

P.E.R.C. NO. 80-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH MONMOUTH REGIONAL SEWER
AUTHORITY,

Respondent,

Docket No. CO-79-56-60

-and-

DISTRICT 65, DISTRIBUTIVE WORKERS
OF AMERICA,

Charging Party.

SYNOPSIS

The Commission issued a decision dismissing a complaint in an unfair practice case in which the charging party alleged that an employee had been discharged illegally as a result of his exercise of protected activities. Although it was evident that the employee had been engaged in certain protected activities, the charging party failed to establish any causal connection between his exercise of protected activities and his termination. Neither party had filed exceptions to the Hearing Examiner's Recommended Report and Decision.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH MONMOUTH REGIONAL
SEWER AUTHORITY,

Respondent,

-and-

Docket No. CO-79-56-50

DISTRICT 65, DISTRIBUTIVE
WORKERS OF AMERICA,

Charging Party.

Appearances:

For the Respondent, Stout, O'Hagan & Dowd, Esqs.
(Mr. William J. O'Hagan, of Counsel)

For the Charging Party, Krieger & Chodash, Esqs.
and Mr. Richard Moser, Organizer
(Mr. William E. Norris, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on September 11, 1978 by District 65, Distributive Workers of America ("District 65") alleging that the South Monmouth Regional Sewer Authority (the "Authority") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") by terminating Richard Scheidt on April 6, 1978 allegedly for his activities on behalf of a union being organized among the employees of the Authority and for his activities in airing complaints by employees with respect to terms and conditions of employment at a meeting convened by the Superintendent of the Authority. This action was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.

A hearing was held before Commission Hearing Examiner Alan R. Howe who, following a hearing conducted on April 11 and April 12, 1979, issued his Recommended Report and Decision on July 12, 1979. H.E. No. 80-2, 5 NJPER ____ (¶ 1979).^{1/} Utilizing the standard developed by the Commission in In re Haddonfield Borough Board of Education, P.E.R.C. 77-36, 3 NJPER 71 (1977), the Hearing Examiner concluded that the Charging Party failed to meet its burden of proof in proving the allegations contained in the Complaint. Although the evidence revealed that Mr. Scheidt had been engaged in certain protected activities during the course of his employment with the Authority, we conclude that the Charging Party failed to prove any causal connection between Scheidt's exercise of protected activities and his termination on April 6, 1978. We further find that the record does not reveal that anti-union animus played any role in the Authority's decision to discharge Scheidt, an individual who had had a long disciplinary history during his relatively brief tenure with the authority.^{2/}

Having reviewed the record ourselves, and noting the absence of exceptions to the Hearing Examiner's Recommended Report and Decision,^{3/} the Commission hereby adopts the findings of fact and conclusions of law contained within the Hearing Examiner's Report. The Commission, therefore, will dismiss the Complaint in its entirety.

^{1/} A copy is attached hereto and made a part hereof.

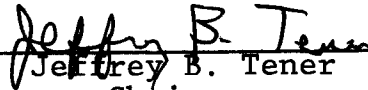
^{2/} Scheidt was hired by the Authority on June 22, 1977.

^{3/} N.J.A.C. 19:14-7.3(b) provides in part that, "Any exception which is not specifically urged shall be deemed to have been waived."

ORDER

For the reasons set forth and upon the entire record,
it is hereby ORDERED that the Complaint herein is dismissed.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Hipp and Parcells voted
for this decision. None opposed. Commissioners Graves and
DATED: Trenton, New Jersey Newbaker were not present.
 August 28, 1979
ISSUED: August 29, 1979

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

In the Matter of

SOUTH MONMOUTH REGIONAL SEWER AUTHORITY,

Respondent,

- and -

Docket No. CO-79-56-50

DISTRICT 65, DISTRIBUTIVE WORKERS OF
AMERICA,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by District 65 against the Authority, which alleged that the Authority had on April 6, 1978 terminated Richard Scheidt on account of his activities on behalf of District 65 during early 1978.

The Hearing Examiner found that although Scheidt had engaged in protected activities, such as signing a union authorization card in February 1978 and speaking out on behalf of himself and other employees with respect to terms and conditions of employment at "job meetings", the Charging Party failed to prove any causal connection between Scheidt's exercise of protected activities and his termination on April 6, 1978. There was no proof of anti-union animus on the part of the Authority. The Authority offered evidence that it had disciplined other employees, who were active on behalf of District 65, for reasons unrelated to union activities.

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

SOUTH MONMOUTH REGIONAL SEWER AUTHORITY,

Respondent,

- and -

Docket No. CO-79-56-50

DISTRICT 65, DISTRIBUTIVE WORKERS OF
AMERICA,

Charging Party.

Appearances:

For the South Monmouth Regional Sewer Authority
Stout, O'Hagan & Dowd, Esqs.
(William J. O'Hagan, Jr., Esq.)

For District 65, Distributive Workers of America
Krieger & Chodash, Esqs. and Mr. Richard Moser, Organizer
(William E. Norris, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 11, 1978 by District 65, Distributive Workers of America (hereinafter the "Charging Party", "District 65" or the "Union") alleging that the South Monmouth Regional Sewer Authority (hereinafter the "Respondent" or the "Authority") had 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. (hereinafter the "Act"), in that the Authority terminated Richard Scheidt on April 6, 1978, allegedly for Scheidt's activities on behalf of the Union during early 1978, which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. ^{1/}

1/ These Subsections prohibit 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."

It appearing that the allegations of the above charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 6, 1979. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 11 and April 12, 1979 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. ^{2/} A post-hearing brief was filed by the Respondent on June 29, 1979. ^{2a/}

An Unfair Practice Charge having been filed with the Commission, a question concerning an alleged violation of the Act, as amended, exists and, after hearing and after consideration of the post-hearing brief of the Respondent, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The South Monmouth Regional Sewer Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. District 65, Distributive Workers of America is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Richard Scheidt was hired by the Authority on June 22, 1977 as a plant maintenance man at the rate of \$4.50 per hour.

4. Beginning in or about August 1977 Scheidt was active in seeking to organize a union on behalf of the Electrical Workers. This was eventually abandoned in favor of organizing for District 65.

5. Scheidt met with Richard Moser, an Organizer for District 65, in January 1978 and brought information back to fellow employees regarding the Union, and seven or eight fellow employees were interested.

6. Scheidt signed an authorization card for the Union on February 4, 1978 (CP-1) and the Authority acknowledged having knowledge of Scheidt's organizational activities on behalf of the Union shortly thereafter.

2/ At the outset of the hearing the Hearing Examiner denied a motion by the Authority contending that the Union lacked standing to file the instant charge of unfair practices. The Hearing Examiner also denied a motion to dismiss the Unfair Practice Charge based on the record at the conclusion of the Charging Party's case: Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (1977).

2a/ Under date of June 14, 1979 Counsel for the Charging Party waived the filing of a brief. Respondent's brief was delayed by the late receipt of transcript.

7. Beginning by at least January 1978 Scheidt spoke on behalf of himself and other employees at "job meetings" convened by Joseph Martone, the Superintendent of the Authority, which meetings were convened by Martone every two or three weeks. The purpose of the meetings was to air complaints by employees with respect to terms and conditions of employment. Scheidt testified without contradiction that he frequently was the only one who spoke up at the meetings on behalf of himself and other employees.

8. On March 9 ^{3/} Scheidt was working the 4:00 p.m. to 12 midnight shift and, having completed his work on the shift and having no transportation home, he telephoned his sister who picked him up at the plant about ten minutes before the end of the shift. Scheidt did not clock out and did not ask permission to leave notwithstanding that the Project Coordinator, Walter Zizik, was on the premises. The following day, March 10, Scheidt was suspended from his employment pending a meeting with the members of the Authority.

9. On April 6 Scheidt appeared before the members of the Authority at a hearing and, notwithstanding that he was denied representation by the Union, Mr. Zizik and Mr. Martone testified with respect to Scheidt's employment record, as to which Scheidt had the right of cross-examination. The Authority members voted at the conclusion of the hearing to convert Scheidt's suspension into a discharge as of that date, based upon a complete review of his employment.

10. The Authority, particularly Joseph Martone, had knowledge of the exercise by Scheidt of activities on behalf of the Union, both with respect to organization for District 65 on the premises of the Authority, and by Martone indicating knowledge that Scheidt was going to Union meetings off the premises. There was however no evidence of surveillance of union meetings by Martone.

11. Martone testified that certain employees asked him his opinion of the "union" and that he said that he was neutral but "if you're going to get a union get a good one." He testified further that he did not consider District 65 a good union.

12. Martone testified, as did Scheidt, that other employees were active in the organization of the Union, and that among these employees were Timothy Flintoft, Vincent Newland, Peter Gibbs, Ray Lewis and Scott Jantzen. Flintoft was laid off in April due to the discontinuance of his shift. Lewis openly wore a District 65 union button and voluntarily resigned in April. Jantzen was terminated on May 12 after failing to appear at a hearing before the Authority

^{3/} All dates hereinafter are in 1978 unless otherwise indicated.

after his suspension. No charge of unfair practices was ever filed on behalf of Jantzen.

13. Scheidt acknowledged on cross-examination the following employment and disciplinary history: July 12, 1977 Scheidt was one hour late and received a warning and on July 15, 1977 he was one half hour late and also received a warning; September 4, 1977 Scheidt failed to report to work without calling in and did so again on November 11, 1977, on which latter occasion he was suspended one day for unauthorized absence; December 19, 1977 Scheidt was one half hour late; January 21 Scheidt did not report for work and called in stating that his car would not start; February 9 Scheidt was assigned to work to remove ice with a pick and made chop marks in the pavement; March 9 Scheidt left ten minutes before the end of the shift without punching out for which he was suspended on March 10 (Finding of Fact No. 8, supra).

14. On March 6, a date after the Authority had acknowledged having knowledge of Scheidt's union activities, Scheidt's request with respect to not being put on the day shift was honored. On March 8 Scheidt requested one hour off to appear in court on a traffic violation, which was granted by Martone. Scheidt actually took three hours off for the traffic court appearance without calling in for permission, for which he was not disciplined.

15. Scheidt was entitled to one day of sick leave for each month of employment and acknowledged that he took his full allotment of sick days notwithstanding that on some of the days he was not sick. He considered that he had the "right" or was qualified to determine whether or not he was needed at work.

16. The Authority introduced evidence that it had disciplined other employees for cause, including discharge, based on their employment and disciplinary history. In particular, the Authority discharged John Durkin on October 14, 1977 and Scott Jantzen on May 12. Vincent Newland was suspended for three days on January 30 for having failed to punch out his time card (CP-2). Newland had had no previous infractions nor has he had any subsequent infractions and is still employed by the Authority. As found previously in Finding of Fact No. 12, supra, both Jantzen and Newland were openly active on behalf of the Union.

THE ISSUE

Did the Respondent Authority violate Subsections (a)(1) and (3) of the Act when it terminated Richard Scheidt on April 6, 1978?

DISCUSSION AND ANALYSISRespondent's Motion to Dismiss is Denied

The Respondent in its brief has renewed its motion to dismiss the charge of unfair practices, which was denied at the hearing, on the ground that District 65 lacks standing to file the charge. (Respondent's Brief pp. 12-14). The Respondent first quotes in full the provisions of Commission Rule 19:14-1.1, which provides:

"Who may file

"A charge that any public employer or public employee organization has engaged or is engaging in any unfair practice listed in subsections (a) and (b) of N.J.S.A. 34:13A-5.4 may be filed by any public employer, public employee, public employee organization, or their representative." (Emphasis supplied).

An examination of the Unfair Practice Charge (C-1) discloses that the name of the Charging Party is District 65 and that the name of the representative is Richard Moser, Organizer. The Hearing Examiner has previously found, based upon the testimony at the hearing of Richard Moser, that District 65 is a public employee representative within the meaning of the Act. Finding of Fact No. 2, supra.

The Hearing Examiner rejects the Respondent's dual contention that District 65 waived its right to file a charge because it did not raise Scheidt's discharge during the pendency of a representation petition, filed March 21, 1978 (R-1), and that District 65 "did not have any relationship with the Authority or the Authority's employees." Plainly, the above Rule provides that any "public employee organization, or their representative" may file a charge of unfair practices under the Act. There is no requirement of a "nexus" to the public employer involved, either by way of organizational activity among its employees, or recognition and a settled collective negotiations relationship with the public employer.

District 65 herein falls squarely within the above Rule. Accordingly, the Hearing Examiner again denies the motion of the Respondent to dismiss for lack of standing. With that the Hearing Examiner will proceed to the merits.

The Respondent Authority Did Not Violate
Subsections (a)(1) and (3) of The Act
When it Terminated Richard Scheidt on
April 6, 1978

The Commission in Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) adopted the following standard in cases alleging a vio-

lation of Subsection (a)(3) of the Act:

"...A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights.

"Application of this two-fold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him by the Act, or that the employer believed said employee was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity.

"...Discriminatory acts by employers, even if only partly motivated by an employee's union activities, or acts that would discourage exercise of such rights, would clearly tend to frustrate the express intent of the Act.

"Furthermore, the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory. It is the Charging Party that must prove its case by the preponderance of the evidence (citing N.J.A.C. 19:14-6.8)."
(3 NJPER at 72)

See also, City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), pet. certif. granted, ___ N.J. ___ (1978) where the Commission said:

"Under the Haddonfield decision, a Section 5.4(a)(3) violation may be found if the Charging Party can prove either that anti-union animus was one of the motivating factors for the discriminatory conduct or that effect of the employer's action was 'inherently destructive' of rights guaranteed to employees by the Act..." (Emphasis supplied)(3 NJPER at 144)

In Haddonfield, supra, the Commission agreed with the Hearing Examiner in that case that the Charging Party had failed to meet its burden of proof by a preponderance of the evidence. So, too, must the Hearing Examiner conclude in the instant case.

The foregoing Findings of Fact demonstrate amply that Scheidt was engaged

in protected activities within the meaning of N.J.S.A. 34:13A-5.3,^{4/} at least since August 1977, first on behalf of the Electrical Workers in August 1977 and, subsequently, on behalf of District 65, commencing in January 1978. Findings of Fact Nos. 4 and 5, supra. On February 4 Scheidt signed an authorization card for District 65 and the Authority had knowledge of this fact shortly thereafter. Finding of Fact No. 6, supra. Beginning in January Scheidt spoke on behalf of himself and other employees at "job meetings" to air employee complaints, which were convened by the Authority's Superintendent, Joseph Martone, and frequently Scheidt was the only employee who spoke up at the meetings. Finding of Fact No. 7, supra. Martone acknowledged that he knew Scheidt was going to Union meetings off the premises. Finding of Fact No. 10, supra.

Thus, from January 1978 the Authority and its Superintendent, Martone, had actual knowledge that Scheidt was exercising rights guaranteed to him by the Act, namely: (1) the right "to form, join and assist" District 65; (2) to speak for himself and other employees at "job meetings" with respect to complaints regarding terms and conditions of employment;^{5/} and (3) attending Union meetings off the premises. The foregoing fully satisfies the Haddonfield preliminary two-prong test, supra.

However, Scheidt was not the only employee who was active in the organization of the Union. Martone and Scheidt both testified that five other employees were active in the organization of the Union.^{6/} One of these employees, Timothy Flintoft, was laid off in April due to the discontinuance of his shift. Another employee, Ray Lewis, who openly wore a District 65 union button, voluntarily resigned in April. Also, Scott Jantzen was terminated on May 12, after failing to appear at a hearing before the Authority following his suspension, and no charge of unfair practices was ever filed on his behalf. Vincent Newland was suspended for three days on January 30 because he failed to punch out his time card; he had had no previous infractions nor has he had any subsequent infractions, and is still employed by the Authority. Findings of Fact Nos. 12 and 16, supra.^{7/}

^{4/} "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity..."

^{5/} See North Brunswick Township Board of Education, P.E.R.C. No. 79-14 (f.n. 16), 4 NJPER 451, 453 (1978).

^{6/} Flintoft, Lewis, Jantzen, Newland and Gibbs. Finding of Fact No. 12, supra.

^{7/} No evidence was offered regarding Peter Gibbs; presumably, he is still employed by the Authority.

On cross-examination Scheidt acknowledged a rather extensive disciplinary history, commencing July 12, 1977 and concluding with his last infraction on March 9. Finding of Fact No. 13, supra. For these infractions he was given two warnings and a one-day suspension prior to his final indefinite suspension on March 10. Thus, Scheidt did not have an unblemished employment record when he was suspended on March 10 and discharged on April 6.

The Hearing Examiner notes further that on March 6, one month after the Authority had knowledge of Scheidt's Union activities, Scheidt's request with respect to a shift was honored. Also, on March 8, the day before his last infraction, Scheidt's request for one hour off to appear in court on a traffic violation was likewise honored by the Superintendent and, notwithstanding that Scheidt actually took three hours off, he was not disciplined. Finding of Fact No. 14, supra.

Finally, in addition to the discharge of Jantzen and the suspension of Newland, both of whom were active on behalf of the Union, supra, the Authority introduced evidence that it had disciplined other employees for cause, including discharge, based on their employment and disciplinary history, citing, in particular, the discharge of John Durkin in October 1977. Finding of Fact No. 16, supra.

The Hearing Examiner finds and concludes that although the Authority's Superintendent testified that he did not consider District 65 a "good union" (Finding of Fact No. 11, supra), the Charging Party has failed to meet its burden of proof, based upon the entire record, that the Authority's decision to discharge Scheidt was motivated, in whole or in part, by anti-union animus, nor was the Authority's conduct "inherently destructive" of employee rights under the Act. See Haddonfield and City of Hackensack, supra. In fact, when the Authority terminated Scheidt on April 6 it did so "...for reasons unrelated to (Scheidt's) union activities...": Haddonfield, supra.

In so finding and concluding the Hearing Examiner takes especial note of the fact that Scheidt was not the subject of disparate treatment vis-a-vis other employees who were active on behalf of the Union, and that on two dates immediately prior to Scheidt's suspension on March 10 separate requests made by him were acted upon favorably by the Authority.

The Hearing Examiner, again referring to Haddonfield, supra, reiterates that, "...The employer may take such action for any cause or no cause at all as long as it is not retaliatory..." (Emphasis supplied). When the infraction of March 9 occurred, the Authority was within its managerial rights in suspending

and terminating Scheidt inasmuch as the Authority's action was not retaliatory.

Thus, the Authority did not violate Subsection (a)(3) of the Act by its conduct herein. Further, the Charging Party failed to adduce evidence of an independent violation of Subsection (a)(1) of the Act. ^{8/}

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:


CONCLUSIONS OF LAW

The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it terminated Richard Scheidt on April 6, 1978.

RECOMMENDED ORDER

The Respondent Authority not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

DATED: July 12, 1979
Trenton, New Jersey



Alan R. Howe
Hearing Examiner

8/ See New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422 (1978).