

H.E. NO. 2001-19

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

In the Matter of

COUNTY OF MIDDLESEX
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CI-H-2000-43

KENNETH C. SMITH,

Charging Party.

Appearances:

For the Respondent
Benjamin D. Leibowitz, Deputy County Counsel

For the Charging Party
Kenneth C. Smith, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 23, 2000, Kenneth C. Smith, a corrections officer, filed an unfair practice charge against Middlesex County. The charge alleges that the County, specifically, three named superior officers, "retaliated against Smith for [his] filing discriminat[ion] charges against [them]." The unfair practice charge alleges that on April 28, 2000, Smith filed such a charge and that on May 8, he was informed that the "long-standing policy regarding mandatory overtime [exemption] is no longer valid," the charge "due in part to the charges filed." The charge further alleges that, "When Warden [Michael] Abode was questioned about this he confirmed what Captain [Michael] Diantonio had already

told [Smith]: 'Because of your complaint your status has changed.'" The County's actions allegedly violate section 5.4a(1) and (4)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On September 14, 2000, a Complaint and Notice of Hearing issued. On September 25, the County filed an Answer, denying knowledge "as to precisely what charges" Smith filed; denying alleged comments by named superior officers; and denying that it retaliated against Smith.

On February 6, 2001, I conducted a hearing at which the parties examined witnesses and presented exhibits. A post-hearing brief was filed on April 27, 2001 and the record closed on April 30.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. Kenneth Smith is a corrections officer employed by Middlesex County. On October 14, 1999, Smith and other ethnic or racial minority officers met with corrections Warden Michael Abode and majority representative president William Tolentino to discuss possible discrimination in matters of assignment, promotion,

^{1/} These provisions 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. (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."

training, benefits and use of facilities (T51; T52; R-4).^{2/}

Witnesses Tolentino and Hargrove testified that the meeting was sometime in 2000 (T62; T71). I do not credit those testimonies; Smith's letter and testimony and Abode's specificity about the date are persuasive. Abode repeated his stance on exemptions from mandatory overtime duty for corrections officers, first mentioned to Smith at a previous meeting with Captain Michael Diantonio (T50; T51). Abode said that he "did not have a problem with you [Smith] taking time off for mid-terms as long as you could bring in documentation with the dates" (T50).

2. Exemptions from mandatory overtime duty have been generally available to corrections officers since 1995 or 1996, when the County implemented shift bidding (T59). Union president Tolentino confirmed that officers had been excused from mandatory overtime "due to their right to attend college courses" (T65). He was unaware of any corrections officer receiving a five-week exemption (T64). Corrections officers Betts and Kravitz had received overtime exemptions because they served in "special posts," such as "training officer" (T66-T67). Officers York (now a lieutenant) and Bruce had been exempt for about one week sometime before shift bidding was implemented (T67-T68).

^{2/} "T" represents the transcript, followed by the page number; "C" represents Commission exhibits; "CP" represents Charging Party exhibits; "R" represents Respondent exhibits.

Exemptions from overtime duty were issued for about one-week periods, during an officer's mid-term and/or final examinations (T59-T60). No written policy explains the circumstances by which officers were granted exemptions from mandatory overtime (T28; T56). Exemptions may be rescinded if a need for overtime duty arises during a requested period (T39-T40).

3. Corrections officers Eugene Gray, Clarence Hargrove and William Gordon testified that they each attended the October 14, 1999 meeting with Warden Abode (T69; T71; T86) (see finding no. 1). Gray testified that before the meeting, Smith was exempted from mandatory overtime but afterwards, he was not (T70). Hargrove testified that after the meeting, Smith was getting "stuck" for mandatory overtime duty (T71). Gordon testified that after the meeting, "there were a few instances where [Smith] was told that he would be mandatory for overtime" (T88). I credit these testimonies.

4. On or about April 25, 2000, Smith asked Lieutenant James Jetters to approve a five-week exemption from mandatory overtime duty. Smith said that he was pursuing a five-week "case study" for academic credit (T25; T26; T47; R-1). Smith gave Jetters a course syllabus indicating that the case study represented 30% of the course grade (R-1).

Jetters initially was uncertain how to respond to the request (T27). The second shift commander, Katherine York, was

away from work on injury leave (T74; T75). Smith either "led [Jettters] to believe" or left an "impression" that Abode had approved the five-week exemption (T25; T32; T33; R-1). Jettters approved the request, though no other officer had ever received a five-week exemption (T27; T28; T103).

5. On April 26 or 27, 2000, Captain Michael Diantonio phoned Jettters and advised that Smith was not exempt from mandatory overtime duty for five weeks (T30; T40; T94). Jettters mentioned that Smith showed him the course syllabus (T93; T102). Diantonio reversed Jettters' decision:

Because what Jettters told me was he excused you [Smith] for five weeks, carte blanche. And I told him that wasn't the deal. It would have to be final exams and mid-terms.
[T98]

Jettters had not asked or informed Diantonio about the requested five-week overtime exemption before approving it (T28; T94). Diantonio told Jettters that his approval was "outside the realm of [his] prerogative and therefore it was overturned" (T31). The record does not show how or precisely when Diantonio was informed of Jettters' approval of Smith's request or whether Smith was promptly informed of Diantonio's reversal (T77).

6. On April 28, 2000, Smith sent a letter concerning "gross violations of County discrimination policy" to the County affirmative action officer, Geraldine Piegdon (T145; R-4). The three-page letter details alleged incidents or conversations between Smith and superior officers Jettters, Diantonio and Abode. The

asserted "areas of concern are daily assignments, promotion, training, fringe benefits and the use of all facilities" (R-4). Smith signed the letter, designating himself as "scribe for the minority officers." Smith could not recall if he sent a copy of the letter to anyone else (T146). I infer that he did not. Smith conceded that his April 28 letter is the "discriminatory charges" referenced in the Complaint (T146).

7. On May 7, 2000, Smith was informed by a Sergeant Sazlay that his "paperwork is no good and you [Smith] are ordered third shift" (R-3). Smith had been working on the second (3-11 p.m.) shift (T29). Nothing in the record suggests that Smith was permanently reassigned to the third shift (11 p.m. - 7 a.m.). Smith then spoke with a Lieutenant Maydish, who told him, "As per the Captain your paperwork is no good and bring a note from school" (R-3).

8. On May 8, 2000, Diantonio met with second shift commander Lieutenant York and Smith (T78; T91; R-2). York did not know about nor have in her possession the "documentation," i.e., the course syllabus, which Smith gave to Jetters (T79). Jetters had misplaced the syllabus in a file which stored requests for military leave and jury duty time off (T79).

Diantonio explained that Abode had already instructed Smith that exemptions from mandatory overtime duty were appropriate for examination periods only (T79; R-2). Smith replied that Abode had also excused him "for his labs and to do his thesis," which Diantonio again denied (R-2).

Smith asked Diantonio why the policy or approval/denial of his request was now "changing for the third time" (R-2). Diantonio denied any "changes" and reiterated that Abode had issued the only directive of which he was aware (R-2).

Smith retorted that it no longer mattered because he was graduating in one month, anyway. Diantonio repeated that Smith could be exempted from mandatory overtime duty during mid-term and final examinations. Smith did not request such exemptions (R-2).

Abode did not attend this meeting. He denied revoking Jetters' approval of Smith's request for a five-week exemption because of any charge Smith filed (T56). Although Abode did not specifically deny "confirming" to Smith that his April 28 complaint "changed" his (exemption) "status," nothing in the record shows that Smith and Abode met or spoke to the other between April 28 and May 8, 2000 (T48-T52). Nor did Smith testify that Abode confirmed in any way the purported reason for the alleged "change in status."

9. Later that day, Smith wrote an "incident" report and gave it to York, requesting that it be "filed up the chain of command" (T81-T82; R-2; R-3). The "location" of the incident was Diantonio's "office" and the report is addressed "to whom it may concern." It states:

This report is in regards to the discriminatory practices of Captain Diantonio and Lieutenant K. York. Several times they have changed the requirements for being excused from overtime. Several days ago, I submitted the necessary documents according to Warden Abode's request. These documents were verified by Lieutenant Jetters. However, on 5/7/2000 I was told by

Sergeant Sazlay, "Your paperwork is no good and you are ordered third shift." After this exchange I talked to Lieutenant Maydish, he stated, "As per the Captain your paperwork is no good and bring a note from school[.]" I opine that the actions of Captain Diantonio and Lieutenant York are in response to unfair labor charges filed on 4/27/2000 by a group of minority officers. Their actions are viewed as harassment and retaliatory in nature....
[R-3]

York read Smith's report, placed it in the "shift" envelope and a short time later wrote a memorandum to Diantonio as a "cover" to it (T83; R-2).

10. Also on May 8, the County affirmative action officers wrote a letter to Smith, addressed to his residence. A copy was sent to County labor relations counsel (not attorney of record for Respondent) (CP-2). The officers wrote that Smith's concerns about postings, scheduling and manpower are really "managerial prerogatives"; that such disputes "should be addressed by filing a formal grievance"; that concerns about promotions should be addressed to the State Department of Personnel; and that nothing entitled Smith to be a "scribe for minority officers" (CP-2).

11. On May 9, 2000, Diantonio asked Jettters to write a memorandum to him about Smith's request for exemption from mandatory overtime duty (T41; R-1). Jettters wrote a memorandum describing the circumstances of the request and his approval (R-1).

12. On May 11, 2000, Smith wrote a responsive letter to one of the affirmative action officers, attaching another copy of his April 28 letter, together with a list of 27 named corrections

officer witnesses to "the grievance hearing with Warden Abode" and officers who "would respond if asked...." The letter disputes the affirmative action officers' written "findings," and questions "...how an investigation was completed without myself or any other correctional officers being interviewed" (R-5).

13. On May 21, 2000, Smith wrote another letter to the affirmative action officers, pursuant to their request for a "format which would be conducive to County policy regarding discrimination in the workplace" (R-6; T165). The letter describes particular concerns about overtime, discipline and post assignments. Nothing in the letter references exemptions from mandatory overtime duty or alleged discrimination in retaliation for filing the April 28 letter (R-6; T167).

ANALYSIS

Public employers are prohibited from discriminating against any employee because he or she has filed a complaint or given information or testimony "under the Act." N.J.S.A. 34:13A-5.4a(4). The critical component of this subsection, as well as subsection a(3), is whether the alleged adverse action by the public employer is impermissible because it is "retaliatory." Hunterdon Cty. and CWA, 116 N.J. 322, 334 (1989).

Retaliatory motive may be proved by applying standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). 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 or 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 does not present evidence of a motive not illegal under the Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Where the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action, 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.

Smith has produced neither direct nor circumstantial evidence showing that the County changed its policy exempting officers from mandatory overtime duty in retaliation for his April 28, 2000 filing of a letter complaining of discrimination with the County affirmative action officer.

For purposes of this decision, I assume that Smith's April 28 letter to the affirmative action officer is conduct protected by the Act. See No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4

NJPER 451 (§4205 1978). ("[I]ndividual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions...constitute protected activities under our Act.")

The credible and unrebutted testimony of Lieutenant Jeters (one of Smith's witnesses) is that one or two days before Smith filed the letter, Captain Diantonio advised him that his approval of Smith's April 25th request for a five-week overtime exemption was rescinded. Diantonio advised Jeters (acting shift commander for the injured Lieutenant Katherine York) that he exceeded his authority and that exemptions were available for the periods of mid-term and final examinations only. Accordingly, Smith has failed to show that the County knew of his protected conduct or was hostile to it when the adverse employment action (rescinding approval of the requested five-week exemption) was taken.

Smith also did not prove the specific allegation in the Complaint that on May 8, 2000, during his meeting with Diantonio and York,

...the reason for the policy [] change was due in part to the charges filed. When Warden Abode was questioned about this he confirmed what Captain Diantonio had already told me: 'Because of your complaint, your status has changed.'
[C-1]

This allegation, if proved, would be direct evidence of hostility.

Nothing in the record confirms any change in the exemption "policy" from at least October 14, 1999, when Abode informed Smith

and other minority officers that exemptions from mandatory overtime were available to corrections officers during the periods of mid-term and final examinations. Diantonio's rescission of Jetters' approval of Smith's request for the five-week exemption does not prove a change in policy (or, for that matter, a change in a term and condition of employment). The rescission actually suggests the County's adherence to the "policy." The testimonies of officers Gray, Hargrove and Gordon that Smith was "stuck" in having to work mandatory overtime, despite his apparent opposition, does not alter my view. The record shows that Smith was denied a requested exemption once only, on or about April 26, 2000, about six months after the meeting with Abode. The officers' testimonies do not specify date, time or place of the purported instances of Smith getting "stuck." They have slight probative value. One could infer that these officers were alluding to instances of possible retaliation against Smith for his protected conduct at the October 14, 1999 meeting. Such an allegation does not appear in the Complaint.

Nor did Smith or any witness testify that Abode "confirmed" the alleged reason for rescinding Jetters' approval of the five-week exemption. Nor did anyone testify that Diantonio said, "Because of your complaint your status has changed." Further undermining this allegation is Smith's own incident report, filed later that day, on May 8, 2000, in which he wrote:

I opine that the actions of Captain Diantonio and Lieutenant York are in response to unfair labor

charges filed on 4/27/000 by a group of minority officers.
[R-3]

Smith objected to being cross-examined on his incident report; I did not insist that he answer Respondent's questions about it, but advised that I may draw negative inferences from his silence. Smith's admitted and near-contemporaneous "opinion" about the motives behind the employment action, i.e., rescission of the five-week exemption, subverts his subsequent allegation (in the Complaint) that such motive was baldly stated in his presence. If the purpose of Smith's in-house complaints to the affirmative action officers was to identify alleged discriminatory conduct of named superior officers, why did he choose not to quote Diantonio's purported statement and Abode's concurrence in them? In the absence of any evidence showing that Diantonio made the remark or that Abode somehow confirmed it, I find that it was not spoken or conveyed.

I have already found that Smith filed his letter on April 28, 2000. The Complaint sets forth that date, the letter bears that date, and Smith did not testify otherwise, or offer differing testimony. I do not credit his reference to April 27 in his incident report.

Considering all the facts, I find that Smith did not prove that the County retaliated against him for filing a discrimination complaint with the County affirmative action officer on April 28, 2000. Nor do the facts suggest that the County independently violated 5.4a(1) of the Act. N.J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.

Jonathon Roth
Hearing Examiner

DATED: June 7, 2001
Trenton, New Jersey