is referred to as "2T".

4/ "R-" refers to Respondent exhibits; "CP-" refers to Charging Party exhibits.

"Seniority/Job Posting", refers to the County maintaining an "accurate, up-to-date seniority roster", the duty to post non-entry level position openings and a definition of seniority as "an employee's total length of service with the employer, commencing with the permanent date of appointment." Articles X and XI refer to vacation and sick leave, respectively. Articles XIX and XX refer to health and safety matters and to a non-discrimination policy.

Article XXV defines the grievance procedure. Section C requires a grievant to "...orally present and discuss his/her complaint with their immediate supervisor on an informal basis...." Section D4 states that "if the grievant alleges acts by or against the person designated to schedule, hear and decide grievances, the grievance shall be filed with...the next highest step...."

3. George Fekete is the County director of economic development. He oversees the job training program. The program's mission is to "retrain or train people to make them employable" (2T45). The program, funded by the federal government under State auspices, inures to the benefit of "eligible" County residents (2T6). Residents may have to be tested and assessed by program counselors who refer them to "vendor(s) for classroom training." Such clients are either unemployed or underemployed.

4. On December 16, 1993, the State Department of Labor's assistant director of office of employment and training services

issued a memorandum to all "administrative entities and private industry council directors." The memorandum announced a "counselor certificate procedure", which "must [be] followed...to be in compliance with Workforce Development guidelines."

The memorandum required that "all individuals functioning as counselors" must at least work toward fulfilling "specific academic credentials." The memorandum listed "acceptable coursework to meet a 15 college credit requirement [in vocational guidance]." Currently employed counselors should have already implemented their "individual development plans.... In addition, a tentative timetable for getting the required college credit hours should be included" (CP-6).

The memorandum also stated:

> Although January 1, 1996 is the target date for the attainment of the required academic credentials, currently employed counselors should not feel that they face a possible loss of employment if this date is not met. A realistic, feasible and concerted effort...must be demonstrated....

Finally, the memorandum demands the submission of a "plan of action" for each counselor working toward the required credentials and a "projected end date must be no later than January 1, 1996." Extensions may be granted but requests for them must include a "strong justification" and evidence of "a good faith effort to meet the requirements" (CP-6).

5. Sharp knew about the academic credit requirement in 1993 (1T24, 1T71). She believed that she was required to enroll in

a required course by January 1996 (1T24-1T25). Sharp was evaluated periodically. In her evaluation dated June 23, 1994 (which Sharp signed), supervisor Williams wrote that she "...has been advised of the NJDOL requirement for counselor certification and the deadline by which certification must be accomplished. I am unaware of any action Ms. Sharp is taking to achieve this goal" (CP-2).

Sharp enrolled in and completed her first vocational guidance class in summer 1994 (1T82, 1T83). She also was required to enroll in several basic skills courses in mathematics, english and reading at Burlington County College (1T84, 1T85). These courses did not count toward the 15 credit requirement (1T85). She did not enroll in any other credit course before August 11, 1995 (1T85).

6. Sharp was a good employee, in general (CP-2; 2T39). She was rebuked several times by Williams in the course of her employment. All of the four or five instances concerned Sharp's conduct with clients (1T88-1T97). The incidents occurred in or about August 1992, November 1992, March 1993, an undetermined date between March 1993 and January 1995, and July 19, 1995 (1T88-1T99). On August 23, 1995, Fekete admonished Williams in a memorandum following a grievance hearing on the July 19 incident that he must "maintain a normal tone of voice during conversation with all employees" (CP-5).

7. Sharp is a member of CWA (1T38). She called the union to complain about Williams but could not remember the approximate

date (1T40, 1T41). Sometime in 1994, Sharp spoke with union representative Florence McNamara about two possible grievances concerning vacation and sick time but none were filed (1T145, 1T147, 1T179).[5/]

CWA representative McNamara testified that the two (possible) grievances concerning Dorothy Sharp in 1994 "were never formally sent to step one" (1T145). Nor were they presented "orally" (1T147). She was then asked on direct examination, "Of the grievances actually filed in 1994, how many related to Dorothy Sharp? McNamara answered, "Two...." She was then asked, "And when they are filed, where do they go?" She answered, "They will remain in-house until enough investigation is done..." (1T146-1T147). I take "in-house" to mean that the substance or merits of the grievance(s) was not communicated to any employer representative. On cross-examination, this fact was again corroborated by McNamara:

> Q. Ms. McNamara, you indicated that in 1994, 4 grievances were actually filed but actually only 2 were filed but you indicated that management was not notified of any of those grievances?

5/ Sharp testified that a group grievance was filed against Williams in 1994 (1T44). McNamara testified that a group grievance was filed in 1995 (1T148). Under cross-examination, Sharp was consistently unable to recall dates or approximate dates of possible grievances (1T99-1T108). CWA offered no document showing that any grievance was filed with the County in 1994. Williams did not know of Sharp's protected conduct until 1995 (see finding no. 10). Nor was Fekete asked if he knew of any 1994 grievance, formal or informal, concerning Sharp. No other evidence corroborates Sharp's testimony about any grievance filed with the County in 1994. I find only that Sharp discussed her work-related problems with McNamara in 1994.

> A. They were paper grievances.
> Q. Okay. So when you say filed that was for your own internal purposes, it was not filed in accordance with the grievance procedure in the contract?
> A. That's correct.
> Q. Okay. When was the first time you filed a grievance with management concerning Dorothy Sharp?
> A. That would be the grievance of July, um, almost summer of '95.
>
> [1T178-1T179]

McNamara also testified "...Dorothy went to George so we had the meeting with George" (1T147). This testimony refers to Sharp's complaints about Williams's conduct but does not prove that these "possible" grievances were discussed with Fekete in 1994. It more likely refers to the formal step one grievance hearing before Fekete in August 1995. Such a meeting with Fekete instead of Williams complies with the grievance procedure (see finding 2). No evidence in the record shows that any grievance was presented to the County on behalf of Sharp in 1994.

McNamara was also asked what specific contractual Articles provided Sharp "layoff rights." McNamara identified Articles 1, 2, 8, 10, 11, 19 and 20. She was asked to identify specific provisions in those Articles which concern "layoff rights." McNamara answered these questions with ranging interpretations of the provisions (1T189-1T202, 1T206). No article in the contract identifies "layoff rights" for employees (R-3; 1T206, 1T207).

McNamara's testimony on these and other items is equivocal, evasive and unresponsive. I do not credit her testimony, except to

the extent it makes admissions against interest. I also credit her testimony about the July 1995 grievance, which is corroborated by documents.

8. A July 19, 1995 incident prompted Sharp to contact McNamara about filing a formal grievance. (Williams allegedly "humiliated Sharp about a client whom he thought was waiting for service" (CP-4)). Sharp did not believe that any grievance of hers was formally filed against the County before July 1995 (1T99, 1T108). On July 25, 1995, McNamara mailed a formal grievance to Fekete about Williams's conduct toward Sharp on July 19 (CP-4, 1T179). The proposed remedy was for Williams to "cease and desist immediately his threatening and unprofessional behavior."

9. On July 27, 1995, Fekete hand-delivered letters to Sharp and to four other employees, advising that "current and planned reductions" in job training funds require the County to "adjust administrative services and cost through staff reductions." Sharp was notified that her employment would end on August 11, 1995 (1T19-1T21; CP-1).

10. Answering a question about Williams's response to her "union activity", Sharp testified, "He didn't want me to contact the union, he just said go. When he called a meeting and I said wait a minute, I have to make a phone call, he said 'go ahead, call the union if you want to' those were his words to me" (1T114, 1T115).

The record is not clear when this conversation occurred. Sharp's testimony indicates that Williams's response to her "phone"

request was in 1994. McNamara testified that in August 1995 Sharp phoned her from the workplace and she (McNamara) heard Williams over the phone "yelling", "go ahead and call your union, I don't care, it's not going to matter" (1T171). No one testified that Williams confronted Sharp twice; that is, in 1994 and in 1995 concerning her phoning the union. It was one year or the other. Sharp testified that she first complained to McNamara about Williams sometime between March 1993 and January 1995 (1T102) (see also, finding no. 6). At that time, Sharp "...didn't want to do anything, I just wanted to get it off my chest...I didn't want her [McNamara] to do any actions, I wasn't after actions" (1T103). Considering her state of mind, I find it unlikely that Sharp would reveal to Williams in 1994 her intent to call the union. I find that Williams's reply to Sharp about her calling the union was in August 1995.

10. The funding for the job training program in 1994-95 was $4,281,866 (2T46; R-1). Sometime before July 1, 1995, Fekete received notice of a reduction in funding in 1995-96 to about $3,009,877 (2T47, 2T50; R-1, R-2). Fekete determined that layoffs were necessary in the counselling department, based on calculations which included an estimated $4000 per client (2T52) in a 45 week year. These estimates translated to 16 clients per week divided by four counselors; which in turn meant that each counselor was assisting about one client a day (2T51). He recommended that to the County Board of Freeholders that five employees in the counselling department be laid off and two supervisory positions not be filled

(2T47-2T48). The County approved the recommendation. Sharp was one of five County employees in the program who were laid off (2T47). The others were Lileth Miller, Sally Baer, Leonard Gaines and Roy Beebe (2T68). They held the titles of job developer, counselor, assistant administrative analyst, and job developer, respectively (2T68).

Two employees working as counselors who were certificated were retained (2T63). One of the laid-off employees was later rehired by the County in a civil service position. Another employee, Lileth Miller, was rehired sometime later (after becoming certified) to replace a departing counselor (2T70-2T71). Another was retained to the end of August 1995 because she worked in a "summer youth" program which concluded at that time. (This employee, Sally Baer, was certificated (2T66)) (2T65-2T66).

Fekete recommended that Sharp be terminated because she would not be certificated by January 1, 1996 (2T63, 2T71).

ANALYSIS

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4(a)(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, 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 the employer did not present 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 unlawful motives 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 anti-union animus was a motivating or substantial reason for the personnel action.

The CWA has produced neither direct nor circumstantial evidence that Sharp's termination was in retaliation for her exercise of the right to file a grievance.

The only possible evidence of the County's knowledge of Sharp's protected conduct (before the July 27, 1995 notification of her termination) is the County's receipt of the formal grievance

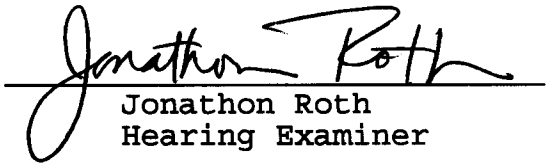
McNamara mailed sometime on July 25. CWA proferred no evidence of the date on which the County received the grievance. It offered no evidence of an estimated date of receipt, based on other mailings. It offered no evidence of any communication to an employer representative that the grievance was being filed.

Assuming that the County received the grievance before Fekete hand-delivered the termination notices on July 27, I find that CWA presented no evidence of anti-union animus between July 25 and 27 which may have motivated her termination. The County's (possible) mere receipt of the grievance does not prove animus. CWA has proven neither knowledge of Sharp's protected conduct nor hostility toward it by a preponderance of evidence.

I am satisfied that the County's decision to terminate Sharp was based on economic, organizational (efficiency) and educational reasons. The 1995-96 budget for the jobs training program suffered a 30% reduction from the previous year. The program was overstaffed with "counselors" and Sharp was one of five unit employees who received termination notices on the same day. Sharp was also advised in writing in June 1994 of the "deadline" for certification. The only evidence in the record of any "deadline" is January 1, 1996. Sharp enrolled in only one required course between June 1994 and July 27, 1995. The County could reasonably conclude that Sharp would not be certified by the new year.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.



Jonathon Roth
Hearing Examiner

DATED: January 17, 1997
Trenton, New Jersey