

P.E.R.C. NO. 92-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY PROSECUTOR,

Respondent,

-and-

Docket No. CO-H-89-282

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1044,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated by the full Commission, dismisses a Complaint filed by the Communications Workers of America, Local 1044 against the Burlington County Prosecutor. The Complaint alleged that an Assistant Prosecutor violated the New Jersey Employer-Employee Relations Act when he made comments to two CWA supporters.

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AMERICA, LOCAL 1044,

Charging Party.

Appearances:

For the Respondent, Michael J. Hogan, Burlington County
Solicitor (Evan H.C. Crook, Assistant County Solicitor)

For the Charging Party, Sweeney & Sweeney, attorneys
(Michael J. Sweeney, of counsel)

DECISION AND ORDER

On March 27, 1989, Communications Workers of America, Local 1044 ("CWA") filed an unfair practice charge against the Burlington County Prosecutor.^{1/} The charge alleges that an Assistant Prosecutor, Gregg Shivers, violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (5) and (7),^{2/} when he said to two CWA

^{1/} The charge names the Burlington County Prosecutor's Office, but the correct name of the public employer is the Burlington County Prosecutor. We have modified the caption accordingly.

^{2/} 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

supporters, Mary Brown and Darlene Jones, "Mary's an activist, see the red button, she must be a commie."

On June 7, 1989, a Complaint and Notice of Hearing issued. The Prosecutor incorporated an earlier statement of position as its Answer. That statement denied that Shivers had any authority to act on the Prosecutor's behalf in making his comments.

On December 14, 1989, Hearing Examiner Lorraine H. Tesauro conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally, but did not file post-hearing briefs.

On July 19, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-3, 17 NJPER ____ (¶____ 1991). She found that Shivers had been joking. She concluded that his comments did not violate the Act and he was not acting as the employer's agent.

The Hearing Examiner served her report on the parties and advised them that exceptions were due on August 1, 1991. Neither party filed exceptions.

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

I have reviewed the record. The Hearing Examiner's findings of fact are accurate. I incorporate them. Based on these facts, and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I adopt the recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: September 12, 1991
Trenton, New Jersey

H.E. NO. 92-3

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

In the Matter of

BURLINGTON COUNTY PROSECUTOR'S OFFICE,

Respondent,

-and-

Docket No. CO-H-89-282

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1044,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss the Charging Party's complaint that alleged an agent of the Burlington County Prosecutor's office violated the New Jersey Employer-Employee Relations Act when he allegedly referred to a CWA supporter as "...an activist...She must be a Commie." The Hearing Examiner finds that the Assistant Prosecutor was not acting as an agent of the Prosecutor, the Prosecutor did not authorize the comment and the Assistant Prosecutor's comments do not reflect the employer's views.

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.

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

In the Matter of

BURLINGTON COUNTY PROSECUTOR'S OFFICE,

Respondent,

-and-

Docket No. CO-H-89-282

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1044,

Charging Party.

Appearances:

For the Respondent, Evan H. C. Crook, Assistant Solicitor
Burlington County

For the Charging Party, Sweeney & Sweeney, Attorneys
(Michael J. Sweeney, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 27, 1989, Communications Workers of America, Local 1044 ("CWA") filed an Unfair Practice Charge against the Burlington County Prosecutor's Office ("Respondent"). On April 11, 1989, the CWA amended the initial charge. The charge, as amended, alleged that an agent of the Respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (5) and (7),^{1/} when

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Greg Shivers, an Assistant Prosecutor, said to Mary Brown and Darlene Jones, two CWA supporters: "Mary is an activist...see the red button, she must be a Commie."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing issued on June 7, 1989. The Respondent filed its Answer on April 21, 1989. A hearing was conducted on December 14, 1989, in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, introduce exhibits and argue orally. No post-hearing briefs were filed. Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Burlington County Prosecutor's Office is a public employer within the meaning of the Act and is subject to its provisions. CWA Local 1044 is a certified representative within the meaning of the Act and is subject to its provisions. CWA represents a unit of clerical employees in the Prosecutor's office.

1/ Footnote Continued From Previous Page

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

2. Mary Brown, a CWA member, is employed by the Burlington County Prosecutor's Office. She is the supervisor of the records and information unit and works closely with the Assistant Prosecutors. Darlene Jones, also a CWA member, works with Brown in the records and information unit.

3. Stephen Raymond, Greg Shivers and James Gerrow are all employees of the Burlington County Prosecutor's Office. Raymond is the Chief Prosecutor and Gerrow at the time of the alleged incident was the Acting Prosecutor. Their supervisory responsibilities pertain to the daily functioning of the Prosecutor's Office and its employees. Greg Shivers is an Assistant Prosecutor assigned to a specific team as a team leader. He does not have any supervisory responsibilities over the clerical staff or Brown's department, the records and information unit.

4. The table of organization in the Burlington County Prosecutor's Office is such that there is a Prosecutor, Stephen Raymond; a First Assistant Prosecutor, Mr. Riley; and a Deputy First Assistant Prosecutor, James Gerrow (the individual in charge at the time the comment was made because the Prosecutor was on vacation and the First Assistant Prosecutor was in Washington). The First Assistant Prosecutor has responsibility for the investigative and the legal division. The Administrative Assistant, Assistant Prosecutor is responsible for the day-to-day administration both on the investigative side as well as the legal side. The staff of Assistant Prosecutors is divided into sections -- e.g. litigation or

grand jury. Each particular section has its own Deputy First Assistant in charge. The Administrative Assistant, Assistant Prosecutor administers all personnel matters.

Greg Shivers is a trial team leader and supervisor of the sexual assault and child abuse unit and the victim witness unit. He testified that he does not have any authority with respect to speaking to any employees concerning personnel matters, does not evaluate unit members such as clerical staff, and does not participate in any way with the grievance process (T-45,46).

5. The parties were in negotiations in March of 1989. On March 20, 1989, CWA members wore buttons in support of their negotiations (Ex. CP-1). Historically, CWA supporters wore buttons and distributed pro-union documents during negotiations (T63). No action was ever taken to discourage or forbid employees from wearing the buttons (T63). Mr. Raymond's testimony established the on-going campaign practices that were never prohibited or interfered with by the employer.

6. On or about March 20, 1989, Brown observed Jones and Shivers talking in the back of the work room. Brown then observed Jones standing up with her finger pointed at Shivers (T-16).

Brown was asked on direct to testify about her perception of the incident and responded: Q.: "Did Mr. Shivers say anything to you at that time? Answer: Yes, sir. He came over and he said something about Mary must be an activist. See her red button, she must be a commie."

Brown testified that Jones removed her button and said she'd had enough. Brown indicated it was the right of union supporters to wear campaign buttons.

Brown testified that she and Shivers have a friendly relationship. She described Shivers as "joking and kidding around for the most part within their unit. Basically, keeps things light and works in a light manner." (T-21) "Q.: With respect to the specific comments that are alleged to be made by Greg, was he laughing at the time he was making these comments, did he have a smile on his face? Answer: He may have had a smile but I wouldn't say he was laughing. His comments were not threatening.

"Q.: You did not feel any kind of imminent danger or coercion coming towards you from Greg? Answer: I would say no to the danger but I thought I was being attacked for wearing what I wore. He was trying to lighten the situation between he and Darlene." (T-21)

Shivers denied saying, "Mary is an activist. " Shivers testified, "I didn't say that as it is stated there. That's not what I said. I don't think I ever used the word activist. That's not one of my normal words. I do remember once when I was kidding with them in the record room saying, 'It's a red button, the whole thing must be a Communist plot.' That's what I recall saying." (T-46, 47) He recollected that only Brown and Jones were present. Shivers further testified that he meant his comment as a joke (T-21) and it was common practice for him to stop in the record room and

joke or kid around with Brown or Jones about everything. He did not recall any conversation with Jones about trying to get her to take her button off. He denied that because he would not stop them from pursuing something that they want to do. Shivers denied ever intimidating or coercing CWA members with respect to their membership. Shivers indicated, on cross-examination that he was not aware of the level of intensity with which Jones and Brown supported their union.

I credit Brown's testimony concerning the contents of the comment. I also credit Shivers' testimony that he did not intend to intimidate Jones and Brown or to interfere with their rights.

Shivers does not serve on the negotiating team nor does he have any knowledge of negotiations; he has no personnel responsibilities. The extent of his supervisory responsibilities extends to lawyers within his team and investigators within his unit.

7. Stephen Raymond has been the Prosecutor of Burlington County by special appointment since July of 1982. His duties include the administration of employee-related matters. He does not get involved in all stages of contract negotiations, but he has the overall responsibility for those negotiations. He specifically deals with personnel matters in the office.^{2/}

^{2/} Administrative Assistant Prosecutor Kathy Morrissey is the office manager. Her responsibilities include personnel matters affecting the clerical staff and their supervisors.

Raymond indicated that the standard Assistant County Prosecutor does not have any duties whatsoever with respect to employees or personnel matters unless it falls within their specific "unit." The term "unit" in the Prosecutor's office describes the specific crime or litigation unit within which the prosecutors work i.e. attorneys in the victim witness unit, sexual assault unit.^{3/} Raymond indicated that after he read the charge, he told Greg not to even kid around, that they were in the middle of negotiations and not to say anything. He further testified that he "mentioned in a staff meeting after the charge was filed, that the clerical staff was in the middle of contract negotiations and they're sensitive and just don't make any type of comments even if it is in a humorous nature."

Raymond testified that he did not authorize Shivers in any way to represent the Prosecutor's Office or the Prosecutor (T-62,63). Raymond has never delegated any personnel authority to Shivers or discussed any union matters with him.

He indicated that Shivers did not participate on behalf of the agency in any union matters. I credit Raymond's testimony concerning Shivers lack of authority.

^{3/} It should be noted that Raymond was on vacation at the time the comments were made and was unaware of the incident until the Acting Prosecutor, James Gerrow, called him. Further, Raymond did not approve of Shivers' comments if they were made at all.

8. At the time of the alleged incident, James Gerrow was the Acting Prosecutor. Gerrow was first made aware of the complaint when a reporter called to ask him for comment. Gerrow then asked Shivers about the incident. Shivers indicated that he'd been joking around with the employees and that was the manner in which he intended it. Gerrow testified that the basis of the discussion with Shivers was really as to the matters that were set forth in the charge. Gerrow testified that Shivers did not deny making the comment, but Shivers stated that the intention of the words had been misconstrued.^{4/}

9. Once the charge was filed and a reporter called Gerrow, Gerrow called Raymond and Raymond shortly thereafter held a staff meeting. Raymond reminded all Assistant Prosecutors that CWA was in negotiations and told them to refrain from any comment concerning the status of negotiations.

DISCUSSION

There are two basic issues to be resolved. The first issue is whether Shivers' comments constituted coercion, harassment or intimidation under subsection 5.4(a)(1). The second issue is whether Shivers was acting as an agent of the Prosecutor when he made those comments.

^{4/} Throughout the hearing, witnesses testified that although Shivers made the comment, and there was no denial of that comment, he did not make the statement with the intention of discouraging or coercing the employees to take a less active role in support of their union. I credit Gerrow's testimony concerning his interpretation of what Shivers told him.

CWA asserts that the Respondent through the actions of its agent Greg Shivers violated subsection 5.4(a)(1) by making derogatory comments to unit members concerning their campaign practices while involved in negotiations, specifically with regard to the comment "Mary is an activist. See the red button...she must be a commie."

The standard in determining whether 5.4(a)(1) has been violated requires the balancing of two conflicting interests: an employer's free speech and the employee's right to be free of coercion. See State of N.J. (Trenton State College), P.E.R.C. 88-19, 13 NJPER 720 (¶18269 1987). There is a clear violation of 5.4(a)(1) when a threat has been made irrespective of whether the threatened employee is actually intimidated. An employer violates subsection 5.4(a)(1) if a representative's statement tends to interfere with an employee's rights under the Act. See Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83); N.J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

The thrust of Shiver's comment did not tend to interfere with the employees' rights to participate in union activity. Shivers testified he was joking and never meant to discourage Brown and Jones from continuing to campaign. Brown confirmed Shivers' joking nature.

The record failed to establish any coercive or discouraging subsequent actions by the employer supporting CWA's allegation that

an agent of the employer tended to interfere with CWA's right to campaign. I do not find this comment interfered with CWA members' rights as protected under the Act.

The second issue is whether Shivers' conduct was acting within his apparent authority as an agent of the Prosecutor and when he made his comments. I feel that Shivers was not acting within his apparent authority.

Shivers holds a staff position in the Prosecutor's Office. The Hearing Examiner must discern the precise capacity in which Shivers was acting, i.e. with or without apparent authority vis-a-vis the facts alleged and proven by the CWA before finding the "Respondent-employer" committed a violation. If Shivers' conduct was within the scope of his apparent authority, in that he was acting in the capacity of supervisor and his comments were coercive or intimidating, then plainly the Respondent is bound and is responsible for his conduct. However, if the conduct was without apparent authority, then the Respondent did not violate the Act.

The Assistant Prosecutors do not participate in the negotiations process. Shivers is a team leader not a supervisor. Moreover, Shivers is a professional pursuant to the Act.^{5/} The litigation unit is distinct from the bargaining unit. The

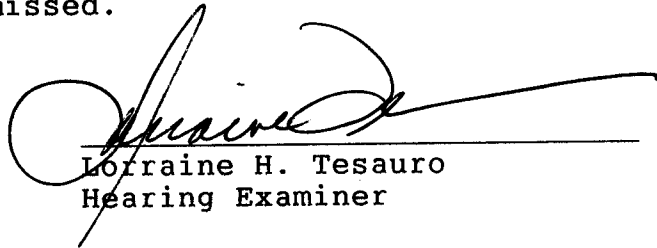
^{5/} "Professional employee" means any employee whose work is predominantly intellectual and varied in character, involves the consistent exercise of discretion and judgment, and requires knowledge of an advanced nature in the field of

Prosecutor is deemed to be the public employer and responsible for both separate and distinct units. It is more than likely that the Prosecutor was aware of the negotiations and the staff was not. The staff does not involve themselves in the process and are not concerned with it. Under these circumstances, I find that Shivers was not acting as an agent of the Prosecutor, the Prosecutor did not authorize the comment and Shivers comments do not reflect the employer's views.

Based on these findings, I recommend that the Complaint be dismissed.

RECOMMENDED ORDER

The Complaint is dismissed.



Lorraine H. Tesauro
Hearing Examiner

Dated: July 19, 1991
Trenton, New Jersey

5/ Footnote Continued From Previous Page

physical, biological, or social sciences, or in the field of learning. The Commission will also consider whether the work is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. The term shall also include any employee who has acquired knowledge of an advanced nature in one of the fields described above, and who is performing related work under the supervision of a professional person to qualify to become a professional employee as defined herein. The term shall include, but not be limited to, attorneys, physicians, nurses, engineers, architects, teachers and the various types of physical, chemical and biological scientists.]
N.J.A.C.19:10-1.1.