

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY COLLEGE OF MEDICINE
AND DENTISTRY,

Respondent,

-and-

Docket No. CO-77-341-28

PROFESSIONAL AND TECHNICAL EMPLOYEES
UNION, LOCAL #484, AFL-CIO,

Charging Party.

SYNOPSIS

The Commission in an unfair practice proceeding initiated by the Professional and Technical Employees Union dismisses a Complaint against the New Jersey College of Medicine and Dentistry in its entirety. The Commission agrees with the Hearing Examiner's determination that those portions of the Complaint alleging that Carmen Tomaro, a security officer employed by the College, was discriminatorily denied certification as a police officer because of his union activities be dismissed. The Commission concludes that the College's actions in not certifying Tomaro were based on legitimate "business" considerations and not union activity. The Commission however disagrees with the Hearing Examiner that the College violated Section 5.4(a)(1) of the Act when it eliminated the position of police officer while the instant unfair practice hearing was still in progress. Among other factors the Commission notes that no proof was adduced that the College's actions concerning the elimination of the police officer position were motivated by anti-union animus and further concludes that the Union has not established that the College evinced any anti-union motivation whatsoever concerning the entire Tomaro incident. The Commission also states that there was record evidence establishing business justification for the College's elimination of the job title in question. The Commission therefore concludes that the College's action in abolishing the job classification of police officer did not tend to interfere with protected rights of employees nor did this action "chill" protected rights.

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Charging Party.

Appearances:

For the Respondent, John J. Degnan, Attorney
General of the State of New Jersey
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Mr. Robert Hile
Professional & Technical Employees Union, Local #484

DECISION AND ORDER

On June 17, 1977 an Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the Professional and Technical Employees Union, Local #484, AFL-CIO (the "Union") alleging that the New Jersey College of Medicine and Dentistry (the "College") 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. (the "Act"). More specifically, the Union in its original charge alleged that Carmen Tomaro, employed by the College as a security officer, was discriminatorily denied certification as a police officer because of his union activities as a shop steward. This charge was later amended to add the allega-

tion that during the course of the unfair practice hearing the College eliminated the classification of Police Officer from the security force. The above actions were alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3).^{1/}

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 26, 1977. Hearings were held on January 23, 1978 and March 30, 1978 before Edmund G. Gerber, Hearing Examiner of the Commission at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent to the close of the hearings the parties submitted Memoranda of Law, the final Memorandum being received on May 22, 1978. On July 20, 1978, the Hearing Examiner issued his Recommended Report and Decision ^{2/} which included findings of fact, conclusions of law and a recommended order. The original of the Report was filed with the Commission and copies were served upon the parties. A copy of this Report is attached to this decision and made a part hereof. Exceptions and a letter memorandum in support thereof were filed by the College on August 16, 1978. The Union filed

^{1/} These subsections prohibit 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.

^{2/} H.E. No. 79-6, 4 NJPER ____ (¶ 1978).

a response to the College's exceptions dated August 23, 1978 and requested, in part, that the Hearing Examiner's Report and Decision be affirmed.

The Hearing Examiner found that the College's action in not certifying Tomaro as a police officer was based on legitimate considerations and was not motivated by anti-union animus. The Hearing Examiner noted that Tomaro's union activities as a shop steward were minimal and credited the testimony of his immediate supervisor, John Love, that Tomaro lacked the qualities and attributes necessary to be a police officer. The Hearing Examiner did find that the College had eliminated the position of police officer while the hearing for this matter was still in progress, and it was his conclusion that the College's timing of this action had a chilling effect on the employees subsumed within the negotiations unit represented by the Union. The Hearing Examiner therefore concluded that this particular action of the College was violative of N.J.S.A. 34:13A-5.4(a)(1). The Hearing Examiner recommended that the Commission order the College to cease and desist interfering with the rights of its employees by eliminating an employment position while the Commission was determining whether one of the College's employees was wrongfully denied the same position and further order that the the College post appropriate notices.

In its exceptions the College disputed the Hearing Examiner's conclusion that the College had violated the Act by eliminating the position of police officer while the instant charge concerning whether Tomaro should have been certified as a police

officer was still pending before the Commission. The College concluded that it had no obligation to delay the implementation of a duly arrived at managerial determination, i.e. the elimination of the police officer position, when legitimate business justification for its decision existed, as found by the Hearing Examiner, when the process leading to the elimination of the title in question commenced prior to the filing of the unfair practice charge and where there was no finding of anti-union motivation on the part of the College directed at either the Union or Tomaro as a shop steward.

In the absence of exceptions with respect to the issue of the non-certification of Tomaro, and after careful consideration of the entire record, the Commission adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order concerning that portion of the instant Complaint. Concerning the elimination of the position of police officer while the hearing in this case was in progress, we disagree with the Hearing Examiner's conclusions relating to that issue for the reasons set forth below.

The Hearing Examiner found that no proof had been adduced that the College's actions regarding the elimination of the police officer position were motivated by an unlawful intent, i.e. anti-union animus. The Hearing Examiner moreover concluded that the Union had not established that the College, through its agents and representatives, evinced any anti-union motivation whatsoever concerning the entire Tomaro incident. The Hearing Examiner also subsequently stated that there was business justification for the College's

elimination of the job title in question. In addition, as pointed out by the College, the incumbents in the position of police officer were all urged to apply for positions as Senior Security Officers, a position with the same salary range as that of police officer.^{3/} The record also establishes that the process leading to the elimination of the job classification in question had commenced prior to the filing of the instant charge.

Although noting the above factors, the Hearing Examiner concluded that the elimination of the police officer position during the course of the hearing to determine whether Tomaro was illegally denied his rights to be certified in that position tended to interfere with or have a "chilling effect" on the exercise of rights protected by the Act. He relied primarily on the timing of the decision to abolish the police officer classification in support of his conclusion -- the first discussion concerning this issue took place before the unfair practice charge was filed but approximately 10 months elapsed before the position was actually eliminated, during the course of the hearing on the Tomaro discrimination matter.

The Commission in determining whether N.J.S.A. 34:13A-5.4(a)(1) has been violated applies the following general rule: It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias,

^{3/} It is not alleged by the Union that any unit members lost jobs at the College as a result of the College's decision to eliminate the classification of police officer.

tend to interfere with, restrain or to coerce a reasonable employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial "business" justification. If an employer, pursuant to the above standard, does establish such justification, no unfair practice will be found under Section 5.4(a)(1) unless the charging party proves anti-union motivation for the employer's actions. In determining initially whether particular actions tend to interfere with, restrain or coerce a reasonable employee in the exercise of rights protected under the Act we will consider the totality of evidence proffered during the course of a hearing and the competing interests of the public employer and the employee organization and/or affected individuals.

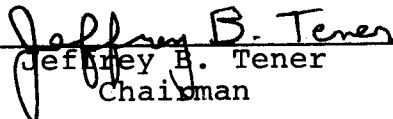
On balance, in light of the factors set forth earlier, we conclude that the College's action in abolishing the job classification of police officer on or about March 3, 1978 did not tend to interfere with the protected rights of unit employees, nor did this action "chill" protected rights. Permissible employer actions motivated by legitimate business justification and free from anti-union animus, i.e. the elimination of the job title of police officer in this instant case, should not be delayed nor restrained solely because of their timing. We are satisfied that none of the negotiations unit members had their rights to engage in protected union activities chilled by the College's actions.^{4/}

^{4/} We note that even assuming arguendo that we had concluded that the College's actions in abolishing the police officer position tended to "chill" protected rights, we would have reached the same conclusion since the Hearing Examiner found, and we affirmed, that legitimate business justification had been proven by the employer and that no evidence was advanced to prove that this action was motivated by anti-union animus.

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Schwartz voted for this decision. Commissioners Graves and Hipp voted against this decision.

DATED: Trenton, New Jersey
September 19, 1978
ISSUED: September 20, 1978

STATE OF NEW JERSEY
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PROFESSIONAL AND TECHNICAL EMPLOYEES
UNION, LOCAL #484, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission that they dismiss an unfair practice charge alleging that a security officer at the College was denied certification as a police officer because he had at one time served as a shop steward.

The Hearing Examiner found the College's action in not certifying the individual in question was based on legitimate consideration and not union activity.

The Hearing Examiner did find that the College eliminated the position of Police Officer while the hearing for this matter was still in progress and it was his conclusion that the College's timing of this action had a chilling effect on all employees and he, therefore, recommended to the Commission that they find that this action of the College violated §5.4(a)(1) of the Act.

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

John P. Degnan, Attorney General of the State of New Jersey
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party

Robert Hile
Professional and Technical Employees Union, Local #484

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On June 17, 1977, the Professional and Technical Employees Union, Local 484 AFL-CIO (PTEU), filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the New Jersey College of Medicine and Dentistry (College) has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (Act), as amended, N.J.S.A. 34:13A-1 et seq. The original charge alleges that Carmen Tomaro was discriminated against because of his union activities in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3). ^{1/}

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing

^{1/} These sections prohibit 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."

was issued on September 26, 1977. Pursuant to the Complaint and Notice of Hearing, hearings were held on January 23, 1978, and March 30, 1978.^{2/} On March 15, 1978, prior to the second day of hearing, the union filed an amendment to the charge claiming that the College eliminated the classification of Police Officer from their security force and such action constituted an additional unfair practice. The Hearing Examiner amended the Complaint to incorporate these additional charges at the March 30, 1978 hearing.

Carmen Tomaro was first employed by the College as a security officer at the Rutgers Campus on October 9, 1972, and accordingly has the most seniority in the Security Unit. The Security Unit was organized by the PTEU and was recognized as the exclusive majority representative for security guard personnel in July 1975. In September 1975 Tomaro was elected as a shop steward.^{3/} He was officially a shop steward until January 4, 1977 when he stopped functioning as such in September 1976 when he was sent to the Police Academy by the College. After returning to the College in January of 1977 Tomaro was given a change of uniform, badge and an identification card, stating he was a police officer. However, he was never sworn in nor did he receive his certification as a police officer. In March 1977 a new Security supervisor at the Rutgers Campus, James Love, was appointed by the College. Love refused to certify Tomaro as a police officer. The union brought this action claiming the College's refusal to certify Tomaro was because of his union activities.

During the year Tomaro served as a shop steward all grievances were handled orally. There were no written grievances since the union was new and did not have formal written procedures. The normal steps of the grievance procedure are 1) the shop steward would meet with the immediate supervisor (Security Supervisor, who at the time was Mr. Currie), 2) the shop steward would meet with the Personnel Director (Kathy Salwitz) and 3) the union's local business representative

^{2/} Both parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs were submitted by both parties by May 17, 1978. Upon the entire record of this proceeding, the Hearing Examiner finds that the College is a public employer within the meaning of the Act. Questions concerning alleged violation of the Act exist and this matter is appropriately before the Commission for determination.

^{3/} Apparently two were chosen at this time.

(Robert Hiles) would meet with Salwitz.

Tomaro was able to recall only three grievances which he handled as shop steward. They concerned overtime, sick time and scheduling. Although he was unable to recall other specific grievances at either hearing date, the union claims this may be partly explained by the difficulty in remembering conversations held two years earlier. However, since no one else was able to recall any other grievances which Tomaro had handled and since the three remembered were remembered in some detail, the undersigned finds these were the only grievances of any consequence which Tomaro handled. The three grievances are discussed below.

On the overtime problem, Tomaro went to Mr. Currie and said some employees were getting all the overtime while others were being denied a chance to have overtime. Since Currie didn't know much about it, Tomaro went to Mrs. Salwitz, who asked him to go back to Mr. Currie to see if they could come to an agreement. Tomaro, along with Mr. Smith, the other shop steward, went back to Mr. Currie, and together they suggested that the senior man on each shift should have the first chance to get the overtime if he's scheduled off. Mr. Currie thought it was a pretty good idea, and the Security Unit has been using this procedure ever since.

Concerning the sick leave problem, Mr. Currie and Mrs. Salwitz were worried about the potential abuse of sick time in the Security Unit, for the men would take off a day every once in a while and thus use up their accrued sick time. When Mr. Currie discussed this with several of the security officers, Tomaro told Currie that the men were entitled to the sick leave and that Currie could not stop them from taking it unless he could prove they weren't sick. Tomaro testified that he didn't get too far with Mr. Currie, went to Mrs. Salwitz and told her the same thing, and never did get the problem resolved. Tomaro spoke to Mr. Hiles about the situation, who made a comment that it was resolved between himself and Mrs. Salwitz. Mrs. Salwitz later testified that they were worried about potential abuse of sick leave for the employees' own protection, for the College does not have disability coverage for its employees. The employees only have accrued sick time, and Personnel will counsel them if it feels there is a potential abuse of sick leave.

On the scheduling problem, Mr. Casey, the Assistant Operations Manager, tried to change their schedules with the result that some men would be working ten

straight weekends. Since all the men disagreed with the schedule change, Tomaro and Mr. Smith went to Mr. Currie, who said he couldn't do anything about it. Tomaro and Smith then went to Mrs. Salwitz, who stated that Casey felt their old schedule had been short of men at times and that she would try to resolve the problem the best she could. Tomaro stated that he didn't believe her, that they never get any results from her, and then excused himself when she got mad. Tomaro then called up Mr. Hiles, who set up a meeting with Mrs. Salwitz and at that meeting the scheduling problem was resolved.

In sum, Tomaro's activity as shop steward was minimal - three grievances in a year and only one disagreement. Said activity ended completely when Tomaro was asked to go to the police academy.

There was some confusion over Tomaro's going to the academy. It was Currie, the man who Tomaro dealt with at the first level of the grievance procedure, who recommended that he go. Currie felt that all the security guards would go to the academy eventually and since Tomaro had the most seniority he went first. Neither Salwitz of Personnel nor Director of Police and Security Charles Larsson were particularly happy about Tomaro's appointment, but their displeasure was on procedural grounds. Larsson had always been consulted in the past as to selection and Salwitz felt it was a promotional opportunity - accordingly Personnel should have been consulted as to who was to go to the academy. Nevertheless, a College I.D. card for a police officer was issued to Tomaro and Larsson signed it on September 13, 1976. Further, since Tomaro had to be in uniform prior to graduation the College issued one to him along with a badge and I.D. Tomaro returned to the school in January 1977 and worked as a police officer until April 11, 1977. He handled no investigations nor did he make any arrests ^{4/} although he did issue summonses and perform routine patrol duties.

Pursuant to Article XI of the contract covering seniority and transfers, paragraph 5, Tomaro had to serve a 90-day probationary period as a police officer before he could be certified. If he failed to perform at his new position satisfactorily, he could be returned to his former position.

While Tomaro was at the academy, Currie left the College and his position was filled on March 4, 1977, by John Love.

^{4/} No police investigations or arrests had been made by any officer since police officers were first used at the campus.

A week after Love began working at the College, Tomaro asked him when he would receive his certification as police officer. Love told Tomaro that this was all new to him and that he would have to speak to Mr. Brereton, Operations Manager, about the certification. Love talked to Brereton a few days later, and Brereton said he would leave the decision as to whether Tomaro should be certified or not to Love.

Love then observed Tomaro at work over the next few weeks and reached a decision. ^{5/}

A meeting was held at the request of the union business agent, Mr. Hiles, among all parties involved. Salwitz stated that she was leaving the sole responsibility of the whole department and, therefore, the decision concerning Tomaro to Love. Love stated that in his opinion Tomaro was not fit or qualified to be a police officer and that he would not certify Tomaro. Love testified that he felt that Tomaro lacked the qualities necessary to be a police officer. Specifically, Tomaro was too excitable. It is noted that Officer Edward Koslovsky, who was called as a witness by the union, admitted on cross-examination that Tomaro is excitable.

Love further testified that he was unaware of the fact that Tomaro had once been a shop steward until it came up in a conversation he had with Officer Koslovsky in May or June of 1977. Again Koslovsky's testimony was in accord with Love's as to this conversation.

On balance the undersigned found Love to be an honest, forthright and credible witness.

In In re City of Hackensack, P.E.R.C. 77-19, 3 NJPER 143 (1977), appeal pending, Appellate Division, Docket No. A-2546-76, and In re Haddonfield, P.E.R.C. 77-36, 2 NJPER 71 (1977), the Commission adopted a twofold standard to be applied to charges of employer discriminatory conduct in violation of N.J.S.A. 34:13A-5.4 (a)(3). A violation should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the

^{5/} Love had 18 years' experience on the New York City Police Force and at one time served with the Tactical Patrol Force. Part of his duties with the Tactical Patrol was the evaluation of officers. Love testified he had evaluated over 100 officers.

effect of so encouraging or discouraging employees in the exercising of those rights. In the instant case, I am satisfied that the decision to deny Tomaro the position of Police Officer as made by Love was made without regard to Tomaro's serving as a shop steward, particularly when his limited role as shop steward is balanced against Love's testimony. As stated above, it was Currie, the person who most often dealt with Tomaro as shop steward, who was responsible for sending Tomaro to the police academy to begin with. Similarly the College's conduct in denying Tomaro such a promotion cannot be considered inherently destructive.

The undersigned is concerned however about the College's action of eliminating the position of police officer while the instant action is pending.

The College introduced evidence to show that the decision to eliminate this position was made prior to the filing of the charge in this matter. In the spring of 1977 Koslovsky put in a request to be upgraded to sergeant. ^{6/} A job description along with the request was apparently sent to Kenneth Steirer, the Manager of Planning and Compensation at the College, by the Personnel Assistant at the Rutgers Campus, Leslie Diamond. Steirer, after consulting with Larsson on this matter replied to Diamond on May 20, 1977. He denied the application for Koslovsky's promotion and requested that the police officer position be reviewed for possible downgrading.

It was not until ten months later, however, March 3, 1978, that the police officers were actually downgraded. On that date the two police officers at the Rutgers Campus were notified that police officers would no longer be used there. Salwitz testified that both officers were notified earlier, but how much earlier was never made clear. Both men were also encouraged to apply for the position of Senior Security Officer. Salwitz maintains that this decision came only after a lengthy review of the staffing of security at the Rutgers Campus. It is noted that the alleged unfair practice, i.e. the failure to certify Tomaro as a police officer, occurred at the same time as the issue under discussion arose. Accordingly, even if the College acted promptly the issue would be before me.

Nevertheless, the undersigned finds it hard to accept the College's contention that the timing of their action was a coincidence. Admittedly no proof was adduced that this action was motivated by an unlawful intent. In fact, there

6/ Tr. of 3/30/78, p. 94.

was business justification for their action. Nonetheless in a §5.4(a)(1) violation (unlike a §(a)(3) violation discussed above), the motive behind an employer's conduct is not an element of the unfair practice charge and if the employer's conduct tends to interfere with the rights of employees it is violative of §5.4(a)(1). In re City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER ____ (1978), appeal pending, Appellate Division, Docket No. _____. The undersigned believes that the College's elimination of the position of Police Officer during the ongoing course of a hearing to determine whether an employee was unlawfully denied his rights to that very position does tend to interfere with the protected rights of its employees. This action unquestionably has a "chilling effect" on the exercise of protected rights. Accordingly, the Hearing Examiner will recommend to the Commission that they find that the College violated N.J.S.A. 34:13A-5.4(a)(1) when they eliminated the position of Police Officer.


The restoration of the position will have no effect on Tomaro, however, since the College was justified in refusing to certify him as an officer. It is therefore recommended that the appropriate remedy in the instant case is the posting of a notice.

RECOMMENDED ORDER

It is recommended that the Commission order the Respondent, its officers and agents to

- 1) Cease and desist from:
 - a) interfering with the rights of its employees by eliminating employment positions while this Commission is determining whether one of its employees was wrongfully denied the very same position
- 2) Take the following affirmative action which is necessary to effectuate the purposes of the Act:
 - a) post in a prominent place at the Rutgers Campus of the New Jersey College of Medicine and Dentistry copies of the attached notice. Copies of said notice, on forms provided by the Commission shall, after being signed by the Respondent's representative, be posted for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by any other material.

3) It is further recommended to the Commission that the portion of the Complaint alleging a violation of N.J.S.A. 34:13A-5.4(a)(3) be dismissed.



Edmund G. Gerber
Hearing Examiner

DATED: July 20, 1978
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with the rights of our employees by eliminating employment positions while the Public Employment Relations Commission is determining whether one of our employees was wrongfully denied the very same position.

WE WILL post in a prominent place at the Rutgers Campus of the New Jersey College of Medicine and Dentistry copies of this notice for a period of sixty (60) consecutive days.

NEW JERSEY COLLEGE OF MEDICINE AND DENTISTRY

(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780