P.E.R.C. NO. 94-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket Nos. CO-H-93-185
CO-H-93-293

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommendation to dismiss a Consolidated Complaint based on unfair practice charges filed by International Union of Operating Engineers, Local 68, AFL-CIO against the Atlantic County Utilities Authority. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act by threatening to subcontract its operations and terminate employees if they should select the Union as their majority representative and by discharging Robert Carter because of his membership and activity on behalf of the Union. In the absence of exceptions, the Commission adopts the Hearing Examiner's conclusion that the employer's conduct did not violate the Act.

P.E.R.C. NO. 94-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket Nos. CO-H-93-185
CO-H-93-293

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Blank, Rome, Comisky & McCauley, attorneys (Jeffrey E. Meyers, of counsel)

For the Charging Party, Kroll & Gaechter, attorneys (Raymond G. Heineman, of counsel)

DECISION AND ORDER

On November 24, 1992 and February 22, 1993, the International Union of Operating Engineers, Local 68, AFL-CIO filed unfair practice charges against the Atlantic County Utilities Authority. The charges allege that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),[1/] by threatening to subcontract its operations and terminate employees if they should

---

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."

select the Union as their majority representative and by discharging Robert Carter because of his membership and activity on behalf of the Union.

On May 3, 1993, a Consolidated Complaint and Notice of Hearing issued. On May 17, the employer filed its Answer denying the allegations.

On June 15 and 16 and July 23, 1993, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On February 10, 1994, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 94-15, 20 NJPER __ (¶_____ 1994). He found that the employer's speeches to employees during working hours were neither coercive nor threatening. He further found that employer would have discharged Carter even absent his protected activities.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due February 25, 1994. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-17). Given those facts and in the absence of exceptions, we adopt the Hearing Examiner's conclusion that the employer's conduct did not violate the Act. Accordingly, we dismiss the Consolidated Complaint.

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino was not present.

DATED: March 29, 1994
Trenton, New Jersey
ISSUED: March 30, 1994

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

In the Matter of

ATLANTIC COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket Nos. CO-H-93-185
CO-H-93-293

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO,

Charging Party.

## SYNOPSIS

A Hearing Examiner recommends that Public Employment Relations Commission dismiss an Unfair Practice Charge, which alleged that the Respondent violated Section 5.4(a)(1) of the New Jersey Employee-Employer Relations Act when its agents and representatives made speeches to employees during working hours. However, they were neither coercive nor contained promises of benefit. Nor did the Respondent violate Section 5.4(a)(3) of the Act when it discharged Robert Carter on July 16, 1993 because, under Bridgewater, it established that this discharge would have occurred even the absence of protected activities, i.e., Carter was discharged for insubordination--directing obscenities to a supervisor.

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. 94-15

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

In the Matter of

ATLANTIC COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket Nos. CO-H-93-185
CO-H-93-293

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Blank, Rome, Comisky & McCauley, Attorneys (Jeffrey E. Meyers, of counsel)

For the Charging Party, Kroll & Gaechter, Attorneys (Raymond G. Heineman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 24, 1992, by the International Union of Operating Engineers, Local No. 68, AFL-CIO ("Charging Party" or "Union") [Dkt. No. CO-H-93-185]. This was followed by a second Unfair Practice Charge, which was filed by the Union on February 22, 1993 [Dkt. No. CO-H-93-293]. Each Charge alleged that the Atlantic County Utilities Authority ("Respondent" or "Authority") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that [1] the Authority since November 8, 1992, through its officers and representatives,

including Brian Lefke, Donald Smith[1/] and Salvatore Celano, have interfered with, restrained and coerced the employees of the Authority in the exercise of their right to join and assist any labor organization freely and without fear of penalty or reprisal as guaranteed to them by the Act, i.e., by threatening to subcontract its operations and terminate its employees if they should select the Union as their collective negotiations representative; and [2] on February 16, 1993, the Authority by its agents and representatives discriminatorily discharged its employee Robert Carter because of his membership and activities on behalf of the Union and to date it has refused to reinstate him to his former position. All of the foregoing is alleged in each Unfair Practice Charge to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.[2/]

A Consolidated Complaint and Notice of Hearing was issued on May 3, 1993. A timely Answer was filed on May 17, 1993, denying all charges. Pursuant to the Complaint and Notice of Hearing, following one adjournment, hearings were held on June 15, June 16 and July 23, 1993, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant

---

1/ It is undisputed that this individual is Donald Scull, a Group Leader.

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. (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."

evidence and argue orally. Oral argument was waived (3Tr146). The parties filed post-hearing briefs by October 4, 1993.

* * * *

Upon the entire record, I make the following:

**FINDINGS OF FACT**

1. The Atlantic County Utilities Authority is a public employer within the meaning of the Act, as amended, and the International Union of Operating Engineers, Local No. 68, AFL-CIO, is a public employee representative within the meaning of the same Act.

2. Robert Carter was an employee of the Authority from September 6, 1989 (R-2) until his termination on February 16, 1993, and Carter is a public employee within the meaning of the Act, as amended.

The Authority

3. The Authority's Solid Waste Division collects, processes, removes and recycles solid waste through this Division, which began operating in the summer of 1988 (3Tr6). In the fall of 1988, the Division began curbside recycling collection (Id.). In the summer of 1990, the Division expanded to include a transfer station (Id.). In the spring of 1992, the Division opened a compost site, followed by a landfill in the fall of 1992 (Id.).

4. Richard Dovey is the President of the Authority and James Rutella is the Vice-President of the Solid Waste Division (3Tr9, 19). Brian Lefke is the Director of Solid Waste Operations

and reports to Rutella (3Tr5, 9). The Authority's Recycling Center is managed by Robert Mooney (1Tr33). Prior to December 1992, the Recycling Center's Site Manager was James Coffey, who is currently the Site Manager for the Transfer Station (3Tr109, 110). The Assistant Site Manager of the Recycling Center is Ronald Berenato (3Tr27). Within the recycling unit, Berenato supervises various "Group Leaders," such as Gary Denelsbeck, David Taylor, Salvatore Celano and Donald Scull (1Tr33, 66, 67, 110; 2Tr5). Group Leaders do not have the authority to make policy or policy announcements for the Authority; nor do they do so in practice (3Tr15, 127, 141).

5. Each year the Authority prepares a fiscal budget (3Tr11). The budget is reviewed and approved by the Authority's Board. As part of the budgetary process, the Authority annually reviews the efficiency of its various divisions. In the past, this analysis has prompted the Authority to take over operations which had previously been subcontracted. Simultaneously, the Authority also considers the cost and benefits of subcontracting various portions of its operations. [3Tr7, 8, 13, 14].

6. Due to a deficit in 1992, the Authority was forced to increase its "tip fees," which are the fees which charged to municipalities for providing trash removal services (2Tr187-189). This increase in fees created demands for privatization (2Tr188). After a brief consideration of the possibility of privatization, the Authority declined to pursue any plan to subcontract in 1992-93 (3Tr14).

Prior Organizational History

7. In the summer of 1991, the International Brotherhood of Teamsters, Local No. 331, commenced an organizing drive among the blue collar employees of the Authority (2Tr5). Its efforts culminated in an election conducted by the Commission on December 20, 1991, in which a majority of ballots were cast for "No Representative" (2Tr23). Carter was a leading advocate for Local No. 331 during its organizing drive and the Authority was aware of this activity (2Tr5, 6). Without having had a prior disciplinary history, Carter received a one-day suspension and a five-day suspension in 1991 during the Local No. 331 organizing drive (2Tr7-23). Following his two suspensions prior to the Local No. 331 election on December 20, 1991, Carter was not formally disciplined until he was discharged on February 16, 1993, infra, which is the subject, in part, of this proceeding.

8. Shortly after the December 20th Teamster's election, the Authority brought in a consultant to advise it on how to structure a joint employer/employee (steering) committee (2Tr193-195). The consultant questioned employees about their problems and conducted a survey, as a result of which, in March 1992, a newly-formed Steering Committee held its first meeting (2Tr193-195). The Steering Committee was comprised equally of representatives of management, supervision and elected representatives of the Authority's employees. The Committee initially had a broad range of responsibilities, including the

formulation of the team bonus program, safety shoes, etc. (CP-4). At its April 14, 1992 meeting, the Steering Committee decided to form two additional committees: The Policy Committee and Human Resource Committee (CP-4; 2Tr195, 198, 199).

9. The Policy Committee was concerned with such issues as whether employees wore clean leather gloves and it also dealt with the holidays worked and days off (2Tr195, 198). The Human Resource Committee members, who are paid, are concerned with such matters as promotions and discipline (1Tr99, 100, 124-127). When this Committee conducts a hearing on discipline, its six employee members and two supervisory members make determinations by plurality vote (3Tr106, 107). At the end of their terms, the employee members of the Human Resource Committee vote on whom they want to have as their successor (1Tr99).

> NOTE: I attach no relevance to the fact that the Authority ceased group meetings with its employees to solicit grievances, following the Local No. 331 election on December 20, 1991, nor to the fact that the Authority ceased discussions with its employees regarding the subcontracting of its operations (1Tr84, 85, 88, 100-102).

10. The Employee Manual provides, inter alia, at pp. 56 & 57, that insubordination is the direct refusal of a work order from supervisory personnel or the use of obscene or objectionable language used in a threatening manner. However, this is not intended to prohibit the right of an employee to question a work order which is unlawful or violates Authority policies. Finally, any act of insubordination will be documented in the employee's

personnel file and will be followed with the appropriate disciplinary action. [2Tr200-203]. The Authority has, however, tolerated in the past a variety of verbal and physical conduct that has exceeded the rule in its Employee Manual (1Tr37-40, 72, 73, 75, 76, 90-93, 106, 107; cf. 1Tr116-118; 2Tr64-66, 68, 69).

Local 68's Organizing Drive

11. In the fall of 1992, the Union commenced an organizing drive among the blue collar employees of the Authority. Carter, who had been wearing a Local 68 insignia on the job, attended a union meeting in November 1992. About 50 employees were present. Carter spoke on behalf of the Union. [1Tr30, 31].

12. In October 1992, Carter was present at a meeting of employees and supervisors at which Authority President Dovey spoke (1Tr52, 67; 2Tr31). Dovey first discussed the budget. Employees then raised questions about their conditions and their Site Manager, James Coffey. An employee, Matthew Daniels, complained about Coffey, stating that if he wasn't such a problem "...we wouldn't need a union." Dovey then stated that we didn't need "...any outside help," following which Carter indicated to Dovey that he favored a union. [2Tr31-33].

13. On November 13, 1992, Lefke had called a meeting of drivers at the Recycling Center, stating that he wanted to discuss budget issues and, among other items, the issue of privatization or subcontracting. As to the latter, he stated that the Authority's Board was "...looking at a number of options, in terms of our

budget. And, privatization was one of the things I was hearing about..." [3Tr17, 18]. Lefke made no predictions and he made no reference to privatization as to any particular employee or employees (3Tr18, 19). Following this meeting, Lefke remained aware of rumors, regarding privatization, which continued to circulate because of the Authority's budget problems. [3Tr19].

14. Dovey had also announced at the October 1992 meeting of employees and supervisors that there would be no privatization of operations in 1993. Dovey added that the Authority was 95% to 99% sure that it would not be privatizing any of its operations. Drivers William Ramp and Robert Thornwell testified without contradiction that they attended at least one of the meetings where Dovey spoke about subcontracting and each agreed that Dovey had made the statement that there was either a 95% to 99% chance, or a 90% to 95% chance, that privatization would not occur (2Tr121, 122, 153, 154). The testimony of Ramp and Thornwell is consistent with the internal discussions that Lefke had with Dovey. [3Tr19, 20].

15. On December 21, 1992, the Union filed a Representation Petition with the Commission, which was docketed under No. RO-93-110 (CP-1). By this Petition, the Union sought to represent all blue collar employees employed by the Authority. Thereafter, the parties entered into a Consent Election Agreement, which was approved by the Director of Representation on January 14, 1993, and an election was conducted on February 5th. [CP-2]. Of the eligible voters, 58 ballots were cast for the Union and 84 ballots were cast for "No Representative." [CP-3].

16 Administrative notice is taken of the Union's having filed timely objections to the conduct of the election on February 16, 1993. Among these objections was No. 4, as follows:

> Since on or about December 21, 1992, the Employer, through Brian Lefke, Donald Smith, Salvatore Celano and other of its supervisors, threatened variously to subcontract its operations, terminate its employees and unilaterally reduce existing benefits (sic) levels in the event they selected Local 68 as their negotiations representative.3/

17. At a meeting of employees and supervisors on February 2, 1993, Dovey stated that the employees did not need a union (1Tr69, 70; 2Tr38, 39, 187, 188). Then there were employee questions (2Tr38). William Fifer asked Dovey who would take away employee benefits if the union "got in". Dovey stated that the Authority would take away benefits. [2Tr38]. Carter asked if there was any way that the Union and the Authority could come to a compromise and work together. Dovey stated that realistically that would never happen and that the employees would "lose something" (2Tr38, 39).4/

---

3/ The Director of Representation on August 30, 1993 deferred a decision on Objection No. 4, supra, pending factual determinations made in this proceeding.

4/ The testimony of Fifer, Robert J. Dube, Joseph H. Hawn and Carter was that Dovey's response to questions at these several meetings was that they did not need a union since the Authority and the employees could work out any problems among themselves (1Tr52-54, 67-70, 89, 90; 2Tr31-33).

18. Although the testimony was less than consistent, I find that, notwithstanding Dovey's statements that subcontracting was a 95% to 99% unlikelihood, Lefke, at a meeting with drivers on November 13, 1992, acknowledged that the Board of the Authority was "...looking at a number of options, in terms of our budget. And privatization was one of the things I was hearing about" (3Tr17, 18).

19. James Vorasso testified that at the November 13th meeting Lefke discussed the bringing in of a private contractor because it would be cheaper instead of "...going for the union..." (1Tr110, 111). Vorasso also added that Scull, an Authority Group Leader, stated around November or December 1992 that he was going to keep his job "at least" (1Tr111, 112). Kenneth E. Wall testified that Scull told him that the Authority was "thinking about" having a private hauler and that the employees would be "out of jobs" (1Tr104). Hawn testified that in a conversation with Group Leader Celano, prior to the filing of the Union's petition in this matter, Celano said, as to subcontracting, that the Authority could do just about anything it wanted to do. Celano also said that it would be the "people on the road, the road handlers and drivers," who would lose their jobs. [1Tr86, 87].

* * * *

**The Discharge of Carter**

20. The Authority's "disciplinary procedures" provide, in part, that when an employee fails to conform to accepted standards, the employee shall receive notification as follows:

1st Offense - written warning or up to three (3) days suspension

2nd Offense - five (5) days suspension; and

3rd Offense - termination.[5/]

21. The Authority, in seeking to establish the basis for its termination of Carter on February 16, 1993, has introduced Carter's prior disciplinary history, beginning with July 19, 1991 and continuing through three additional incidents, the last one of which occurred on April 3, 1992 (R-13 through R-16; 2Tr7, 10, 21-23, 84; 3Tr114, 117-121).[6/]

22. The fifth and final disciplinary incident involving Carter occurred on February 2, 1993 and resulted in his termination two weeks later on February 16th. Carter had been evaluated by his Group Leader, David Taylor, twice during 1992, and again in January 1993 when Taylor met with Carter to review his evaluation, which, at that point, had been reduced to writing (R-2; 3Tr95, 96). Carter's evaluation had merited what is known as a "one-step" raise, which is the raise that about 60% to 70% of the Authority's workforce receives (3Tr17, 96). Carter thought that he should have received a "two-step" raise because he was above average and was one of the

---

5/ Employees may use the grievance procedure in matters concerning their discipline or termination." (R-4, R-6; 2Tr165-169).

6/ The first of the above disciplines imposed upon Carter was a written warning, followed by a one-day suspension and a five-day suspension. All three of these incidents occurred in 1991. The fourth incident, in April 1992, involved Carter's having had to pay $84.57 toward the painting of a wall (R-16).

hardest working employees "on the road" (2Tr33-36; 3Tr96, 97). Taylor responded that he had only "given out a couple (of) two step raises..." and that Carter was doing a satisfactory job (3Tr97).[7/]

23. Carter next sought review of his evaluation by Ronald Berenato, the Assistant Site Manager, which took place on January 29, 1993 (R-2; 2Tr36; 3Tr97, 98). On that date, Berenato stated to Carter that he would "look into it" and would then meet with Carter at a later date. Before his next meeting with Carter, Berenato made several changes in the evaluation. He then met with Carter on February 2nd. [3Tr29-31].

24. Carter acknowledged that he was angry when he left Dovey's February 2nd meeting of employees and supervisors. Carter had disagreed with Dovey at this meeting. He also had had a disagreement with Leslie Houston, the Assistant Secretary of the Authority. All of this had occurred just prior to Carter's meeting with Berenato [2Tr39-41].

25. Carter and Berenato met in the Site Manager's office on the second floor after the Dovey meeting (see R-8; 2Tr36; 3Tr31, 32). Berenato stated to Carter that the only change that he had made in his evaluation was the "wording up top." Carter was extremely disturbed, claiming that Berenato had, in their prior meeting, agreed to change the rating on his evaluation to reflect

---

7/ I do not credit Carter's testimony that Taylor said "Bob, its all politics," in rejecting a "two-step" raise for Carter (2Tr35).

that Carter "...was an above average worker..." [3Tr31, 32; 2Tr41]. Berenato refused to make any further change, which made Carter "more angry..." (2Tr95; 3Tr32).

26. Carter then walked over to Berenato at the door of the office. According to Berenato, whose testimony is credited, based upon his overall demeanor, Carter uttered "...an obscenity to me, and got in my face..." (2Tr95; 3Tr32). On cross-examination, Berenato amplified upon his direct testimony, stating that Carter specifically said "...that's fucked up. And, that's why we need a fuckin' Union in here..." Again I credit Berenato, based upon his demeanor (3Tr53, 54; 32-34). At that point, Berenato went to open the door for Carter and, as he did so, Carter uttered a couple of more obscenities about Berenato, specifically, that Berenato "...didn't know jack shit...," referring to his job (3Tr33, 34, 57-60; 68; 2Tr42).[8/] Berenato also testified on cross-examination that he had made no response to anything that Carter had said to him during this encounter (3Tr57).

---

8/ I reject the alleged distinction between the testimony of a witness under oath in this hearing, such as Berenato, and what he may or may not have stated in a contemporaneous statement at the time of the event such as Exhibit R-12. A witness appearing at a hearing may be cross-examined on prior inconsistent statements made but he or she cannot be impeached on the basis of alleged discrepancies after the hearing is concluded, i.e., the testimony adduced at the hearing before me, coupled with my opportunity to assess demeanor, is controlling and overrides any inconsistent statements made prior to the hearing, upon which no cross-examination was had. [See, for example, footnotes 1 through 4 at pp. 9-11 of the Union's brief].

27. Debra Berenato, a Senior Secretary for the Authority, was at one point in the hallway outside of the office while the encounter between Carter and Berenato was in progress (3Tr65-68). She, too, testified credibly, based upon her demeanor, that Carter appeared to be upset and that he had told Mr. Berenato "...you don't know jack shit...," adding that she did not know what they had been talking about previously (3Tr68; 2Tr96, 97). After Ms. Berenato had walked to her desk, she had to ask Carter to go elsewhere because he was "...disrupting my work area..." (3Tr68). Carter's response was to tell her to mind her own business. When she replied that she was in her work area and that he was bothering her, Carter stated "...well who the F are you. You're just a secretary..." (3Tr68; 2Tr43, 44) When Carter then stated that he never disrespected her, she replied that he did because he used "...foul language in my work area..." [3Tr68, 69].[9/]

28. Gary Denelsbeck, a Group Leader, was on February 2nd within three feet of the door to the Site Manager's office where Carter and Berenato were "meeting." (3Tr75-78). As they were leaving this office, and had entered the hallway, Denelebeck overheard Carter state to Berenato that he "...doesn't know jack

---

9/ Carter's testimony, regarding this incident, as it relates to Ms. Berenato (2Tr96, 97) is not credited. Ms. Berenato's version of the event is inherently more probable. Further, I was impressed by her demeanor and the fact that, as a Secretary, she would not appear to have any stake in the outcome of this case. Finally, counsel for the Authority established to my satisfaction that the relationship between the two Berenato's was so remote as to be de minimus.

shit about his job..." Then Ms. Berenato appeared and asked Carter to take his discussion elsewhere--that he was disrupting her work area. Carter replied "...who the fuck are you?..." [3Tr78]. Carter also stated that he had never disrespected Ms. Berenato. At that point, Carter was lead down the staircase by Vorasso. Denelsbeck had spoken to no one during this incident and had heard no profanities uttered by either of the Berenato's. [3Tr79].10/

29. On February 2, 1993, Mr. Berenato issued a Notice of Reprimand to Carter, alleging "Insubordination" and "Antagonism Toward Co-Workers." This was discussed with Carter on February 3rd. [See R-12, p. 2]. In accordance with the Authority's policies, an Investigative Committee immediately examined the allegations against Carter (1Tr126-130)

30. The Authority's witness, Ronald M. Johnson, a Handler, was a member of this Committee, which was charged with investigating the incident between Carter and Mr. Berenato. The Investigative Committee ultimately sent the matter to the Human Resource Committee

---

10/ The testimony of Denelsbeck strikes me as credible, based on his demeanor and the probable likelihood that the events that he described actually occurred. Even though Denelsbeck is a Group Leader, he was not Carter's Group Leader. Carter's Group Leader was David Taylor. [3Tr40].

without a recommendation or decision (1Tr129, 130; 123, 125-129).[11/]

31. The Investigative Committee sent the matter to the Human Resource Committee, which hears and considers a host of personnel activities, including discipline. In such other cases it determines the level of discipline for the particular infraction (2Tr150, 179).[12/] The Committee's determination is binding upon the Authority if, for instance, its decision is that no discipline is appropriate (3Tr24, 25). However, an employee may appeal an adverse decision of the Human Resource Committee under the grievance procedures provided by the Authority (R-6; 2Tr179; 3Tr24, 25).

32. On February 16, 1993, the Human Resource Committee met to determine what, if any, discipline was to be imposed on Carter (2Tr119-121; 3Tr81, 82). Carter appeared before the Committee on that date and gave his version of what had transpired on February 2nd. He asked to produce just one witness, Robert J. Dube. When Dube declined to appear, his written statement was submitted and read by the Committee members. [1Tr133; 2Tr57, 58, 121, 155].

---

11/ My reading of the record on this point does not support the Authority's statement at page 15 of its Brief that the Investigative Committee "...determined that a notice of reprimand should be issued against Carter, based on their factual investigation..." [Authority's Brief, p. 15, last sentence.]

12/ The composition of the Committee for Carter consisted of six rank-and-file employees and two Group Leaders plus two non-voting advisors from management (1Tr124-126; 2Tr177, 178). I find that the composition of this Committee, which passed upon the discipline imposed on Carter, is irrelevant to the resolution of the legality or illegality of Carter's discharge by the Authority.

33. After considering Carter's past record, the Committee cast a secret ballot vote on which of two options was to be adopted: termination or a five-day suspension (1Tr138; 2Tr120, 135-137; 3Tr82). The decision of the Committee was to recommend termination (2Tr58, 127; 3Tr82). The Secretary of the Authority, David Liberto, informed Carter of the Committee's decision on the same day, February 16th (2Tr58, 59). Liberto also informed Carter, who knew independently, of his right to grieve (R-6), but Carter declined to do so, claiming that the grievance procedure did not work for him (2Tr82, 100).

**ANALYSIS**

The Unfair Practice Charge in CO-H-93-185 alleges what is essentially an independent violation of Section 5.4(a)(1) of the Act by the Authority. The test for determining whether or not an independent violation of subsection (a)(1) of the Act has occurred is found in the following precedent of the Commission:

"An employer (independently) violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification": Jackson Tp., H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988), adopted, P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987); State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987); Mine Hill Tp., P.E.R.C. No.

86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). The tendency of the employer's conduct, and not its result or motivation, is the threshold issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-26, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (1983). Also, the Charging Party need not prove an illegal motive in order to establish an independent violation of Section 5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

* * * *

Both my Findings of Fact above and the arguments of the parties in their Briefs raise the question of employer free speech in the conduct of Dovey and Lefke when they spoke to employees of the Authority during the period October 1992 through February 1993.

The Act in Section 5.4(a)(1) has been construed to recognize the right of a public employer to express opinions about labor relations provided that the statements are not coercive and contain no promise of benefit. Thus, analyzing these cases requires a balancing of two equally important and conflicting rights: the employer's right of free speech and the right of an employee to be free from coercion, restraint or interference in his exercise of protected activities. See: County of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985).

The Commission's standard mirrors that developed in the private sector under the Labor Management Relations Act, 29 USC §141

et seq. (LMRA). See NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481, 2497, 2498 (1969). In determining whether a statement is coercive, the National Labor Relations Board (NLRB) considers the "...total context of the situation from the standpoint of employees over whom the employer has a measure of economic power." NLRB v. E. I. Dupont de Nemours, 750 F.2d 524, 118 LRRM 2014, 2016 (6th Cir. 1984).

See also, State of New Jersey, P.E.R.C. No. 88-147, 14 NJPER 470 (¶19198 1988) and Trenton State College, supra at 721. Additionally, see: Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. [Id. at 503]

* * * *

The Respondent Authority Did Not Violate Section 5.4(a)(1) Of The Act, Either Independently Or Derivatively By Its Agents And Representatives.

The key to deciding whether or not an independent violation of subsection (a)(1) of the Act occurred is whether the conduct of the Respondent "tended" to interfere with the statutory rights of its employees under the Act. My reading of the conduct of the various agents and representatives of the Authority, from Dovey on

down,[13/] is that their activities were confined to speech, which never arose to the type of conduct described by the Union at pp. 6-8 of its Brief. For example, although there was "talk" of subcontracting and privatization during 1992, the simple fact is that it never occurred: compare Glassboro Housing Authority, P.E.R.C. No. 90-16, 15 NJPER 524, 525 (¶20216 1989) or IFPTE Local 195 v State, 88 N.J. 393 (1982).

Further, the Charging Party's citations, involving alleged threats to dismiss employees in order to restrain their protected activities, are not apposite: see Paterson Board of Education, P.E.R.C. No. 87-108, 13 NJPER 265-267 (¶18109 1987), Township of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER 526, 527 (¶17197 1986); Commercial Township Bd. of Ed., supra at 553. Nor, do I deem relevant the citation of City of Camden, P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982), adopting H.E. No. 82-34, 8 NJPER 181, 183 (¶13078 1982).

Although interesting, the citation of NLRB v Gissel Packing Co., supra, on this record, is of marginal interest since the predictions made by Dovey were that there was a 95% to 99% likelihood that subcontracting or privatization would not take place (F/F No. 14). The Charging Party's citation of Parke Coal Company at p. 14 of its Brief[14/] is not helpful since the employer there

---

13/ I find that lower level supervisors such as Group Leaders Celano and Scull have no authority to make statements which would bind the authority (3Tr15, 127, 140).

14/ 219 NLRB 546, 89 LRRM 1708 (1975).

had made a statement that if the union won the election it did not know how long it would operate, i.e., an implied threat of plant closure. Nothing like this occurred in the instant case. Similarly, in Benner Glass Co.,[15/] the Board found unlawful a threat of plant closure based on the statement by a supervisor that the employer's President would close the plant "...before he would pay that kind of salary..." Likewise, Fred Lewis Carpets, Inc.,[16/] is not germane to the case before me since the Board there found that an employer's statement that it would go bankrupt, if it was unionized, was unlawful.

Taking all three of the above cases together, I concur with the Union that they stand for the proposition that illegal employer inferference with the statutory rights of employees is a violation under either the NLRA or our Act. However, based on my findings of fact, I must conclude that the conduct engaged in by Dovey and/or Lefke is in no way parallel to the facts presented by the three cases cited above. In particular, there were no threats made by Dovey or Lefke to shut down all or a part of the Authority's operations by privatizing or subcontracting; nor were there any actual threats to layoff the Authority's employees during the Union's organizational activity. [See F/F Nos. 12-14, 17].

---

15/ 209 NLRB No. 111, 86 LRRM 1189 (1974).

16/ 260 NLRB 843, 109 LRRM 1239 (1982).

Again, looking at the contention of the Union, at pages 14 and 15 of its Brief, that the Authority's "supervisors and agents" kept alive the issue of privatization and that several of its supervisors injected subcontracting into employee discussions on unionization, I am not convinced that the Union has proven this as a fact by a preponderance of the evidence.

I note further that at page 15 of the Union's Brief it contends that the Authority's supervisors "...never provided any objective basis for their predictions..." This statement is not supported by the record (see F/F Nos. 6, 13, 14 & 18). The Union then states that Lefke testified that both he and Dovey informed employees "...that privatization was not objectively justified..." If this was the position of the Authority,as conveyed by Dovey and Lefke, then what was all the excitement about?

Finally, the several cases cited on page 15 of the Union's Brief require no comment since they have no apparent relevance to the case at bar. The Union's statement that in Dovey's speech on February 2, 1993, he indicated that the Authority would propose taking away benefits during negotiations strikes me as a totally non-coercive statement. It would appear to be a statement of the Authority's bargaining position if the Union should "win."

To buttress its position, the Authority has cited several cases on the §5.4(a)(1) issue: Overnite Transportation Co., 296 NLRB 669, 670; 132 LRRM 1176, 1177 (1989) where the NLRB stated that employer speech, sufficient to be an unlawful threat in violation of

the NLRA, must equate unionization with "...unprofitability, loss of jobs, and business closings--not on the basis of objective fact...but rather as calculated threats during the course of an intense anti-union campaign..."

However, not all statements with respect to unprofitability etc. are unlawful. To determine whether particular statements are "calculated threats" or coercive, it is necessary to examine the context in which they are made: Kawasaki Motors Mfg. Corp., 280 NLRB 491, 493; 123 LRRM 1009 (1986); aff'd. 834 F.2d 816 (9th Cir. 1987), 127 LRRM 2060. See also, Speciality Steel Treating, Inc., 279 NLRB 670, 672; 123 LRRM 1022 (1986) and Standard Products Co., 281 NLRB 141, 163; 124 LRRM 1319 (1986). An employer does not threaten his employees merely by discussing with them the possible pitfalls which may result from collective bargaining. [Id.].

I essentially agree with the factual recital, based upon the record, as set forth in the Authority's Brief at pp. 22-24, particularly as this recital pertains to Dovey's conversations with employees Broomhead, Dube, Fifer, Wall, Vorasso and Carter himself. In like fashion, I concur with the recital of the facts dealing with Lefke's conversation with certain drivers on November 19, 1992 (Authority's Brief, pp. 25, 26).

As I read the record on this phase of the case, the above instances of Authority conduct suggest that its agents and representatives acted with a legitimate and substantial business justification within the scope of Commission and federal precedent above.

* * * *

The Respondent Authority Did
Not Violate Section 5.4(a)(3)
Of The Act When It Discharged
Robert Carter on February 16, 1993.

The allegations in the second Unfair Practice Charge, docketed CO-H-93-293, state that the Authority discriminatorily discharged Robert Carter because of his membership and activities on behalf of the Union, and that the Authority has refused to reinstate him to his former position. To determine whether or not the Authority has violated Section 5.4(a)(3) of the Act, we must apply the test established by our Supreme Court in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984) to assess employer motivation. The Court there articulated the following test: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).

Further, the Court stated that no violation may be found unless the Charging Party has proved by a preponderance of the evidence on the record as a whole that protected activity was a substantial or a motivating factor in the employer's adverse action. This may be done by direct or circumstantial evidence, which demonstrates that the employee engaged in protected activity,

that the employer knew of this activity, and, finally, that the employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].17/

If, however, the employer has failed to present sufficient evidence to establish the legality of its motive under our Act, or, if its explanation has been rejected as pretextual, then there is a sufficient basis for finding a violation of the Act without more. But if the record demonstrates that a "dual motive" is involved, the employer will be found not to have violated the Act if it has proven by a preponderance of the evidence that its action would have occurred even in the absence of protected conduct [Id. at 242]. This affirmative defense need only be considered if the Charging Party has first proven on the record as a whole that anti-union animus was a "...motivating force or substantial reason for the employer's action..." [Id].

* * * *

The record is clear that Carter engaged in extensive protected activities over several years and that the Authority's agents and representatives had actual knowledge of his exercise of these activities. However, I find the record somewhat deficient when it comes to the Union's proofs that the Authority's agents and

---

17/ However, the Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action..." (95 N.J. at 242).

representatives manifested hostility or animus toward Carter because of his exercise of protected activities. Notwithstanding this apparent shortcoming in the Union's proofs, I have concluded that the better course is to assume for purposes of this decision that the first part of Bridgewater has been fully satisfied and then proceed directly to the second part of the test, namely, whether or not the Authority has met the burden of proof by preponderance of the evidence that its action of discharging Carter would have taken place even in the absence of his exercise of protected activities. My conclusion is that the Authority has met that burden and that the evidence amply supports the conclusion that Carter would have been discharged even in the absence of his protected activities, i.e. his prior disciplinary history in 1991 and 1992 and his opprobrious conduct on February 2, 1993, which was riddled with obscenities and profanities.

In support of its position that the case law is on its side and that its discharge of Carter on February 16th was proper, the following authorities are cited in the Authority's post-hearing Brief: U.S. Postal Service, 268 NLRB 274, 275; 114 LRRM 1281, 1282 (1983) and Hyatt on Union Square, 265 NLRB 612, 617; 111 LRRM 1684 (1982) for the proposition that an employer has the right to maintain order and respect in its business operations. More specifically, an employee who directs obscenities at a supervisor may by such conduct lose the protection afforded by the NLRA: U.S.

Postal Service, supra, and Atlantic Steel Co., 245 NLRB 814, 816; 102 LRRM 1247, 1249 (1979).[18/]

In N.J. Transit Bus Operations, Inc., P.E.R.C. No. 86-31, 11 NJPER 586 (¶16205 1985), adopting H.E. No. 85-41, 11 NJPER 362, 365 (¶16128 1985), the hearing examiner found that an employee was properly dismissed for insubordination where that employee had directed profanity toward his supervisor. In response to the supervisor's inquiry as to whether he had a problem, the employee responded, "...I don't have no fucking problem... Who the fuck are you to talk to me like that? What am I, a piece of shit?..." The employee's profane outburst to a supervisor in the presence of other employees "...is a classic basis for discharge on the ground of insubordination..." (11 NJPER at 365).

Two other cases from the private sector have been cited by the Authority, which I find relevant herein: Chicago Tribune Company v NLRB, 962 F.2d. 712, 718 (7th Cir. 1992), 140 LRRM 2286, vacating an NLRB order and holding that an employer properly terminated a known union activist who had directed abusive and profane language to his supervisor. The activist had been disciplined previously with a suspension without pay and two written warnings. Abusive and profane language was the last step in the implementation of progressive discpline. [Id. at 140 LRRM 2288].

---

18/ In Atlantic Steel it was stated that "...the Board and the courts have recognized... that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act..." (Id. at 1249).

See also, NLRB v Mini-Togs, Inc., 980 F.2d 1027, 1034 (5th Cir. 1993), 142 LRRM 2265, 2270, where a union advocate, who had read an anti-union flyer that was left on her sewing machine, referred to the contents in a loud voice as a bunch of "god damn lies" and called the distributors of the flyers "fucking whores." [Id. at 142 LRRM 2267]. The employee's termination did not violate the NLRA since there was ample cause and no disparate treatment was established. Also of interest, the remarks were directed only to co-employees and not to supervisors, unlike most cases above.

* * * *

Turning now to the Brief of the Union on the Bridgewater analysis aspect (at pp. 17-23), and assuming that the Union has proved "an illegal motive," i.e. hostility or anti-union animus toward Carter's exercise of protected activities, the Union correctly alleges that the burden shifts to the Authority to establish by a preponderance of the evidence that the adverse action of discharging Carter would have taken place even in the absence of his protected conduct. The Union then cites Gloucester Tp. Fire District No. 4, H.E. No. 93-23, 19 NJPER 235 (¶24115 1993), [P.E.R.C. Decision as yet undecided]; Newark City Housing Authority, P.E.R.C. No. 93-10, 18 NJPER 432 (¶23195 1992); and Ewing Tp. Bd. of Ed., P.E.R.C. No. 91-77, 17 NJPER 162 (¶22067 1991). These three cases stand for the holdings contained therein.

The Union argues that Carter was active in the Union organizing drive and that the Authority was aware of his many

activities, which included the attendance at Union meetings, the speaking to co-workers on behalf of the Union and wearing a Union insignia to work. The Union's contention that the Authority was illegally motivated, i.e., showed hostility or animus, is predicated solely upon Carter's having been discharged on February 16, 1993 [the date of the Human Resource Committee's decision to terminate him]. The Union then notes that February 16th was shortly after the election on February 5th and the date that the Union filed objections to the election with the Commission, supra. The Union makes little of the discipline imposed on Carter in 1991 and 1992.

Finally, the Union suggests that the Authority's anti-union motivation with respect to Carter is further demonstrated by its having established its various joint committees. The Union argues that such committees are barred by the decision of the NLRB in Electromation, Inc., 309 NLRB No. 163, 142 LRRM 1001 (1992). While the Union may have a point here, the simple fact is that there was no amendment to either Unfair Practice Charge in this case which would permit an attack upon the Authority's having established such committees as the Human Resource Committee, etc.

The Union cites at the top of page 20 of its Brief several cases that purport to demonstrate anti-union animus by the Authority, namely, its solicitation of employee grievances in October 1992. While I do not quarrel with the authorities cited, I question their applicability to the instant record.

Next, the Union contends that "...for the first time since Local 331's organizing drive..." the Authority in October 1992 altered its "open door policy" by holding a captive audience meeting allegedly to solicit employee grievances. I have already dealt with employer speech which is non-coercive and which does not contain a promise of benefit. I see nothing in the Union's Brief at p. 20 which persuades me that this is new matter.

I place no weight whatsoever upon Carter having been told by Taylor that his evaluation involved "politics." As previously noted, Taylor was a low-level supervisor and what he said or did not say about the political nature of Carter's evaluation at Taylor's level is of no weight in the deciding of this case. Also, I place no weight upon the fact that Denelsbeck appeared as an adverse witness and as a member of the Human Resource Committee.

In one of its final arguments, the Union contends that, in discharging Carter, the Authority relied upon the statements of the two Berenato's and the statement of Denelsbeck. The Union would have me find as a fact that these three individuals' statements were internally inconsistent and contradictory whereas Carter, corroborated by Vorasso and Dube, was consistent, detailed and credible. Upon this record, I cannot concur in these contentions of the Union.

Finally, the Union states that the Authority's past toleration of profanity shows the pretextual nature of its motive in discharging Carter on the basis of profanity: Filene's Basement

Store, etc., 299 NLRB No. 23, 135 LRRM 1090 (1990). However, I remain persuaded by the authorities cited by the Respondent that Carter's exercise of extensive protected activities did not, in any way, insulate him from discharge on the basis of the obscenities leveled by him upon the two Berenato's on February 2, 1993. There was no provocation by Ronald Berenato as he attempted to discuss Carter's evaluation. Berenato had made only minor changes. Under the circumstances, this did not excuse the outburst that occurred. Debra Berenato was at most an innocent interloper during the course of the confrontation between Carter and Ronald Berenato.[19/]

* * * *

Although the Union did not raise the issue of disparate treatment as to the discipline imposed upon Carter, namely, discharge, vis-a-vis the lesser discipline imposed on three other employees for profanity, this issue was raised by the Authority as a defense and is treated here as follows: Frederick Dickerson was suspended for using profanity toward Coffey on December 5, 1990 and he was then terminated on the same day (see letter: R-7 vs. 3Tr122, 123); Martin Johnson directed profanity at Coffey on April 29, 1991 and he was suspended for three days (3Tr123, 124; R-7 letter); and, finally, Jeffrey Salerno used profanity to Celano and Mooney on

---

19/ I do not perceive that I have any jurisdiction in this matter to deal with the Union's objections to the conduct of the election conducted by the Commission on February 5, 1993, and as to which objections were filed on February 16th. [See Union's Brief at p. 23].

January 25, 1993 and he was suspended for five days. (R-7; 3Tr136, 137).

* * * *

Based upon the foregoing analysis of the record and the respective arguments of the parties in their post-hearing Briefs, I have concluded that the Authority did not independently violate Section 5.4(a)(1) of the Act by the conduct of Dovey and Lefke in speeches to employees of the Authority. Specifically, as to Section 5.4(a)(3) of the Act, the Bridgewater analysis compels the conclusion that although the Union satisfied its proofs as to the first part of the test enunciated by our Supreme Court, the Authority proved by a preponderance of the evidence that Carter would have been discharged, notwithstanding his exercise of protected activity, i.e., the Authority had a legitimate business justification in terminating him for the obscenities which he used on February 2, 1993.

* * * *

Based upon the record and the Briefs and arguments of the parties, I make the following:

**CONCLUSIONS OF LAW**

1. The Respondent Authority did not independently or derivatively violate N.J.S.A. 34:13A-5.4(a)(1) by its conduct herein, particularly its President, Richard Dovey, and its Solid Waste Operations Director, Brian Lefke, having made speeches to employees during working hours, these speeches having been non-coercive and without promise of benefit.

2. The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(3) since its discharge of Robert Carter on February 16, 1993 would have taken place even in the absence of his exercise of protected activities by reason of his insubordination to a supervisor on February 2, 1993 in the form of unprovoked obscenities.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Complaint be dismissed.

Alan R. Howe
Hearing Examiner

Dated: February 10, 1994
Trenton, New Jersey