

P.E.R.C. NO. 86-128

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY DIVISION
OF WELFARE,

Respondent,

-and-

Docket No. CO-84-334-52

COUNCIL 52, AFSCME, LOCAL 1697,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by Council 52, AFSCME, Local 1697 against the Hudson County Division of Welfare. The charge alleged the County violated the New Jersey Employer-Employee Relations Act when it failed to promote Local 1697's president, Kathleen Mazzouccolo. The Commission, however, applying the governing tests of In re Bridgewater, 95 N.J. 235 (1985), finds that the County would not have promoted Mazzouccolo even absent her union activity.

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Charging Party.

Appearances:

For the Respondent, Murray & Granello, Esqs.
(Karen A. Bulsiewicz, of Counsel)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.
(Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

On June 4, 1984, Council 52, AFSCME, Local 1697 ("Local 1697") filed an unfair practice charge against the Hudson County Division of Welfare ("Division"). The charge alleges that the Division violated subsections 5.4(a)(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it promoted Ethel Ward, rather than Local 1697's president Kathleen Mazzouccolo, to data processing coordinator.

^{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; and (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."

On October 3, 1984, a Complaint and Notice of Hearing issued. The Division then filed an Answer denying that it did not promote Mazzouccolo because of her union activity.

On January 28 and March 26, 1985, Hearing Examiner Marc F. Stuart conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On January 29, 1986, the Hearing Examiner issued a report recommending dismissal of the Complaint. H.E. No. 86-37, 12 NJPER ____ (¶ ____ 1986) (copy attached). Although he found that Local 1697 had proved that anti-union animus was a substantial factor in not promoting Mazzouccolo, he concluded that the Division would have promoted Ward absent Mazzouccolo's protected activity.

On February 18, Local 1697 filed exceptions. It asserts the Hearing Examiner erred in determining that Ward would have been promoted absent Massouccolo's protected activity.

On February 24, the Division filed a response supporting the Hearing Examiner's report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. We adopt and incorporate them here.^{2/}

^{2/} The Hearing Examiner's legal analysis contains findings of fact concerning Ward's union activity (p. 13) and Ward and Mazzouccolo's evaluations (pp. 14-16). These findings are accurate and we adopt them. Our Hearing Examiners, however should include all findings of fact under that heading.

In In re Bridgewater Tp., 95 N.J. 234 (1984), the Supreme Court established a two-part test for considering allegations of discriminatory personnel actions. The charging party must first prove that protected activity was a motivating factor in the personnel action. If it succeeds, the employer must prove by a preponderance of the evidence that the same personnel action would have occurred absent the protected activity. The factfinder must ultimately resolve conflicting proofs.

The Hearing Examiner found that Mazzouccolo's protected activity was a motivating factor in not promoting her. The Division has not excepted to this finding. We accept it, although the prima facie case is not especially strong. Mazzouccolo's activity as president was substantial and known, but there is no direct evidence that the Division found this activity upsetting and the circumstantial evidence, while sufficient to establish a prima facie case, is not compelling.

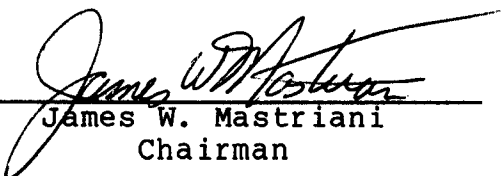
Reviewing the record as a whole and resolving the conflicting proofs, we agree with the Hearing Examiner that the Division would have promoted Ward regardless of Mazzouccolo's protected activity. While Ward had not been considered for promotion in 1983 because she lacked knowledge of Division codes, undisputed testimony proved that she gained such knowledge during the ensuing year by working on special projects and attending numerous code deficiency meetings. We are troubled by the Division's failure to consider Mazzouccolo's slightly better tardiness record, but that fact alone would not have changed the

relative promotional ratings of Ward and Mazzouccolo in light of Ward's superior evaluations, cooperation and code knowledge.^{3/} In sum, under all the circumstances of this case, we believe the Division would have promoted Ward regardless of Mazzouccolo's protected activity.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Wenzler voted in favor of this decision. Commissioner Hipp was opposed. Commissioner Horan was not present.

DATED: Trenton, New Jersey
May 21, 1986
ISSUED: May 22, 1986

3/ The Hearing Examiner was not required to discredit the testimony of the Division's witnesses concerning evaluations, cooperation and code knowledge simply because he did not credit their explanation for not considering the lateness factor. His determination to reject the lateness explanation turned on a careful assessment of much contradictory evidence; the evidence concerning the employees' evaluations, cooperation and code knowledge, however, was uncontradicted and not inherently implausible.

H.E. NO. 86-37

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

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-and-

Docket No. CO-84-334-52

COUNCIL 52, AFSCME, LOCAL 1697,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Hudson County Division of Welfare did not violate §5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when on July 29, 1983, it declined to promote Kathleen Mazzouccolo, the Local President, to the position of Data Processing Coordinator. Although the Hearing Examiner concludes that Local 1697 established a prima facie case under In re Bridgewater Tp., 95 N.J. 235 (1984), the Respondent Division established a valid and substantial business justification for its decision to promote another employee, who had received outstanding evaluations, instead of the Local President.

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.

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Appearances:

For the Respondent

Murray and Granello, Esqs.
(Karen A. Bulsiewicz, Esq.)

For the Charging Party

Oxford, Cohen & Blunda, Esqs.
(Sanford R. Oxford, Esq.)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

Council 52, AFSCME, Local 1697, filed an Unfair Practice Charge with the Public Employment Relations Commission on June 4, 1984, alleging that the Hudson County Division of Welfare 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., stating that the Division declined to appoint Kathleen Mazzouccolo, the President of Local 1697, to a promotional position despite her seniority, knowledge and ability, and because of her union affiliation. To lend further support to its charge, Local

1697 asserted as background, allegations of a continuing practice of not appointing Mazzouccolo to promotional positions for which she qualified. Council 52 asserts that this conduct violated N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 3, 1984. On October 24, 1984, the Division filed an answer to Council 52's charge, denying the commission of any unfair practice, and asserting both management prerogatives and legitimate and substantial business justifications for its actions. An evidentiary hearing was scheduled to be held on December 17, 19, and 21, 1984; however, following an adjournment by joint request, the hearing was finally conducted on January 28 and March 26, 1985, at which time the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Following an extension of time in which to file post-hearing briefs, Local 1697 filed a memorandum in lieu of a final brief on October 10, 1985, and the Division filed a post-hearing brief on October 11, 1985. The parties waived reply briefs.

^{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."

Upon the entire record the Hearing Examiner makes the following:

Findings of fact

1. The Hudson County Division of Welfare is a public employer within the meaning of the Act and is the employer of the employee who is the subject of this unfair practice proceeding (TA-6)^{2/}.
2. Council 52, AFSCME, Local 1697, is a public employee representative within the meaning of the Act and is the majority representative of the subject employee (TA-6).
3. Kathleen Mazzouccolo has been employed by the Division since August 11, 1969 (TA-51). From 1969 until 1971, Mazzouccolo was a case worker, at which point she was promoted to a supervisory position (TA-51). In July, 1976, Mazzouccolo became "chief executive officer" of Local 1697's predecessor union, the Hudson County Welfare Supervisors' Association (TA-52). In 1980, the Hudson County Welfare Supervisors' Association became affiliated with AFSCME, and Mazzouccolo then became President (TA-52). Thus, Mazzouccolo has been the head of the union since July, 1976 (TA-53).
4. On November 10, 1981 (TA-55), the position of Data Processing Coordinator became vacant and Mazzouccolo applied for it (TA-56). The position was posted by James F. Young, then the

^{2/} Transcript cites are as follows: TA refers to the transcript dated January 28, 1985. TB refers to the transcript dated March 25, 1985.

Director of the Department of Health and Social Services (CP-9).^{3/} According to the posting, the position would not have represented a promotion to Mazzouccolo, but rather a lateral transfer (TA-104; CP-9); however, Mazzouccolo testified that despite the posting, it had been the parties' agreement, through negotiations, that the title should be posted at a higher level and; thus, would have represented a promotion to her (TA-106). Mazzouccolo further testified that this would have become the subject of a grievance had the situation arisen (TA-106). Following Mazzouccolo's application for this position, she was called to the personnel office and asked to fill out a CS-6 form, the paperwork that would have processed the change in position (TA-60-61). However, subsequently, the person who had originally filled the Data Processing Coordinator position returned to the position, and Mazzouccolo remained in her previous position (TA-65).

5. On January 11, 1983, Angelica Harrison, who became the Director approximately January or February of 1984 following the demise of James F. Young, and the current Director, again posted a notice of the availability of the Data Processing Coordinator position (TA-80). Pursuant to that posting, Mazzouccolo again made formal application therefor (CP-2). Shortly thereafter, a matrix was constructed in which Mazzouccolo along with four other

^{3/} Exhibit cites are designated as follows: CP refers to Charging Party's exhibits; R refers to Respondent's exhibits; J refers to Joint exhibits; C refers to Commission exhibits.

candidates for the position, were rated in the areas of "Seniority in "Title," "Cooperation," "Work Performance Evaluation," "Codes Experience and Application of Codes Knowledge," and "Lateness" (CP-3).^{4/} Robert Martinovich received a total of 60 promotional points (CP-3). Mazzouccolo received a total of 51 points (CP-3). Ethel Ward, the only other candidate whose score is relevant to these proceedings, was not considered because she had a minimal working knowledge of codes in all areas and she did not work with codes documents on an in-depth basis daily (CP-3). Thus, as a result of the scores generated by this matrix, Martinovich was appointed to the position of Data Processing Coordinator (TA-17).

6. Thereafter, Local 1697 grieved the Martinovich promotion (CP-3; TB-46). The grievance proceeded through three steps, and was ultimately denied (TB-46). Harrison testified that the use of lateness as a promotional criteria, was an area covered extensively in Local 1697's grievance (TB-69); however, upon cross-examination, Harrrison admitted that in her written response at the first step, although she commented on such criteria as work performance and seniority, she did not comment on lateness (TB-75-76). Harrison testified that she would not have been able to comment upon everything that was discussed at the hearing because

^{4/} Harrison testified that this matrix system for promotional consideration and its criteria had been standard procedure in the Division and had been used by the previous director (TA-23-TA-26; TA-27-TA-28; TA-31).

the hearings frequently lasted for extended periods of time (TB-72). However, later in these proceedings, the record revealed uncontradicted testimony that the grievance involved merely the fact of the Martinovich promotion; and, expressly demanded a "cessation" of "all discriminatory acts." Lateness was not specifically mentioned (TB-68). On balance, I find that if lateness was an aspect of Local 1697's grievance, it did not occupy a position of great prominence in these proceedings.

7. In July of 1983, the position of Child Support and Paternity Coordinator became vacant, although it was never posted (TA-113). In response, during April of 1983 Mazzouccolo took a Civil Service exam for that position (TA-113-114; TA-115). The position would have represented a promotion for her (TA-115). Martinovich also applied for the CSR Coordinator position (TA-115); however, the new position represented a transfer to Martinovich at the same salary level (TA-117). Harrison testified that the position went to Martinovich because as a transfer candidate, he had preference over somebody who was applying for a promotional position (TA-167).

8. On July 29, 1983, the position of Data Processing Coordinator was again posted as a vacancy (TA-80; CP-5). Pursuant to this posting, Mazzouccolo again applied for the position (CP-6). As before, a matrix for promotional consideration was prepared in order to evaluate, comparatively, the various candidates for the position (R-9). As a result of this matrix, Mazzouccolo was given

24 points for "Seniority in Title," 7 points for "Cooperation," 15 points for "Work Performance," 8 points for "Codes Experience and Application of Codes Knowledge," for a total of 54 points (R-9). Ward, who also was a candidate for the position, received 18 points for "Seniority in Title," 11 points for "Cooperation," 25 points for "Work Performance," 8 points for "Codes Experience and Application of Codes Knowledge," for a total of 62 points (R-9).^{5/} This second matrix was identical to the previous one in terms of its criteria with the exception that "Lateness" was eliminated (R-9). Pursuant to this matrix, Harrison recommended that the promotion to Data Processing Coordinator be awarded to Ward (R-10). Ultimately, the position went to Ward, and her promotion was announced by memo from Harrison to the staff dated April 30, 1984 (R-10; CP-7). Harrison testified that Ward acquired her relatively recent knowledge of codes after having become involved in "Error Prone Profile" and "Monthly Reporting Income" and attending numerous code deficiency meetings relative to the "SS5" in 1983 (TB-18; TB-30). (See also TA-163-167, TA-170-TA-172). Harrison further testified that lateness, as a criteria, was eliminated on the later matrix, because it was a factor to nearly everybody on the second promotional consideration list, and because Local 1697 had previously grieved the use of lateness as a promotional criteria

^{5/} There were four other candidates, however, their scores are not germane to these proceedings.

(TB-34-TB-35). In earlier testimony, however, Harrison testified that neither Ward nor Mazzouccolo had a lateness problem, hence, evaluation of the candidates in the area of lateness would have been meaningless (TA-173; TB-175).^{6/}

Legal Analysis

In re Bridgewater Tp., 95 N.J. 235 (1984), sets forth the standards to determine whether an employer has illegally discriminated against an employee in retaliation for protected activity:

...[t]he employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or substantial factor in the employer's decision. 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. Transportation Management, supra, _____ U.S. _____, 103 S.Ct. at 2474, 76 L.Ed. 2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. [Id at 242]

Here, there is an absence of direct evidence of anti-union motivation for the Division's decision not to promote Mazzouccolo to the position of Data Processing coordinator. Given this absence, in order to establish a prima facie case, the Charging Party must show (1) that the employee engaged in protected activity; (2) that the employer had knowledge of this activity; and (3) that the employer

^{6/} Refer to Legal Analysis for resolution of this issue.

was hostile toward the exercise of protect rights. Bridgewater, supra, at 246; In re State of New Jersey, P.E.R.C. No. 81-32, 6 NJPER 443, 444 (¶11227 1980); In re North Warren Reg. Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978). Applying these standards, I conclude that the Charging Party established a prima facie case.

First, it is undisputed that Mazzouccolo engaged in substantial protected activity. The record indicates, without contradiction, that she has been the chief union official, representing titles in her bargaining unit, through two different unions and with two different positional titles, since July of 1976. As such, she played a more prominent part in the area of grievance handling, than any other union official. Additionally, Mazzouccolo served on the union's negotiating team (TA-95-96).

Secondly, it is equally obvious from the record that the Division had knowledge of these protected activities through Mazzouccolo's highly visible grievance handling, contract negotiations, and generally, as a result of her having held the top union position since her fellow employees were first organized in July of 1976.

The third question in determining whether the Charging Party has established a prima facie case is whether the Division was hostile towards Mazzouccolo's exercise of protected activities. This question is often the most difficult because the existence of direct evidence of hostility is rare. The Supreme Court recognized,

however, that hostility toward the exercise of protected rights can be inferred from the employer's conduct. In re Bridgewater, supra, 95 N.J. at 247. Specifically, in Bridgewater, the Court stated:

PERC held that the following facts were sufficient to establish the Township's hostility toward Longo's union activities: Longo's transfer soon after his March 5th protest and his recent promotion; the absence of any written complaints about his employment; and the failure of the Township to follow its own written procedures and give Longo thirty days written notice of the elimination of his position and his transfer.

Thus, we conclude that there is sufficient and credible evidence to support PERC's position that the Association established a prima facie case that a motivating factor in Longo's transfer was the Township's reprisal for his protected union activity. [95 N.J. at 247]

Here, the record contains testimony that the history of labor relations between the union and the employer has been difficult, that there was a lengthy strike in 1980 which was "unpleasant," and that there has been a history of protracted negotiations (TA-87-88). Mazzouccolo further testified that Harrison was employed by the Division in 1980 at the time of the strike (TA-80). None of this testimony was directly contradicted by any Division witness or evidence. Although Harrison testified that, as Director, she believes that the Local is fully within its rights to pursue grievances and to engage in other protected activities, I do not find that this testimony, of a general and ideological

nature, contradicts the specific testimony by Mazzouccolo of a difficult relationship between the Division and Local 1697.^{7/}

Additionally, however, indirect evidence of the Division Director's hostility to Mazzouccolo's protected activities can be inferred from collective evidence establishing that Mazzouccolo had always received positive evaluations of her work, and that as a result of a posting in late 1981, at a time when Harrison's predecessor was still Director, Mazzouccolo applied for and, appeared to be about to be placed into the position of Data Processing Coordinator, only to find at the very last moment that the person who originally held the position would be returning to it, and, thus, the position would not be available; that as a result of a July 11, 1983 posting for the position of Data Processing Coordinator, Mazzouccolo was rated along with Martinovich and Ward, receiving 51 promotional points to Martinovich's 60 promotional points to Ward's lack of serious consideration as a result of any in depth knowledge of codes, and Ward's ultimate promotion to this same position only approximately six months later, after having scored more promotional points for the position than Mazzouccolo.

I am further persuaded by evidence in the record establishing that "lateness" was eliminated as a promotional criteria for the final matrix, and that had it been included as it

^{7/} However, taken alone, I do not find this to be adequate evidence of the Division's hostility to Mazzouccolo's pursuit of protected activities.

had previously, Mazzouccolo's total score would have been higher. I conclude this despite testimony from Harrison that lateness was eliminated because both participants had lateness during the previous year, and, thus, its inclusion would have not made an appreciable difference in promotional points. I specifically find, in this regard, that although both did have lateness in their records for this period of time, Ward's lateness was such that it would have been counted as violative of the Division's lateness policy then in effect; whereas, Mazzouccolo's lateness, although not significantly different in total time, would not have (TB-57; TB-60; TB-65; TB-66). Additionally, Harrison's testimony in this regard was contradictory and not entirely borne out by later testimony and evidence dealing with the same issue. Originally, Harrison testified that lateness was excluded because neither Ward nor Mazzouccolo had a lateness problem during the period in question. In fact Harrison specifically testified upon Voir Dire that Ward had had "no problem with lateness that could be considered in the scoring" (TA-175). Later on, Harrison changed her testimony and indicated that lateness was eliminated because they both had lateness problems during the period in question. Harrison testified that one reason why lateness was eliminated was that Local 1697 had filed a grievance in which it challenged the use of lateness as a promotional criteria. However, the record reveals that although the Local did file a grievance, its grievance was merely a challenge of the Martinovich promotion and a demand for the "cessation" of "all discriminatory acts"; that despite Harrison's testimony that

lateness was an integral part of the Local's grievance, she did not discuss the issue of lateness in her written response at level 1; and, finally, that after having gone through three steps, the grievance was finally denied (see earlier discussion of lateness issue in Findings of Fact, par. 8). Thus, it would appear that the issue of lateness as a promotional criteria, to the extent it was an issue in the grievance, was resolved in the employer's favor; and, lateness would continue to be a criteria. If, as the employer suggests, it eliminated lateness as a result of Local 1697's grievance, I would have expected the Director to have discussed lateness in her Step 1 response and for the Division to have resolved this grievance, at least as far as lateness was concerned, in the Local's favor. Accordingly, I do not credit the employer's proffer, with regard to the elimination of lateness as a promotional criteria.

The Division attempted to refute Local 1697's allegations of hostility toward Mazzouccolo's protected activities by offering evidence of Martinovich's union involvement as Secretary-Treasurer from 1981 through 1983 and Ward's participation as a member; however, the record establishes that despite his office, neither Martinovich nor Ward for that matter was engaged in protected activities nearly to the extent that Mazzouccolo was; nor, in the case of Martinovich, for as long a period of time.

Thus, as a result of credible evidence of the parties' "difficult" relationship; Mazzouccolo's having been judged qualified for the position of Data Processing Coordinator in 1981 by the

previous Director, and the current Director's subsequent decisions not to promote her to this same position on two separate occasions; the timing of Ward's mastery of the codes function; and the timing of the removal of lateness on the final matrix, along with my determination that Harrison's testimony in explanation of this was not credible, I conclude, by collective indirect evidence, that Mazzouccolo's protected activities were was a substantial or motivating factor in the Division's decision not to promote her to the position of Data Processing Coordinator in 1983. Bridgewater, 95 N.J., supra, at 235; Brookdale Community College, P.E.R.C. 78-80, 4 NJPER 243 (W4123 1978), aff'd App. Div. Docket No. A-4824-77 (1/9/80).

Once a prima facie case is established the burden shifts to the employer to establish, by a preponderance of the evidence, that it had a valid business justification for the action taken--i.e., it would have taken the same action, even in the absence of protected activities. Bridgewater, supra, at 244. I conclude that the employer has met this burden.

In support of its asserted business justification for the 1983 promotion of Ward over Mazzouccolo, the Division relied heavily upon the promotional matrix that was prepared to determine the successful candidate. The matrix, however, was based in part on previous written evaluations of the candidates' performance. In this regard, Ward's evaluations have been markedly superior to those of Mazzouccolo (R-11; R-12). Ward was evaluated on September 24,

1981 and February 1, 1984. In her 1981 evaluation, Ward was rated, by Katherine B_____ls (name is unintelligible), "Very Good" in "Quantity of Work," "Effectiveness With Others," "Utilization of Subordinates," and "Developing Subordinates." She was rated "Outstanding," however, in the areas of "Quality of Work" and "Job Attitude" (R-12). Mazzouccolo was evaluated on September 30, 1981 and again on February 4, 1983 (CP-11; CP-8). On her September 30, 1981 evaluation she was rated by Harrison to be "Satisfactory" in the areas of "Quantity of Work," "Job Attitude," "Effectiveness With Others," "Utilization of Subordinates," and "Developing Subordinates." She was rated "Very Good" in the area of "Quality of Work" (CP-11). Additionally, Harrison stated Mazzouccolo was deficient in the area of timely production of work. Mazzouccolo filed a lengthy response in which she stated there was a lack of any established standards and criteria, and that all evaluations were purely subjective. Mazzouccolo also stated that this evaluation was markedly inferior to her previous evaluation in 1977 in which she was rated higher in some of same areas than she was rated in the 1981 evaluation (see CP-11). This, however, would appear to detract from her argument of the lack of any established standards and criteria.

In her February 4, 1983 evaluation, Mazzouccolo was rated by Marianne Maguire, "Satisfactory in the area of "Quantity of Work," "Job Attitude," "Effectiveness With Others," "Utilization of Subordinates," and "Developing Subordinates." She was rated "Very

Good" in the area of "Quality of Work." Maguire also praised Mazzouccolo for her working knowledge of rules and regulations as well as codes and stated that this should be considered with regard to promotion. (CP-8). Maguire made no comment of Mazzouccolo which could be considered to be negative in character.

In Harrison's February 1, 1984 evaluation of Ward, however, Ward was rated as "Outstanding" in every area. Although this represented an improvement over her previous evaluation, her previous evaluation had been very positive and was markedly superior to either of Mazzouccolo's evaluations. Moreover, despite that it was Harrison who evaluated Ward in 1984, her evaluation of Ward was not so substantively different from the previous evaluation of Ward, by a different evaluator, in 1981.

Similarly, with the exception of the negative comment involving Mazzouccolo's timely production of work, the Harrison evaluation of Mazzouccolo in 1981 was identical to the Maguire evaluation of Mazzouccolo in 1983. Thus, I conclude that Ward's evaluations have been markedly superior to those of Mazzouccolo, and I credit and place substantial weight upon this evidence in light of the different evaluators that were involved, and the relative consistency of each applicant's evaluations.

Local 1697 asserts, however, that the Division's proffered business justification for its decision to promote Ward over Mazzouccolo was pretextual. Under the law:

[i]f the reason asserted by an employer...is pretextual, the fact that the action taken is

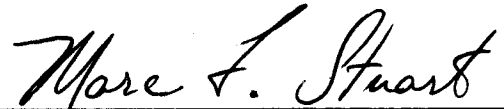
otherwise legal or even praiseworthy is not controlling. See NLRB v. Transportation Management, Inc., 462 U.S. _____, 113 LRRM 2857 (1983). If the Board finds, as it did here, that the otherwise legitimate reason asserted by the employer...is a pretext, then the nature of the pretext is immaterial....See, e.g., New Foodland, Inc., 205 NLRB 418, 420,84 LRRM 1253 (1973)(discriminatory discharge of underage employee). Indeed, we noted in NLRB v. Eris Resistor Corp., 373 U.S. 221, 230, n. 8, 53 LRRM 2121 (1963), even evidence of a "good-faith" motive..."has not been deemed an absolute defense to an unfair labor practice charge." [Sure Tan, Inc. v. NLRB, 467 U.S. _____, 116 LRRM 2857 (1984)]

In support of its assertion, Local 1697 suggests that it is suspicious that Ward was able to acquire such a thorough knowledge of codes in such a short time. The Division asserts, that this knowledge was acquired through the assignment of additional duties to Ward during 1983 which were required by the then prevailing needs of the Division (see Findings of Fact, par. 8). Local 1697 also argues that lateness was eliminated as a promotional criteria because its continued use would have added points to Mazzouccolo's score. With regard to Ward's sudden proficiency in the codes area, although I acknowledge its timing to be suspicious, Local 1697 did not offer any evidence in dispute of her knowledge of those functions. With respect to the elimination of the lateness category, and despite my previous findings on this issue in which I did not credit Harrison's explanation for the removal of this criteria, I do find, however, that had lateness been included and given as much weight as it had on the previous matrix, it could have only added a maximum of five points to Mazzouccolo's score (see CP-3), which would only have given her a total of 59 points to Ward's 62 points.

Thus, I conclude that the Division established, by a preponderance of the evidence, that Ward was promoted over Mazzouccolo on July 29, 1983 for legitimate and substantial business reasons, and as a valid exercise of its managerial prerogative to establish promotional criteria and promote based upon the criteria established. Stated, conversely, it is my conclusion that Mazzouccolo would not have received this promotion even in the absence of her protected activities. Accordingly, I conclude that Local 1697 failed to establish that the Division violated §5.4(a)(1) or (3) of the Act when it promoted Ward over Mazzouccolo to the position of Data Processing Coordinator on July 29, 1983.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Marc F. Stuart
Marc F. Stuart
Hearing Examiner

Dated: January 29, 1986
Trenton, New Jersey