

H.E. NO. 2023-7

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

In the Matter of

NEW JERSEY TRANSIT, MERCER,
Respondent,

-and-

Docket No. CI-2019-035

PAMELA L. WILLIAMS,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based on an unfair practice charge filed by Pamela L. Williams. The charge alleges that New Jersey Transit (NJT) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a (3), when NJT terminated Williams' employment as a bus operator. Specifically, Williams alleges that in connection with her termination, she was denied due process; was not allowed to be represented by her union; was fired unjustly according to NJT's policies; and while in a meeting immediately prior to the termination decision, an NJT supervisor and her union president had "a strong disagreement over other cases," and that "at the end of the disagreement" the NJT supervisor looked at Williams and said, "I've decided to terminate your employment," which Williams believes "was done to prove" to her union president that the NJT supervisor "was in control after they had argued so intently."

NJT filed a motion for summary judgment, which the Commission granted in part and denied in part, leaving only the 5.4a (3) charge, or a 5.4a (1) charge derivatively, regarding Williams' claims that the NJT supervisor's decision to terminate her employment arose from the "strong disagreement" between the NJT supervisor and the union president, and her termination "was done to prove" to the union president that the NJT supervisor "was in control" after the disagreement.

The Hearing Examiner found that NJT did not violate section 5.4a (3), or section a(1) derivatively, of the Act.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Matthew J. Platkin, Attorney General
(Diane L. Scott, Deputy Attorney General)

For the Charging Party,
(Pamela L. Williams, pro se)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On April 1 and 2, 2019, Pamela L. Williams (Williams) filed an unfair practice charge and an amended charge, respectively, against New Jersey Transit Corporation (Mercer) (NJT). The charge alleges that NJT violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically 5.4a(2), (3), (4) and (5),^{1/} by terminating Williams' employment

^{1/} These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the
(continued...)

as a bus operator with NJT on December 26, 2018. Specifically, Williams alleges that in connection with her termination, she was denied due process; was not allowed to be represented by her union; was fired unjustly according to NJT's policies; and while in a meeting immediately prior to the termination decision, an NJT supervisor, Charles Hellyer, and her union president, Kenneth Rice, had "a strong disagreement over other cases," and that "at the end of the disagreement" Hellyer looked at Williams and said, "I've decided to terminate your employment," which Williams believes "was done to prove" to Rice that Hellyer "was in control after they had argued so intently."

On February 9, 2021, a Complaint and Notice of Pre-Hearing were issued as to the 5.4a(3) allegation (C-1).^{2/} On April 19, 2021, NJT filed an Answer, along with Affirmative Defenses, denying that it violated the Act in any way by terminating Williams' employment (C-2).

1/ (...continued)
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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Commission exhibits are marked "C-", while Joint, Charging Party and Respondent exhibits are marked "J-", "CP-", and "R-", respectively.

On February 22, 2022, NJT filed a motion for summary judgment. On March 24, 2022, the motion for summary judgment was referred to the Commission. N.J.A.C. 19:14-4.8(a). On May 26, 2022, the Commission granted in part and denied in part NJT's motion for summary judgment as follows:

[NJT's] motion for summary judgment is granted on [Williams'] claims related to the events of December 24, 2018. NJT's motion for summary judgment is denied as to [Williams'] allegations that Hellyer's alleged conduct during the probationary employee meeting on December 26, 2018 violated N.J.S.A. 34:13A-5.4a(3) and (1) derivatively.

[P.E.R.C. No. 2022-46, 49 NJPER 12 (¶3 2022) (J-2).]

The Commission further explained its decision as follows:

[W]e find that NJT is not entitled to summary judgment on [Williams'] allegations about what occurred in the probationary employee meeting on December 26, 2018; specifically, her claim that Hellyer's decision to terminate her employment had to do with the fact that Hellyer and Rice, during the probationary employee meeting, allegedly got into a "strong disagreement over other cases," and that the termination "was done to prove" to Rice that Hellyer "was in control after they had argued so intently." In support of its summary judgment motion, NJT did not address these allegations at all. Accordingly, we are permitting a hearing to allow [Williams] an opportunity to meet her burden of proving, by a preponderance of the evidence, her allegations as to the December 26, 2018 meeting. [Footnote omitted.] Those allegations present material issues of fact not susceptible to summary disposition. [J-2]

The Commission continued:

[Williams] has also alleged facts about what occurred between Hellyer and Rice during the probationary employee meeting. Whether those allegations, if true, support [Williams'] 5.4a(3) claim is a question that is distinct from [her] unsupported claims that she was denied due process and Union representation.

. . .

Here, during the probationary employee meeting at issue, [Williams] was exercising rights guaranteed by the Act, specifically her Weingarten rights, while being represented by Rice during the meeting. . . . However, whether a substantial or motivating factor in the termination decision was Hellyer's desire "to prove" to Rice that Hellyer "was in control" after their allegedly "strong disagreement about other cases" (i.e., that Hellyer's decision was motivated by hostility towards protected conduct), or whether such a disagreement even occurred, as [Williams] alleges, simply cannot be established from the facts on record at this juncture in this case.

Therefore, a hearing is required to determine whether the termination decision was substantially motivated by protected conduct during the probationary employee meeting Accordingly, we deny NJT's motion for summary judgment of the Charging Party's 5.4a(3) charge with respect to the alleged conduct of Hellyer during the probationary employee meeting, and his alleged motive for same. [J-2]

A hearing was held in this matter on December 1, 2022.^{3/} The parties decided to forgo submitting post-hearing briefs and the record was closed at the conclusion of the hearing.

Based upon the record, I find the following:

FINDINGS OF FACT

1. NJT is a public employer within the meaning of N.J.S.A. 34:13A-1 et seq., and the rules and regulations of the Public Employment Relations Commission promulgated in accordance therewith. (T12-12 to -23).

2. During the course of her employment with NJT, Williams was a public employee within the meaning of the Act. (T22-14 to T23-13).

3. Williams commenced her employment with NJT on October 11, 2018 as a bus operator, a title within the unit represented by Amalgamated Transit Union ("ATU"). (T19-19 to -22; J-1 at NJT0152-NJT0153).

4. NJT and ATU were parties to a collective negotiations agreement (CNA) effective from July 1, 2010 through June 30, 2017, the terms of which continued in effect pending negotiations for a successor agreement. (J-1 at NJT0002-NJT0150, J-2).

^{3/} "T" represents the transcript, followed by the page and line number(s).

5. Under the terms of the CNA, employees become eligible for union membership after thirty (30) days of employment with NJT (J-1 at NJT0014). In addition, employees are required to serve a ninety (90) day probationary period, which commences after successful completion of a training period. (J-1 at NJT0155).

6. Williams completed her training period on November 8, 2018. (T19-19 to T20-4; J-1 at NJT0181). As such, she had not yet completed her probationary period on December 26, 2018, the date of her termination. (T19-19 to T20-4; J-2).

7. Pursuant to the CNA, probationary employees are not entitled to utilize the contractual grievance procedure to challenge disciplinary action. (J-1 at NJT0155-NJT0156). Instead, Procedure 04-050-01 of NJT's Standard Operating Procedures Manual provides limited disciplinary procedures to probationary employees. These limited procedures afforded to probationary employees provide, in pertinent part:

1. Probationary employees are to be issued "see me slips" and have incidents recorded on incident reports as the normal custom for all employees.

2. The union is to be notified that a "probationary employee meeting" is being scheduled for that employee and shall be allowed to represent the employee. Such representation cannot interfere with management's rights to investigate and conduct the hearing.

3. The meeting and all paperwork generated shall be referred to as a "probationary employee meeting" not a first step hearing.

At the start of the hearing, the following shall be stated to all in attendance:

"This meeting is a probationary employee meeting. Pursuant to the terms of the labor agreement, probationary employees are not entitled to the contract's grievance process. This meeting is to explore a violation or charge by the probationary employee. At the conclusion of the meeting, a decision will be made as to what if any discipline will be assessed. Such decision will be final."

4. Upon conclusion of the probationary employee meeting, unless the matter is held in abeyance, the probationary employee is to be notified of a decision and this determination must be written on the bottom of the incident report There is no appeal of a discipline rendered at a probationary meeting.

[Id.]

8. On December 24, 2018, Williams was assigned to "roll call" at the Hamilton Township Garage from 12:30 p.m. to 5:30 p.m. (T26-19 to -23; R-6 at ¶10). At approximately 3:10 p.m., Williams was assigned a bus route, which was scheduled to depart at 4:14 p.m. and return to the garage at 12:25 a.m. (R-6 at ¶10). After being assigned the route, Williams reported to the bus/garage dispatcher that she could not work the assigned route because she felt ill, and Williams went home for the remainder of her shift without performing the assignment. (Id.; T32-21 to T34-21).

9. Williams did not seek medical care nor did she obtain a doctor's note after leaving her shift early on December 24, 2018. (T49-8 to -23).

10. On December 25, 2018, Williams called NJT for her daily work assignment and was told by the answering bus depot master not to report to work until December 26, 2018. (T29-2 to -12).

11. When Williams reported to work on December 26, 2018, she had a "probationary employee meeting" with ATU Local 540 union president Kenneth Rice, and NJT supervisor Charles Hellyer to discuss Williams' failure to work the bus route assigned to her on December 24, 2018. The meeting was held in the Hamilton Township Garage conference room and only Williams, Rice, and Hellyer attended. (T91-7 to -11; T121-7 to -20).

12. During the probationary employee meeting, Rice and Hellyer had a spirited discussion about the termination of Williams' employment, as Rice and Hellyer strongly disagreed about the termination, and Rice raised examples of other employees who were not terminated in support of his position that Williams' termination was not warranted. (T73-3 to T75-2; T76-15 to T77-8; T78-9 to T79-8).

13. Although the discussion between Rice and Hellyer at the probationary employee meeting was spirited, as they strongly disagreed regarding the appropriateness of Williams' termination,

and although Williams may have misunderstood this spirited discussion to be tense and negative because she had never witnessed one before, the discussion was typical of the way the two interact, and a normal labor/management discussion between them, similar to many other discussions between the two both before and after that day. (T73-3 to T75-2; T76-15 to T77-8; T78-9 to T79-8; T91-12 to T92-12; T103-14 to -21; T133-7 to -17).

14. At the conclusion of the probationary employee meeting, Williams was notified that she was being terminated from her position. (T133-15 to -21; R-6 at ¶15). NJT's reason for Williams' termination was "refusing work" for not performing the bus route that she was assigned on December 24, 2018. (T133-15 to -21; R-4).

15. The decision to terminate Williams was not made until the December 26, 2018 meeting. (T120-15 to -18).

16. Prior to Williams' termination for "refusing work", NJT had terminated an employee for "refusing work" on June 25, 2018. After Williams' termination, NJT terminated another employee for "refusing work" on October 28, 2020. (R-5; T93-16 to -22; T96-6 to T99-23; T101-6 to -20). Unlike Williams, these two other terminated employees were non-probationary employees who were entitled to the CNA's grievance procedure, and they were both

reinstated after the grievance procedure. (T139-19 to T140-5; T141-11 to T142-2).

ANALYSIS

N.J.S.A. 34:13A-5.3 guarantees to all public employees the right to engage in union activities, including the right to form or join a union, negotiate collectively and make their concerns known to their employer. Specifically, it provides that:

[a] majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

[N.J.S.A. 34:13A-5.3.]

The issue here is whether NJT's decision to terminate Williams was substantially motivated by protected conduct during the probationary employee meeting in violation of 5.4a(3), and specifically, whether Hellyer's decision to terminate her employment had to do with the fact that Hellyer and Rice, during the probationary employee meeting, allegedly got into a "strong disagreement over other cases," and that the termination "was done to prove" to Rice that Hellyer "was in control after they had argued so intently." In re Bridgewater Tp., 95 N.J. 235, 244 (1984), sets forth the elements a charging party must prove to establish a violation of 5.4a(3).

Under Bridgewater, 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 to the exercise of 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 a sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives 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.

Although Williams does not allege that she personally engaged in protected activity, she could demonstrate a violation of a(3) if she could establish that she was discriminated against

as a result of Rice's protected activities. See Arnoldware, Inc., 129 N.L.R.B. 228, 46 L.R.R.M. 1525, 129 NLRB No. 25 (Jan. 1, 1960) (holding section 8(a) (3) of NLRA violated when employer discriminated against two employees who had not engaged in protected activity known to employer because their terminations were intended to discourage union activities).^{4/} Again, Williams alleges that Hellyer's decision to terminate her was motivated by a "strong disagreement" that occurred between Rice and Hellyer during the probationary employee meeting. As the union president, Rice was not obligated to concur or keep quiet during the meeting and his conduct fell within the "wide latitude" of lawful behavior accorded union representatives. See Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10058 1979).

Based on the foregoing, Williams has established the first two prongs of the Bridgewater test. First, it is apparent that Rice engaged in protected conduct during the December 26, 2018 probationary employee meeting when he contested NJT's decision to terminate Williams. See Hamilton Tp. Bd. of Ed., supra, 5 NJPER 115. Second, NJT was clearly aware of the protected activity

^{4/} Although Arnoldware was decided under the National Labor Relations Act, "the 'experience and adjudications' under the federal act may appropriately guide the interpretation of the provisions of the New Jersey statutory scheme." See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secretaries, 78 N.J. 1, 8 (1978) (quoting Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 424 (1970)).

through Hellyer's attendance at the meeting. However, I find that Williams has failed to establish the required nexus between the protected activity and the adverse employment action.

The Commission has held that in order "[t]o prevail on [a] [5.4]a(3) claim, a charging party 'must assert some nexus between activities protected by the Act and the adverse personnel action.'" Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013) (quoting Woodbridge Tp., D.U.P. No. 94-14, 19 NJPER 523, 524 (¶24243 1993)). "Where a charge alleges unfair treatment that has no relationship to the protections afforded employees under the Act, no violation of section 5.4a(3) may be found." Id. (emphasis added) (citing Woodbridge Tp.; Camden Cty. College, D.U.P. No. 91-7, 16 NJPER 523 (¶21229 1990); Essex Cty. Div. of Welfare, D.U.P. No. 85-25, 11 NJPER 439 (¶16150 1985); Edison Bd. of Ed., D.U.P. No. 85-18, 11 NJPER 103 (¶16044 1985)). "The mere fact that an employee is a union activist or officer is not, without more, sufficient to show that there is a nexus between union activity and subsequent employer action" and "[t]o suggest that nexus automatically exists is to infer that those who participate in union activity are entitled to greater protection than any other employee.'" Passaic Cty. Sheriff's Office, H.E. No. 2016-3, 42 NJPER 145 (¶38 2015) (final agency decision; emphasis added) (quoting Warren Cty. Prosecutor's Office, P.E.R.C. No. 2000-88, 26 NJPER 223 (¶31091 2000)).

In addition, “[t]iming is an important factor in determining whether or not hostility or union animus may be inferred” and “only where the personnel action is unanticipated and is taken at a time or in a manner inconsistent with the ordinary course of business does that inference arise.” Bloomingtondale Bor., H.E. No. 2006-2, 31 NJPER 267 (¶106 2005) (final agency decision; emphasis added) (citing West Orange Tp., P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999); Essex Cty. Sheriff’s Dep’t, P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16, 18 (¶17005 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985)); see also Branchburg Tp. Bd. of Ed., P.E.R.C. No. 2022-30, 48 NJPER 305 (¶68 2022).

Here, Williams has failed to demonstrate any nexus between the protected activity and the adverse employment action. Although the nexus may be proven through direct or circumstantial evidence, see Bridgewater, supra, 95 N.J. at 246, Williams has failed to establish the requisite nexus through either. Despite Williams’ contention that Hellyer terminated her employment in response to Rice expressing disagreement during the December 26 probationary employee meeting, the weight of the evidence shows otherwise.

Although the discussion between Rice and Hellyer at the probationary employee meeting was spirited, as they strongly

disagreed regarding the appropriateness of Williams' termination, and although Williams may have misunderstood this spirited discussion to be tense and negative because she had never witnessed one before, Hellyer and Rice both testified that the discussion was typical of the way the two interact, and a normal labor/management discussion between them, similar to many other discussions between the two both before and after that day. Moreover, NJT had terminated two other employees for "refusing work", with one before and one after Williams' termination. Therefore, as the adverse action for refusing work was consistent and could be anticipated, there is no inference of anti-union hostility. See Branchburg, supra, 48 NJPER 305.

Williams has not set forth any facts showing that NJT violated the Act. Instead, Williams' entire claim is based on her mistaken belief that Hellyer acted in a hostile manner towards the union at the December 26 probationary employee meeting. Additionally, I find no merit to Williams' argument that NJT exhibited hostility by refusing to reinstate her after previously reinstating the two other employees who were similarly terminated for "refusing work" because the comparison is inapposite. The reinstated employees were reinstated by availing themselves of the negotiated grievance procedure, which Williams was not entitled to utilize as a probationary employee. Furthermore, the reinstatement of the other two employees weighs

against a finding of anti-union animus, as NJT would not have reinstated two other employees represented by ATU if NJT held anti-union animus.

Accordingly, the preponderance of the evidence demonstrates that refusing work consistently results in termination, and that NJT's decision to terminate Williams was not substantially motivated by Rice's protected conduct during the December 26, 2018 probationary employee meeting in violation of 5.4a(3).

Under all these circumstances, I find that NJT did not violate section 5.4a(3), or section a(1) derivatively, of the Act.

CONCLUSION OF LAW

Based upon the above, I find that NJT did not violate section 5.4a(3), or section 5.4a(1) derivatively, of the Act.

ORDER

I recommend that the Complaint be dismissed.

/s/ Lisa Ruch
Lisa Ruch
Hearing Examiner

DATED: April 14, 2023
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by April 24, 2023.