

P.E.R.C. NO. 95-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND ENERGY),

Respondent,

-and-

Docket No. CO-H-94-37

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the State of New Jersey (Department of Environmental Protection and Energy). The Complaint, based on an unfair practice charge filed by Communications Workers of America, alleges that the State violated the Act when it suspended Estavon Posey and referred him to the Employee Advisory Service, allegedly because CWA had filed a grievance concerning his Performance Assessment Review. The Commission finds that the discipline against Posey was not retaliatory.

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AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Deborah T. Poritz, Attorney General
(Stephen Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Diane E. Ristaino, of counsel)

DECISION AND ORDER

On August 2, 1993, the Communications Workers of America, AFL-CIO filed an unfair practice charge against the State of New Jersey (Department of Environmental Protection and Energy). The charge alleges 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), (3), (4) and (7),^{1/}

^{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. (4) Discharging

when it disciplined Estavon Posey and referred him to the Employee Advisory Service because CWA had filed a grievance concerning his Performance Assessment Review ("PAR").

On November 18, 1993, a Complaint and Notice of Hearing issued. On November 29, the employer filed its Answer. It admits that CWA filed a grievance and that Posey was referred to the EAS, but claims that it had a legitimate business justification for disciplining Posey.

On March 30, 1994, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. At the end of the charging party's case-in-chief and without objection from the charging party, the Hearing Examiner dismissed the allegation concerning the EAS referral. Both parties filed post-hearing briefs.

On July 8, 1994, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 95-2, 20 NJPER ____ (¶____ 1994). He found that the charging party had not proved that the employer disciplined Posey because CWA had filed a grievance.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due July 21, 1994. Neither party filed exceptions or requested an extension of time.

1/ Footnote Continued From Previous Page


or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 2-8). In the absence of exceptions, we adopt the Hearing Examiner's conclusion that protected activity did not motivate Posey's suspension. Nor did the charging party prove a violation of subsections 5.4(a)(4) or (7). Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: August 19, 1994
Trenton, New Jersey
ISSUED: August 19, 1994

H.E. NO. 95-2

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

In the Matter of

STATE OF NEW JERSEY (DEPE),

Respondent,

-and-

Docket No. CO-H-94-37

C.W.A., LOCAL 1034,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss an unfair practice charge alleging that a negotiations unit employee was suspended in retaliation for exercising rights under the Act. The Hearing Examiner recommends that the Charging Party failed to demonstrate a prima facie case under In re Bridgewater Tp., 95 N.J. 235 (1984).

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 95-2

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

In the Matter of

STATE OF NEW JERSEY (DEPE),

Respondent,

-and-

Docket No. CO-H-94-37

C.W.A., LOCAL 1034,

Charging Party.

Appearances:

For the Respondent
Deborah T. Poritz, Attorney General
(Stephen Schwartz, Deputy Attorney General)

For the Charging Party
Weissman & Mintz, attorneys
(Diane E. Ristaino, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 2, 1993, the Communications Workers of America, Local 1034, AFL-CIO filed an unfair practice charge against the State of New Jersey, Department of Environmental Protection and Energy (DEPE). The charge alleges that on or about February 3, 1993, CWA filed a grievance concerning unit employee Estavon Posey's PAR rating and that "apparently because" of that filing, he was disciplined and referred to the Employee Advisory Service (EAS). These employment actions allegedly violate subsections 5.4(a)(1),

(3), (4) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On November 18, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On November 29, 1993, the State filed an Answer, admitting that on or about February 3, 1993, CWA filed a grievance concerning Posey's PAR rating and that Posey was referred to EAS. It denies that it engaged in any unfair practice, asserting that it had "legitimate business justification" for the employment actions.

On March 30, 1994, I conducted a hearing at which the parties examined witnesses, introduced exhibits and argued orally. Post-hearing briefs were filed by June 1, 1994.

Upon the record, I make these:

FINDINGS OF FACT

1. Estavon Posey is a public employee, the State of New Jersey is a public employer and CWA is a majority representative within the meaning of the Act.

^{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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

2. Posey has been a State employee for 23 years and now is an Administrative Analyst I in the Pesticide Control Program at the Scotch Road office of DEPE (T15-T17). His title is included in the professional employee unit represented by CWA.

In 1992, Posey was assigned to five different DEPE programs and reported to five different program supervisors (T17). In October 1992, Posey was assigned to John Orrok, Bureau Chief of Pesticide Compliance (T22, T28).

3. Posey did not receive a PAR evaluation in 1992. His last evaluation was completed in November 1990 (CP-1(b)). The 1992 evaluation would have covered November 1, 1991 - October 31, 1992 (T22).

4. Sometime in October or November 1992, Orrok spoke to Posey about his job duties and Posey, disagreeing, said he would file a grievance about them (1T89, 1T90; CP-2). No grievance was filed. On December 8, 1992, Orrok met with Posey and wrote some notes afterwards (T89; R-5). Orrok wrote that Posey believed his PAR was "unsuitable"; that he wished to or did meet with a shop steward (it states "filed grievance"); and that they discussed work-related problems of another employee. Orrok also wrote that he was recommending that Posey visit with the EAS because he shows "remarkable capacity for conflict [and] confrontation" (R-5).^{2/}

^{2/} Posey testified that before late January 1993, he had no discussions with Ferrarin or Orrok about filing grievances (T116). R-5 states otherwise and CWA did not show why it is an unreliable document. Accordingly, I credit the exhibit.

5. On January 23, 1993, Orrok told Posey he wanted to schedule a meeting for a final 1992 PAR evaluation (T23). He was directed to complete the evaluation by the Division Director (T91). Posey objected because Orrok had been his immediate supervisor for a relatively brief time. He was also concerned that his duties were not complying with his job description (T24). He asked Orrok if he had spoken with any other supervisor(s) and if he was aware that the evaluation should be prorated among all of them. Orrok answered, "no" (T24, T91).

Posey responded that the plan to write the final PAR evaluation was "improper"; that it violated Department of Personnel "rules", and if Orrok insisted, he (Posey) would file a grievance (T25).^{3/}

Immediately after this five minute discussion, Posey walked over to Assistant Director Raymond Ferrarin's office and asked him to "intercede" on his behalf (T26). Ferrarin advised him that Orrok would speak to the "appropriate people downtown." Posey responded that he would file a grievance (T26).

^{3/} Orrok wrote a memorandum to Posey's file stating that Posey would refuse to meet with him on a final PAR evaluation unless he received "input from his previous supervisor." Orrok concluded his January 23 memo;

Rather than get into a discussion on insubordination I ended the conversation there, with the idea that when I actually have the rating ready for his review, I would insist on a meeting a that time (R-6).

7. On January 29, 1993, Orrok again visited Posey at his desk and advised that he wanted to conduct a meeting and write a final PAR evaluation (T27, T94). He asked Posey to come to his office for the meeting (T94).

Posey declined.

Orrok replied that a refusal "could be" insubordination (T94).

Posey again refused to meet.

Orrok asked Posey to go to Ferrarin's office and he declined that request (T94).

8. Orrok left Posey and spoke with Ferrarin. Orrok explained to him that Posey had refused the PAR meeting and was warned about "insubordination" (T104). Orrok did not tell Ferrarin that Posey threatened to process a grievance.

Both supervisors returned to Posey's work station and Ferrarin asked Posey if he had refused Orrok's request to meet about a final PAR evaluation. Posey said, "yes." Ferrarin answered that the refusal was insubordination (T28).

9. On the same date, Orrok wrote two memoranda on the incident. One memo was sent to Ferrarin, the other to Posey's file. The memo to Ferrarin includes statements about Posey's "refusal to meet" and "refusal to come to your office"; it characterizes these actions as "intentional disobedience", "disgraceful", "arrogant", and "confrontational." Orrok also wrote

that Posey, during the disagreement, "jumped from his chair and came at [him]." ^{4/} Orrok recommended a ten-day suspension (R-2).

The memo to Posey's file is a narrative and states that Posey's refusal to meet on January 29, 1993, was insubordination to a "reasonable request to have a meeting" (R-3).

Ferrarin called Director of Division of Environmental Safety, Health and Analytical Programs, Gerald Nicholls, who agreed that discipline would be appropriate. Nicholls asked Ferrarin for a memorandum addressed to Personnel Director D. Craig Stevens, requesting disciplinary action (T105). Orrok drafted the memorandum (R-1).

10. On February 3, 1993, Posey delivered a grievance to CWA staff representative, John Seiler (T44, T57; CP-2). The 3 1/2 page typed single-spaced text complains of Orrok's misapplication or violation of N.J.A.C. 4A:6-5.2(b)(1); that he was "not entitled" to evaluate him, etc. (CP-2).

11. Also on February 3, 1993, Director Gerald Nicholls received Orrok's memorandum (under Nicholls' signature) addressed to Personnel Director Stevens. It requests implementation of "appropriate disciplinary action for Estavon Posey...for insubordination and intimidation..." (R-1). Attached were copies of the two memoranda Orrok wrote on January 29, 1993 (T77-T78).

^{4/} Orrok is shorter than Posey and relatively slight in build.

12. On or before February 5, 1993, CWA representative John Seiler delivered Posey's grievance to Natalie Kane at the Office of Employee Relations.^{5/}

13. Patricia Mahan is a departmental hearing officer at DEPE's Office of Employee Relations. She received Nicholls' memorandum between February 3 and 5, 1993 (T74). Sometime between February 3 and February 5, Mahan met with Orrok, Ferrarin and DEPE Director, Employee Relations, Robert Weakley at Ferrarin's or Orrok's request (T81). Weakley wanted to discuss Posey's alleged insubordination of January 29, 1993. He believed discipline was appropriate. Weakley directed Mahan to issue a "three day letter" (T82). On February 5, 1993, she issued the letter to Posey on behalf of Natalie Kane. The letter advises of Kane's receipt of Nicholls' request for disciplinary action (R-1), and of an imminent investigation of "the circumstances" (CP-3). The letter asks Posey to contact Mahan and advises that he is entitled to "union representation prior to talking to OER."

14. Mahan explained that Nicholls' February 3 memorandum, like all requests for discipline, was received from the Director's office. The February 5 response to Posey is also a routine acknowledgment in such cases (T77).

^{5/} When Seiler was asked if he delivered the grievance on February 3, 1993, he replied;

I have to be honest, its on or about this day, this came in and I got it there as quickly as possible, within or one or two days (T57-T58).

Mahan denied that she was aware of Posey's grievance when she issued the February 5 letter. Her unrebutted testimony on office procedures is that a simultaneously pending disciplinary request for and a grievance filed by a unit employee are not processed by the same person (T77).

She explained that grievances are logged by number in the computer system by the Director's secretary, reviewed and assigned (T79-T80). Posey's grievance is logged "2849", which was "received" in the system on February 9, 1993 (T81; R-4).

15. Posey was eventually suspended for four days for insubordination (T111). Posey's "minor discipline" appeal was denied before the Joint Union Management Panel (T108-T111; R-7).

ANALYSIS

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4(a)(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The CWA has not produced any direct evidence that Posey's suspension was in retaliation for his exercise of the right to file a grievance. Nor does circumstantial evidence demonstrate a prima facie case.

The charge alleges that the filing of the grievance resulted in a retaliatory suspension. But CWA was able to show only that the grievance was delivered no later than February 5, 1993. Documentation recommending disciplinary action for insubordination was produced by Posey's supervisor Orrok, approved by Assistant Director Ferrarin and requested by Director Nicholls on January 29, 1993. On February 3, Nicholls received the memorandum requesting disciplinary action, which was forwarded to DEPE's Office of

Employee Relations by no later than February 5, 1993. On that date, Director Weakley met with Ferrarin and Orrok and ordered that a notice be sent to Posey.

CWA has not demonstrated that the processing of Posey's discipline was in any way affected by the filing of the grievance. Moreover, CWA has not shown, by a preponderance of evidence, that the State knew of Posey's grievance when significant decisions on discipline were made.

CWA contends in its post-hearing brief that it was Posey's "spoken intention" to file a grievance which resulted in his suspension. Posey first expressed an interest in filing a grievance over his job duties in October or November 1992. He reported his intention in discussions with Orrok and Ferrarin on January 23 and 29, 1993. Assuming that these statements show that the State knew of Posey's protected activities,^{6/} I recommend that CWA has not

^{6/} In North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), App. Div. Dkt. No. A-698-78 (4/11/79), the Commission stated:

We find that individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act.

[4 NJPER at 454].

Applying this standard to the facts, I note that Posey's objections, statements and grievance are protected by the Act.

established a prima facie case because it has not shown that the State was hostile to his exercise of protected rights.

The only possible evidence of hostility is the timing of the February 5 letter notifying Posey of a disciplinary investigation and the filing of the grievance. Although timing is an important factor in assessing motivation, no facts show that the timing of the two events is more than coincidental. No witness identified a document or comment or innuendo or even a facial expression suggesting that the decision to discipline or to begin such a proceeding was in response to Posey's statements that he intended to file a grievance. Posey had in fact expressed that intention in October or November 1992 and had not been disciplined. Furthermore, significant decisions about the implementation of discipline were made before February 5, 1993.

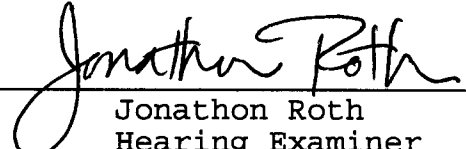
I am satisfied that the discipline was triggered by Posey's unabashed and repeated refusals to meet with his supervisors on January 23 and 29, 1993. Even after Posey was warned by Orrok that his refusal to meet was insubordinate, he repeated his refusal to Ferrarin. Posey does not deny these facts. Posey reasoned that Orrok did not have the "authority" to write his final PAR evaluation; his argument was written in the grievance he gave to CWA representative Seiler on February 3, 1993. Assuming the validity of the argument, Posey could have "not agreed" with the final PAR evaluation by checking the appropriate box on the form. He could have pursued a grievance after receiving the evaluation.

The CWA alleges that the refusal to meet is pretextual because "management had not scheduled a PAR meeting...." The unrebutted facts show that on January 23, Orrok advised Posey that when he actually prepared the final PAR evaluation, he would insist "on a meeting at that time" (R-6). On January 29, Orrok advised Posey that he wanted to conduct a meeting on the final PAR evaluation and Posey refused.

Under these circumstances, I see no merit in the argument that no appointment was "clearly scheduled."

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.^{7/}


Jonathon Roth
Hearing Examiner

DATED: July 8, 1994
Trenton, Jersey

^{7/} No facts suggest that the State violated 5.4(a)(4) and (7) of the Act. Accordingly, I also recommend that these charges be dismissed.