

P.E.R.C. NO. 97-109

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CO-H-95-275

SKILLED TRADES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands a Complaint based on an unfair practice charge filed by the Skilled Trades Association against the Newark Housing Authority. The Complaint alleges that the Housing Authority violated the New Jersey Employer-Employee Relations Act by transferring the Association president in retaliation for his protected activities. The Commission finds discrepancies over the timing of the transfer and therefore over the level of protected activity and hostility to that activity that might have contributed to the transfer decision. The Commission remands the case so that the timing and motivation for the transfer can be revisited based on all the evidence.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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SKILLED TRADES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Terry Ridley, attorney

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On February 21, 1995, the Skilled Trades Association filed an unfair practice charge against the Newark Housing Authority. The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (5),^{1/} by

^{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. (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 exercise of the rights guaranteed to them by 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."

transferring Association president Robert Fiore in retaliation for his protected activities.

The Association simultaneously filed an application for interim relief, which was denied by a Commission designee on March 8, 1995.

On March 17, 1995, a Complaint and Notice of Hearing issued. On April 17, the Authority filed an Answer denying that the "reassignment" was in retaliation for protected activity.

On August 2 and 4, 1995, Hearing Examiner Illse E. Goldfarb conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally.

On June 24, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 96-24, 22 NJPER 289 (¶27157 1996). She recommended dismissing the subsection 5.4(a)(2) and (5) allegations because she found no evidence to support them. She recommended dismissing the subsection 5.4(a)(1) and (3) allegations based on her application of the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

The Hearing Examiner found insufficient evidence to prove that the Authority was hostile toward Fiore's protected conduct. Her recommendation was based on findings that the Authority's Executive Director, Harold Lucas, did not participate in the decision to transfer Fiore; the decision was made in January 1995 by Director of Housing Management Antonio Barroqueiro; and Barroqueiro was not hostile toward Fiore's protected activity.

The Hearing Examiner also found evidence of a legitimate and substantial business justification for the transfer sufficient to overcome a circumstantial inference that Barroqueiro was hostile toward Fiore's protected activity.

On August 5, 1996, the Association filed exceptions. It raised several points, including the Hearing Examiner's failure to consider evidence of hostility and protected activity arising at a January 19, 1995 meeting and afterwards.

We have reviewed the record. That review has revealed substantial inconsistencies between the record and the Hearing Examiner's recommendations that require that those recommendations be revisited.

The Hearing Examiner found that during the fall of 1994, there was a continuing dialogue between Fiore and Executive Director Lucas over problems at the Authority's buildings. Fiore's advocacy was vigorous and Lucas felt compelled to rebuke him publicly. In December 1994, Fiore was offered, but rejected, a promotion out of the negotiations unit. He felt that it was in the Association's best interests that he remain the president of the union.

The Hearing Examiner then found that within a month after Fiore rejected the promotion offer, but before a contentious January 19 meeting, Barroqueiro transferred Fiore to a less desirable housing project. She specifically found that Barroqueiro acted alone in making the transfer decision before the January meeting. However, in deciding this case, we must reconcile those recommended

findings with substantial evidence that the transfer decision was made in February, after a contentious public interchange between Fiore and Lucas.

Fiore had rejected Lucas' promotion offer on December 19, 1994. On January 19, 1995, Lucas and Fiore exchanged comments at the monthly Commissioners meeting. The Hearing Examiner found that Fiore mentioned his transfer at the January meeting, but the record does not support that finding and other evidence appears to indicate that the transfer decision was not made until February and that Fiore did not know about the transfer until then. Because the Hearing Examiner believed that the transfer decision was made in January, she may not have fully considered later evidence of hostility when she concluded that Barroqueiro alone made the decision to transfer Fiore.

Lucas and Fiore engaged in a tense exchange at the January Commissioner's meeting; the Association filed two grievances against the Authority in late January; and the New Jersey Department of Personnel ("DOP") advised the Authority, based on the Association's complaint, that it was violating DOP regulations in an area that had been the center of a long-standing dispute between Lucas and Fiore. This evidence should be considered in assessing motivation for the transfer if the transfer decision was, in fact, made in February.

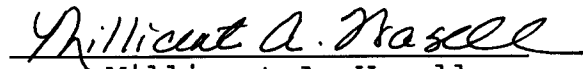
We are obligated to find the facts before reaching a legal conclusion. Maywood Bd. of Ed. v. Maywood Ed. Ass'n, 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979). We

cannot ignore these discrepancies over the timing of the transfer and therefore over the levels of protected activity and hostility that might have contributed to the transfer decision. Accordingly, we will remand this case so that the timing and motivation for the transfer can be revisited based on all the evidence.

ORDER

This matter is remanded consistent with this decision.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Buchanan abstained from consideration.

DATED: February 27, 1997
Trenton, New Jersey
ISSUED: February 28, 1997

H.E. NO. 96-24

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

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CO-H-95-275

SKILLED TRADES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Newark Housing Authority did not violate the rights of the president of the Skilled Trades Association, Inc., Robert Fiore, when it transferred Fiore to a less desirable location. The Hearing Examiner finds that the Authority had a legitimate and substantial business reason for Fiore's transfer.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman 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.

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

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

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Docket No. CO-H-95-275

SKILLED TRADES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Frank L. Armour, General Counsel
(Terry Ridley, Senior Associate Counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Arnold S. Cohen, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 21, 1995, the Skilled Trades Association filed an unfair practice charge with the Public Employment Relations Commission against the Newark Housing Authority. The Association alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a) (1), (2), (3) and (5),^{1/} when it reassigned the Association president, Robert Fiore, in retaliation for his union activity.

^{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. (2) Dominating or interfering with the formation, existence or administration of

On March 17, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing (Cm-1).^{2/} The Authority filed its answer on April 13, 1995, generally denying the allegations in the charge (Cm-2).

At hearings conducted on August 2 and August 4, 1995, the parties examined witnesses and introduced exhibits.^{3/} At the close of the hearing, the parties argued orally.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. Robert Fiore is employed by the Newark Housing Authority in the department of housing management, central maintenance (2T41). He has worked since 1964 as an elevator mechanic, repairing and servicing the elevators and performing

1/ Footnote Continued From Previous Page

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 exercise of the rights guaranteed to them by 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/ The designation "Cm" is for Commission documents.

3/ Documents marked "CP" refer to the Charging Party's exhibits and documents marked "R" refer to the Respondent's exhibits. The transcript citations indicate the date the record was developed: "1T" is for August 2, 1995 and "2T" is for August 4, 1995.

general electrical work (1T14; 1T85; 1T87). From 1972 through January 1995, he worked primarily at the Stephen Crane and at the Baxter complexes, the Walsh Homes and the Branchbrook site (1T14; 1T34; 1T86). Fiore was regarded by his former foreman, Nicholas Monticello, as "more or less the senior electrician" at his location.^{4/} Fiore ordered most of the materials and saw to it that "everything was running right" (1T12; 1T13).

Electricians usually work with the same partner "unless somebody retired or (the foreman) had to make a replacement" (1T16; 1T17). Fiore and his partner, Timmy Collins, have worked together for about five years. Collins works about 4 hours a day with Fiore (1T14). They were responsible for 29 elevators: 20 Stately elevators (18 serving the Stephen Crane complex and two at Branchbrook) and nine Thompson elevators (five at Walsh Homes and four at the Baxter Elderly complex) (1T14-1T15; 1T24-1T25). Fiore spent 80% of his time on elevator repairs (1T84).

2. Fiore has been the president of the Skilled Trades Association from the time of its formation in 1988 (1T86) and has actively promoted many issues in behalf of the Association. In June 1994, Fiore attended a Board of Commissioners' meeting and urged them to sign the parties' agreement. Fiore subsequently filed an unfair practice charge against the Authority in October 1994 for refusing to execute a successor agreement (1T90; CP-3). The

^{4/} Monticello retired in March 1993 (1T22).

agreement was signed on March 1995, almost a year after it had been ratified by the Association (1T91).

In January 1995, Fiore authorized the processing of two bargaining unit members' grievances (CP-12; CP-13). In February 1995, after many unsuccessful complaints to the Authority's Executive Director, Harold Lucas, he successfully appealed to the State Department of Personnel that the Authority's practice of hiring provisional employees into Civil Service positions be stopped (CP-9; CP-10; CP-11; 1T110; 1T111; 1T113-114; 2T31).

3. In 1989, the Newark Coalition for Low Income Housing brought a federal suit against the Authority, seeking to have the Authority provide an adequate supply of public housing for Newark. Subsequently, the parties entered into a settlement agreement to construct new units and to rehabilitate and repair existing units (2T13-2T14; R-2).

Thereafter, the Authority made progress towards meeting the goals set in the settlement agreement. There was the beginning of a "new and effective top management" for the Authority, starting with the appointment of Harold Lucas as its new executive director. Although there was substantial progress in the construction of new housing units, there were a series of "critical breaches" of the settlement agreement. The Authority's major failing was the repair of vacant units (R-2). In August of 1992, the plaintiffs filed to place the Authority in receivership. As an alternative to taking the Authority over, the Court approved a settlement agreement on

February 18, 1993, between the Authority and the federal Housing and Urban Development agency. The agreement established an implementation plan and schedule for rehabilitating of 1,158 uninhabited units (R-2).

4. The Stella Wright complex is a multi-building high rise project for families. Because of its size, it has more tenants than other projects even though it does not have a high occupancy rate. Many of the tenants are adolescents. As a consequence, the 28 Thompson elevators in the complex (1T79) are subjected to more use and vandalism than elevators in projects housing the elderly, such as Stephen Crane (1T24; 1T29; 1T60-62; R-6, para. 8; R-7, para.

6). 5/

5/ Joseph Maloney, acting chief of maintenance, is Fiore's supervisor. He was a witness for the Association. The Association sought to discredit portions of Exhibit R-6, which is Maloney's two page certification made in behalf of the Authority. Maloney testified that R-6 was prepared by the Authority's attorney. He stated that he refused to sign the certification because of statements contained in R-6's paragraphs 6 and 7 (2T37) and that the Authority's attorney agreed to delete them. Maloney testified that thereafter he was called to the attorney's office, where he signed just the second page which contains the last four lines of paragraph 9 and paragraph 10. He never reviewed both pages of the certification. Maloney stated that "by mistake," the first page of the original certification containing paragraphs 6 and 7 was attached to the second page containing his signature (2T37-2T38). Maloney also asserted that he was "not sure" about paragraphs 8 and 9 (2T39).

I find Maloney's testimony not to be creditable. Given his concern about paragraphs 6 and 7, it is not reasonable that he would sign the certification without reviewing both pages to

Footnote Continued on Next Page

Joseph Maloney, the acting chief of maintenance, described the contrast between the Stella Wright and the Stephen Crane projects:

At Stephen Crane, maintenance was always done and done on time, parts were always ordered, parts were always on hand and the vandalism wasn't that bad. Whereas Stella Wright there are so many children, and kids and middle aged kids, everything is broken. They break the elevators, they break the lobby doors, they break the windows, they break the lights. It's like night and day" (1T60-1T61). . . . "There are so many kids in all those buildings and they're not watched. They have nothing better to do than break things. (1T62)

Stella Wright has a bigger elevator crew than Stephen Crane. For the past 10 years, Richard Kazmirek and Leo Fitzsimmons, with the assistance of two helpers, have repaired and maintained the elevators at Stella Wright (1T16; 1T28; 1T66).

5. By August 1993, it was apparent that the Authority was failing to meet the court-ordered rehabilitation schedule. On August 25, 1993, the Court appointed a Special Master to hold hearings and review and evaluate the Authority's plan for the rehabilitation construction program (R-2; R-3).

5/ Footnote Continued From Previous Page

see that it had been revised as promised. Further, the last four lines, containing the essential facts of paragraph 9, are printed on the second page; yet he raised no objection to this text when he signed that page. Therefore, Maloney is bound by his certification.

6. As part of the rehabilitation repair program, the Authority hired G & M Eastern Contracting, Inc., sometime in the middle of 1993, to repair the plumbing in 250 vacant apartments at the Stella Wright complex (1T38-39; 1T65; 2T61; R-7. para. 8). G & M Contracting would work under the supervision of an Authority foreman (1T38).

In addition to the chronic overuse and vandalism that the Stella Wright elevators are subjected to, deteriorating plumbing throughout the project was affecting elevator operation. Broken pipes were leaking steam into the elevator shafts. The heat and condensed water were destroying the elevators' electrical wiring (1T20; 1T38; 1T64; 1T78).

Sometime in the fall of 1993, G & M complained to Maloney that the continual elevator breakdowns in the complex were impeding it's ability to complete the plumbing repairs. At about the same time, Maloney was getting complaints from Fitzsimmons that elevators in all the buildings were out or running in an unsafe condition (1T6; 1T36; 1T38-1T39; 1T41).

Sometime near the end of 1993 or the beginning of 1994, Maloney implemented a emergency elevator and plumbing repair program at Stella Wright. All available plumbers and electricians were assigned to do plumbing repairs (1T38); two outside elevator mechanics were hired to work exclusively on elevators used by the G & M crew in order to keep the rehabilitation work going (1T39-1T40); and Kazmirek and Fitzsimmons, with the assistance of a helper, were

to continue working on elevator repair and maintenance throughout the complex (1T40; 1T50; 1T66; 1T79).

7. In February, 1994, the Special Master made his recommendations to the Court. In accordance with the Court's directive in August 1993, he had reviewed the Authority's plan and adopted its conclusion that the necessary repairs and renovations to the vacant units could not be accomplished by just using in-house resources. The Court accepted the Special Master's recommendations, and on February 16, 1994, the Court ordered the Authority to expeditiously as possible hire an outside construction manager to proceed with the vacant unit repair and renovation work (2T18; R-2; R-1).

8. In spite of the concerted repair efforts instituted at Stella Wright, elevator breakdowns were still hampering G & M's work. On February 21, 1994, G & M's project manager wrote to the Authority and complained that the new repair crew was impossible to reach and was not responding to their calls (R-4).

By June 28, 1994, G & M wrote the Authority again, complaining that the daily "elevator down time" was costing time and money. G & M was dissatisfied with the elevator repair crew assigned to assist them. The crew was slow respond and the quality of its work was poor (R-5). As a consequence, G & M filed a complaint against the Authority, seeking to recover \$220,000 in damages (1T56).

9. Fiore became aware in September 1994 that the Authority was hiring subcontractors (2T27). He had read a newspaper article lauding the Authority's progress in rehabilitating vacant units.

Fiore appeared before the Authority's Board of Commissioners on September 29, 1994. He complained that the efforts the Authority's electricians and mechanics were being ignored by the Authority, even though they could do the work cheaper than the subcontractors. He proposed that the Commissioners "take a shot at our people doing this" (CP-4). Executive Director Lucas countered that he had personally defended the quality and amount of the in-house work at hearings conducted by the Special Master. He stated that Fiore's remarks were not fair and that he was "grandstanding" (CP-4).

On October 27, 1994, Fiore appeared before the Board with the following proposal: His Association members would work a weekend without pay and rehabilitate a unit with materials provided by the Authority. Fiore asserted that he could demonstrate a 65% cost savings over the work done by subcontractors (1T98; CP-5). The Board requested that Fiore submit his proposal in writing for its consideration (CP-5).^{6/}

At a Board meeting on December 15, 1994, Executive Director Lucas told Fiore that he would meet with Fiore within the next two

^{6/} Fiore did not made his proposal to the Court-appointed Special Master, even though he knew the Special Master and that he had the authority to hire a construction manager and prepare bid packages for outside contractors (2T16; 2T18).

days to discuss the proposal, because "we have something for you" (1T100; CP-6). Shortly after the Board meeting, Director of Housing Management, Antonio Barroqueiro, called Fiore. Barroqueiro reports to Lucas. He was appointed in 1993 and is responsible for all maintenance personnel and manages of all the Authority's housing units (2T41-2T42). Barroqueiro offered Fiore a job to do renovation work for the Authority (1T100).

On December 19, 1994, Fiore sent a letter to Robert Graham, Assistant Executive Director, with copies to the Board of Commissioners, rejecting the Authority's offer of a promotion to project coordinator. Fiore stated that it was in the Association's best interests that he remain the president of the union. He stated in part:

It's frustrating to me to be viewed in many instances as an adversary by our administration. My recommendations and suggestions are sincere, well thought out and intended to establish good working relations throughout the NHA. Nothing would please me more than to see our relationship's status improve to the point where there would be a commonality regarding our mutual goals and objectives... (CP-7)

10. Barroqueiro makes decisions to transfer employees under his supervision all the time (2T46). One of the improvements instituted by the new management at the Authority was to make "accurate and focused assignments, the right people to fit the right job." (2T47).

The emergency plumbing and electrical repairs at the Stella Wright complex were completed sometime in the latter part of 1994

(1T41; 1T65; 1T67). Elevator operations throughout the complex were improved (1T62). The two temporary elevator mechanics were laid off at this time (1T42).

Barroqueiro was aware that there were still problems at Stella Wright (2T63-2T64). In addition to the usual elevator breakdowns, new problems developed. Rainwater from recently installed roofs was leaking into the elevator shafts and flooding out the elevators (1T78). And in the first part of 1995, G & M began a second phase of renovations at the Stella Wright complex (1T74-1T75).^{7/} Barroqueiro felt that he could not rely on the temporary hires to handle the work at Stella Wright without some direction (2T44; 2T63). Barroqueiro wanted the most experienced person at Stella Wright, someone who knew all of the equipment and could help the temporary electricians too (2T45; 2T48). Fiore had been praised by the staff engineer, Nitin Patel (2T45; 2T63). Maloney, when talking of the various elevator maintenance problems

^{7/} Barroqueiro and the other witnesses in this case shared an inability to remember specific dates. Barroqueiro was also vague on the details of who told him or when he heard about the continuing problems at Stella Wright -- "told to me in a conversation or . . . as I was running to the parking lot" (2T63). However, I credit Barroqueiro's reason for these lapses in his recall. He emphasized that he is responsible for 1,000 employees, 50 of which he supervises directly (2T64) and that he was "in the middle of doing a lot of work" (2T65) -- all the rehabilitation and construction work being done throughout the Authority's buildings. For instance, Maloney testified that he met with Barroqueiro every day and had regular meetings with him (1T44).

at different sites, had praised Fiore as the "top gun" (2T45) and that he knew the whole system (2T57).^{8/}

Based upon the information from Maloney and Patel, Barroqueiro determined that Fiore was the best and most experienced mechanic on his staff (2T45). Acting on his own without input from Lucas or Graham, Barroqueiro made the decision to switch Fiore for Kazmirek (1T47; 2T45-2T46; 2T48; 2T50; 2T53). Sometime in January 1995, Barroqueiro directed Maloney to transfer Fiore to the Stella Wright complex. Fiore refused to make the move until the reassignment was put in writing.

11. On January 19, 1995, Fiore attended the Board meeting. In an exchange with Lucas, Fiore observed that his proposal had died and he was being transferred (1T105; CP-8). Lucas replied that "... we have offered you a promotion because you have represented to this Board that you know how to do it better than everybody else. And you are telling me I would rather be an electrician...." When chided by a Commissioner that this type of exchange was inappropriate for a Board meeting, Lucas responded, "Commissioners, we cannot continue to let people take pot shots at us at our Board meetings and at my staff with these innuendos, with this half-baked stuff without a rebuttal." (CP-8)

^{8/} Barroqueiro testified credibly that at first Maloney was forthcoming with high praise of Fiore until he sensed that Barroqueiro was considering transferring Fiore. Then Maloney began to qualify Fiore's abilities, claiming that Fiore could only work on Staley elevators. (2T55; 2T57; 2T63). Barroqueiro testified that he knew that Maloney and Fiore were friends (1T52) and he felt that this compromised Maloney's objectivity as to a transfer (2T54).

12. On February 15, 1995, Barroqueiro issued a memo transferring Fiore immediately, "for the good of the Newark Housing Authority" (1T34-1T44; CP-1). Fiore was assigned to work with Fitzsimmons.

Maloney did not agree with the Barroqueiro's decision; he stated that Fiore was not as familiar with Thompson elevators as Kazmirek (1T19; 1T50), and Kazmirek had never worked on Staley elevators (1T15). Rather than switching electricians, he felt that the Authority should have added more temporary elevator mechanics. He thought this arrangement had had worked well with G & M (1T43; 1T48).

Fiore and Fitzsimmons work exclusively on elevator repairs (1T87). They are assisted by a temporary electrician who had worked at the Stella Wright project before doing emergency electrical repairs. Because he has no experience with elevator repairs, Maloney has directed Fiore and Fitzsimmons to training him (1T81; 1T82).

Fiore is learning the different components used in the Thompson elevators at Stella Wright (1T69; 1T88-1T89). Fitzsimmons has no doubts about Fiore's abilities (1T73). Fitzsimmons has worked at almost every project in his 27 year career --the last 15 years of which were as a full time employee -- and he did not have a problem learning each new elevator system (1T83).

After Kazmirek's transfer to Stephen Crane, the number of elevator breakdowns increased there. Maloney had to assign a

mechanic part-time to assist Kazmirek (1T52; 1T53). Barroqueiro has had no complaints about the conditions at Stella Wright since Fiore's transfer (2T48).

Analysis

The Association argues that Fiore's transfer from the Stephen Crane project to the Stella Wright project was in retaliation for his activities as the Association president. The Stephen Crane project is a very desirable work site, whereas the Stella Wright project is a site plagued by constant repair problems and is in need of major rehabilitation,

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation of subsections 5.4(a)(1) or (3) 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 motives unlawful 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. Conflicting proofs concerning the employer's motives are for the Commission to resolve.

Timing is an important factor in assessing motivation. City of Margate, H.E. No. 87-46, 13 NJPER 149 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Borough of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

Fiore's advocacy of the Skilled Trades Association was vigorous and well known on all levels of the Authority's management. Between June and January 1995, Fiore engaged in a continuing dialogue with Executive Director Lucas and the Board of Commissioners about various issues concerning the Association. Between September 1994 and January 1995, Fiore's main concern was the Court-ordered renovations being done by subcontractors and temporary hires. At two Commission meetings, Lucas felt compelled to rebuked Fiore publicly about this issue. It is apparent that at the time Fiore wrote his December 19, 1994, letter explaining why

he was declining the promotion to project manager, he felt beleaguered.

But the record shows that Lucas was not involved in the decision to transfer Fiore. Barroqueiro made that decision on his own. There is no direct evidence to indicate that Barroqueiro was hostile to Fiore's union activities. However, Barroqueiro was involved in offering the promotion to Fiore in December 1995. Within a month after Fiore rejected the offer, Barroqueiro transferred him to the less desirable Stella Wright project. The timing of the decision circumstantially implicates Barroqueiro. However, I find sufficient evidence of a legitimate and substantial business justification for the transfer to overcome any circumstantial inference of hostility towards Fiore.

The Authority has a managerial prerogative to transfer Fiore if it is for a legitimate business concerns. Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978). Stella Wright is beset with elevator breakdowns that require continual repairs. The site is undergoing further work by G & M Contractors, Inc.. This is the same subcontractor who, after the first round of rehabilitation repair, is suing the Authority for cost overruns caused by unrepaired elevators. Barroqueiro concluded from that experience that temporary electricians alone could not do the work required to keep the elevators running at Stella

Wright.^{9/} And Barroqueiro knew that new problems had developed at the site. As confirmed by Fitzsimmons, roof leaks were causing additional elevator breakdowns. Barroqueiro testified credibly that he did not want the problems encountered during the subcontract's first renovation job to be repeated.

The record shows that there is a consensus that Fiore is the Authority's best electrician. Fiore has over 31 years experience, many of those years spent working on Thompson elevators in other projects. It was acknowledged by Maloney, his former supervisor and the department's engineer that he knows all aspects of his job. One of Maloney's objections to the transfer had to do with Kazmirek. Maloney's concern that Kazmirek lacked the experience to work on Staley elevators proved to be a reasonable one. Kazmirek was assigned an assistant in order to handle his new assignment. Fiore, on the other hand, has handled the transfer well. In addition to his day-to-day work, he and Fitzsimmons have also taken on the responsibility of training an experienced temporary electrician.^{10/}

The Association argues that the Authority has a policy of not transferring its electricians. It is true that there is

^{9/} The facts on the record regarding the G & M repair contract contradicts Maloney's testimony that the temporary hires had worked out well.

^{10/} This is further evidence that Maloney's insistence that temporary electricians are the solution to getting the work done has not proven to be a satisfactory long-term solution.

evidence that electricians such as Fiore, Fitzsimmons and Kazmirek has worked at the same site with the same partner for long periods of time. But there is also evidence that Fiore and Fitzsimmons have moved many times in their career. I find Barroqueiro's testimony credible that transfers have happened and will continue to happen, in light of the Authority's efforts to better manage its personnel.

The Association has not plead nor proven any facts in support of an independent violation of N.J.S.A. 34:13A-5.4(a)(1). Nor had it proven violations of subsections 5.4(a)(2) and (5).


Accordingly, based upon the above analysis of the record, I make the following:

CONCLUSIONS OF LAW

The Newark Housing Authority did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) by transferring Robert Fiore.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.


Ilse E. Goldfarb
Hearing EXaminer

Dated: June 24, 1996
Trenton, New Jersey