P.E.R.C. NO. 91-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(TRENTON STATE COLLEGE),

Respondent,

-and- Docket No. CO-H-89-308

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT,
AFL-CIO, LOCAL 2364,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority delegated by the full Commission in the absence of exceptions, grants the employer's motion for summary judgment and dismisses a Complaint based on an unfair practice charge filed by Council of New Jersey State College Locals, NJSFT-AFT, AFL-CIO, Local 2364 against the State of New Jersey (Trenton State College). The charge alleged that the College violated the New Jersey Employer-Employee Relations Act when its acting affirmative action officer sent letters to Local 2364's president. The Chairman finds that Local 2364 failed to prove hostility to protected rights or that the letters tended to chill the president's protected rights.

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Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Melvin Mounts, Deputy Attorney General)

For the Charging Party, Dwyer & Cannellis, attorneys
(Paul J. Burns, of counsel)

DECISION AND ORDER

On April 17, 1990, the Council of New Jersey State College Locals, NJSFT-AFT, AFL-CIO, Local 2364 filed an unfair practice charge against the State of New Jersey (Trenton State College). 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) and (3),[1/] when its acting affirmative action officer sent letters to the charging party's

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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."

president. The letters labeled as sexist and racist some of the president's remarks at a public meeting of the College's Board of Trustees.

On June 15, 1990, a Complaint and Notice of Hearing issued. On June 29, the employer filed its Answer. On August 4, the employer filed a motion to dismiss. The motion was treated as a motion for summary judgment and referred to Hearing Examiner Margaret A. Cotoia pursuant to N.J.A.C. 19:14-4.8.

On May 9, 1990, the Hearing Examiner recommended granting summary judgment for the employer. H.E. No. 90-48, 16 NJPER 337 (¶21139 1990). She found that the charging party had failed to prove hostility to protected rights or that the letters tended to chill the president's protected rights.

The Hearing Examiner served her decision on the parties and informed them that exceptions were due by May 17, 1990. Neither party filed exceptions or requested an extension of time.

Acting pursuant to authority granted to me by the full Commission in the absence of exceptions, I adopt the Hearing Examiner's recommendation and grant the employer's motion for summary judgment.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
July 11, 1990

H.E. NO. 90-48

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

In the Matter of

STATE OF NEW JERSEY
(TRENTON STATE COLLEGE),

Respondent,

-and-

Docket No. CO-H-89-308

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, AFT, AFL-CIO,
LOCAL 2364,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a Motion for Summary Judgment filed by the State of New Jersey (Trenton State College) be granted. The Hearing Examiner found that two letters from the College's Acting Affirmative Action Officer to the President of the College's faculty union did not violate subsections (a)(1) or (3) of the Act. The Hearing Examiner found that the letters adressed the affirmative action implications of statements the president made at a public meeting of the College's Board of Trustees, and that the letters did not tend to chill the president's right to speak at public meetings and express opinions on labor relations.

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. 90-48

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

In the Matter of

STATE OF NEW JERSEY
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Respondent,

-and- Docket No. CO-H-89-308

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, AFT, AFL-CIO,
LOCAL 2364,

Charging Party.

Appearances:

For the Respondent
Robert DelTufo, Attorney General
(Melvin Mounts, Deputy Attorney General)

For the Charging Party
Dwyer & Cannellis, attorneys
(Paul J. Burns, of counsel)

DECISION ON MOTION FOR SUMMARY JUDGMENT

On April 17, 1989, The Council of New Jersey State College Locals NJSFT-AFT/AFL-CIO Local 2364 ("Local 2364") filed an unfair practice charge with the Public Employment Relations Commission ("Commission"). It alleges that Trenton State College ("College") violated subsections 5.4(a)(1) and (3) of the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/]

A Complaint and Notice of Hearing issued on June 15, 1989, scheduling the matter for hearing. On June 29, 1989, the State filed an Answer to the Charge, admitting that professor Arthur Steinman ("Steinman") received two letters from College Acting Affirmative Action Officer Teresa Sanchez-Lazer ("Sanchez-Lazer") concerning remarks Steinman made at the October 27, 1988 public meeting of the College's Board of Trustees. The State denies that Sanchez-Lazer is an agent or representative of the College Board of Trustees, that Steinman addressed the Board on October 27, 1988 as a representative of Local 2364 and that the two letters from Sanchez-Lazer to Steinman violated Steniman's rights under the Act.

On August 4, 1989, the State filed a motion to dismiss with accompanying brief. On August 8, 1989, the State was informed that the motion was more appropriately classified as a motion for summary judgment. Local 2364 filed a brief in opposition to the motion together with certifications on August 23, 1989. The Chairman has referred the motion to me for disposition.

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 excercise of the rights guaranteed to them by this act."

Pursuant to N.J.A.C. 19:14-4.8(d), summary judgment may be granted "[i]f it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...." Summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super 182, 185 (App. Div. 1981); Essex Cty. Ed. Services Comm'n., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Local 2364 alleges that the College's actions violated subsection a(3) of the Act. In order to prove a violation of 5.4 (a)(3), Local 2364 must show that Steinman was engaged in protected activity, that the College was aware of it and was hostile toward him for that activity. Tp. of Bridgewater and Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). In its brief filed in response to the motion to dismiss, Local 2364 states that "The fact that no action was taken against Steinman is irrelevant as to this charge since the "chilling effect" has been targeted for and felt by Professor Steinman." Local 2364 brief at 3. Local 2364 has not alleged that Steinman was disciplined or that he was otherwise adversely affected in regard to hire or tenure of employment or any term and condition of employment, City of Newark, H.E. No. 88-3, 13

NJPER 621 (¶18233 1987), adopted P.E.R.C. No. 88-24, 13 NJPER 727 (¶18274 1987); Township of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986), nor has it alleged any facts that show hostility of the college towards Steinman. Bridgewater. Although any alleged chilling effect of the College's actions is relevant to an analysis of a possible subsection (a)(1) violation, such allegations are not sufficient to meet the Bridgewater standard for finding a violation of subsection (a)(3). City of Newark, Mine Hill. Accordingly, I find no violation of subsection (a)(3) and that allegation is dismissed.

Local 2364 contends that Sanchez-Lazer's letters to Steinman violated subsection (a)(1) of the Act. A public employer independently violates subsection (a)(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ -- Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1957); Mine Hill Twp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). The charging party need not prove an illegal motive in order to establish an independent violation of subsection 5.4 (a)(1) of the Act. Morris, The Developing Labor Law, at 75-78 (2d ed. 1983). Public Employers violate subsection 5.4 (a)(1) when their agents make statements

threatning or implicating an employee's job status not because of the employee's job performance but because of that employee's conduct as an employee representative. In re Blackhorse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), Ridgefield Park Board of Education, P.E.R.C. No. 84-120, 10 NJPER 266, 267 (¶15130 1984); Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83). Conversely, an employee is not insulated from adverse action by an employer for impermissible conduct just because the employee is a union representative. Black Horse Pike, Trenton Board of Education, P.E.R.C. No. 80-130, 6 NJPER 216, 217 (¶11108 1980).

Sanchez-Lazer's letters to Steinman concerned two statements he made at a public meeting of the Board of Trustees.[2/] The statements were: "Put your balls on the chopping block.", which Sanchez-Lazer characterized as sexist[3/] and "As a faculty Representative, speaking as a faculty point of view, uh, faculty do not want to roll their eyes, smile, say 'yassuh' and

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2/ The statements were transcribed from tapes of the Board meeting.

3/ Sanchez-Lazer's response to this statement in her November 18, 1988 letter to Steinman was: "The equation of testicles ("balls") with power is sexist. This statement implies that the absence of testicles (the condition of not being a man) is a condition of weakness. The assumption behind your statement is inaccurate, and the assertion, especially in the context in which you used it, denigrates the status of women on the campus."

shuffle their feet; they want...", which Sanchez-Lazer characterized as racist.[4/] Sanchez-Lazer's November 18, 1988 letter to Steinman stated that the above comments were of deep concern to her in her capacity as Acting Affirmative Action Officer. She also requested that Steinman contact her for an appointment "...to discuss a solution to this situation.". Sanchez-Lazer's November 23, 1988 letter to Steinman outlined her responsibilities as Acting Affirmative Action Officer and advised Steinman that in her judgment as Affirmative Action Officer, it would be in his best interest to "...resolve this situation in a prompt, informal manner.". Sanchez-Lazer also stated that in her opinion, Steinman's remarks could provoke an official complaint from anyone whom they offended.

The State denies that Steinman addressed the Board of Trustees on October 10, 1987 as both faculty representative and as President of Local 2364. It also denies that Sanchez-Lazer is an agent or representative of the Board of Trustees. Although the foregoing are factual disputes, they are not material to the outcome of this matter and can be viewed in the light most favorable to the charging party. The issue to be resolved is whether Sanchez-Lazer's letters tend to chill Steinman's rights under the Act, even assuming

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4/ Sanchez-Lazer's response to this statement in her November 18, 1988 letter to Steinman was: "This assertion is racist. It refers to the historical, involuntary enslavement of American Black people in caricature, using an image of willing and cheerful passivity. This is a clear distortion of history. It is irresponsible and insulting to Black persons to imply that slavery was a happy or naive state of existence."

arguendo that Steinman was acting in the capacity of an employee representative and that Sanchez-Lazer is an agent of the Board of Trustees.

Although the Commission has held that wide latitude in terms of offensive speech and conduct must be allowed in grievance procedings to insure the efficacy of the process,[5/] conduct that is beyond the bounds of propriety is not protected activity under the Act when it is not in the context of a grievance meeting. City of East Orange, P.E.R.C. No. 84-70, 10 NJPER 28 (¶15017 1983). In East Orange, an employee disrupted a staff meeting called by the employer to admonish employees for improper conduct. The Commission found that a heated argument which disrupted the meeting was beyond the bounds of propriety, although no threats, abusive language or profanity were involved. The Commission found that when an employee is not acting as a spokesperson for the majority representative seeking to represent or defend employees during an investigation of suspected employee misconduct, that employee does not have a protected right to unilaterally convert a meeting called by the employer into a grievance conference where the parties are on an equal footing.

Acting as an employee representative does not insulate an employee from reprimand for objectionable behavior. Black Horse

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5/ Hamilton Twp. Bd. of Ed , P.E.R.C. No. 79-59, 5 NJPER 115, 116 (¶10068 1979); Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979).

Pike; Trenton Board of Education. The Commission has held that: "...an employee may not act with impunity even though he may be engaged in what might constitute protected activity in certain circumstances." City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 215, 215 (¶4107 1978). In State of New Jersey, P.E.R.C. No. 85-85, 11 NJPER 130 (¶16058 1985), the Commission found that a written reprimand issued to a union representative for unbecoming behavior including violation of established work rules and insulting and intimidating agency clients did not violate the Act. The Commission found that there was not an impermissible connection between the representative's employment status and her role as an employee representative and that she was not reprimanded for engaging in protected activity.

The District of Columbia circuit has held that racist statements are objectionable behavior and are not protected activity. In Government Employees v. FLRA, 878 F.2d 460, (D.C. Cir. 1989), 131 LRRM 2857, the court held that employee statements referring to an agency manager as an "Uncle Tom" and a "spook" that were published in a union newspaper were not protected by Section 7102 of the Federal Labor-Management Relations Act. That section provides employees with broad rights to speak out on union-management issues without fear of reprisal. The court held that the Federal Labor Relations Authority could reasonably conclude that the statements were disparagement of a manager based on racial stereotyping and that the statements had no place in the federal

labor-management program because remarks tending to generate or excerbate racial conflict in the workplace are inherently disruptive.

An employer has a legitimate and substantial business justification in administering and enforcing its affirmative action plan to avoid possible complaints under state and federal anti-discrimination laws. In a case involving a challenge to promotions made in accordance with an affirmative action plan, the Appellate Division has held that implementation of an established affirmative action plan is a proper excercise of managerial prerogative. Jersey City Ed. Assoc. v. Jersey City Bd. of Ed., 218 N.J. Super. 177, 187-88 (App. Div. 1987).

The College has a legitimate interest in enforcing its affirmative action plan, which extends to addressing situations where its employees make remarks at open public meetings that can be construed as sexist and racist. These employer intersts must be balanced against Steinman's right to speak at public meetings and express opinions on labor relations. I find that the Sanchez-Lazer's letters did not tend to chill either right. Sanchez-Lazer's letters were limited to two specific remarks Steinman made at a Board of Trustees meeting that in her opinion violated College affirmative action policy. Sanchez-Lazer's comments addressed those remarks in the context of their affirmative action implications; specifically their sexist and racist connotations. Even assuming that Steinman was at the Board meeting

as President of Local 2364, it has not been alleged that he was at the meeting to process grievances and Sanchez-Lazer's letters did not address his conduct as an employee representative or his right to speak to the Board as an employee representative. Steinman's status as an employee representative does not insulate him from reprimand for objectionable behavior, which includes statements that were perceived as sexist and racist by the College's Acting Affirmative Action Officer. I find that Sanchez-Lazer's letters were an attempt to resolve a legitimate concern about comments made at a public meeting that were perceived as racist and sexist, and that the letters did not tend to chill Steinman's rights under subsection (a)(1) of the Act.

CONCLUSION

The College's Motion for Summary Judgment is granted.

Margaret A. Cotoia
Hearing Examiner

DATED: May 9, 1990
Trenton, New Jersey