P.E.R.C. NO. 96-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WARREN COUNTY,

Respondent,

-and-

Docket No. CO-H-94-280

PBA LOCAL 302,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by PBA Local 302 against Warren County. The charge alleged that the employer violated the New Jersey Employer-Employee Relations Act when it terminated Deborah Ellison in retaliation for her protected activity. The Commission adopts the Hearing Examiner's recommendation that the employer proved that would have terminated Ellison for insubordination even absent her protected activity.

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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BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WARREN COUNTY,

Respondent,

-and- Docket No. CO-H-94-280

PBA LOCAL 302,

Charging Party.

Appearances:

For the Respondent, David A. Wallace, attorney

For the Charging Party, Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, attorneys (Bruce D. Leder, of counsel; Jacqueline Jassner, at hearing and on the exceptions)

DECISION AND ORDER

On March 17, 1994, PBA Local 302 filed an unfair practice charge against Warren County. 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), (2) and (3).1/

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

Footnote Continued on Next Page

On April 25, 1994, a Complaint and Notice of Hearing issued. On May 26, the employer filed its Answer generally denying the allegations.

On October 13, December 9 and December 16, 1994, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On June 20, 1995, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 95-26, 21 NJPER 255 (¶26164 1995). He recommended dismissing the subsection 5.4(a)(2) allegation because he found no evidence to support it. He recommended dismissing the subsection 5.4(a)(1) and (3) allegations based on his application of the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). On November 28, we adopted the Hearing Examiner's recommendation to dismiss the subsection 5.4(a)(2) allegations and remanded the case for a supplemental report reapplying the standards set forth in Bridgewater. P.E.R.C. No. 96-41, 22 NJPER 26 (¶27012 1995).

On January 5, 1996, the Hearing Examiner issued his supplemental report. H.E. No. 96-11, 22 NJPER 96 (¶27048 1996). He concluded that although protected activity was a motivating factor in Ellison's termination, the County proved that it would have taken

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1/ Footnote Continued From Previous Page

exercise of the rights guaranteed to them by this act." by terminating correction officer Deborah Ellison in retaliation for her exercising rights protected by the Act.

the same action even absent the protected activity. Ellison was a provisional employee who grieved the denial of her request to transfer to the day shift. After the denial, she resigned but was later reinstated by an arbitrator. Upon returning to work, Ellison was ordered to under complete retraining, including exposure to pepper mace. She was terminated 22 days later for refusing to be exposed to mace and for failing to take a Civil Service examination for a permanent correction officer title.

On February 5, 1996, the charging party filed exceptions to the Hearing Examiner's supplemental report. It disagrees with the Hearing Examiner's supplemental finding of fact that employees who fail to complete any aspect of agency training are terminated. It also disagrees with the Hearing Examiner's conclusions that the employer's asserted reasons for terminating Ellison were not pretextual and that the employer would have terminated her for those reasons even absent her protected activity.

On February 13, 1996, the employer filed cross-exceptions and an answering brief. It asserts that the charging party did not prove that protected activity was a motivating factor in Ellison's termination. It further asserts that the Hearing Examiner properly found that Ellison was terminated because she refused mandatory training and because she did not take an announced examination for the correction officer position.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. No. 95-26 at 2-25) and

supplemental findings of fact (H.E. No. 96-11 at 3-4) with these modifications. We clarify finding 2 in H.E. 96-11 to indicate that the testimony that any employee who objected to any part of the training would be terminated appears to refer to new hires (1T144). We clarify finding 31 in H.E. No. 95-26 to indicate that Warden McGhee testified that he called his attorney when he discovered that Ellison had not taken the correction officer examination. He explained his delay in terminating Ellison by stating that he had to talk to the administrator, his attorney and the Department of Personnel. He did not testify that he spoke to or received a written opinion from any of them before her termination.

In re Bridgewater Tp., 95 N.J. 235 (1984), requires a charging party to prove by a preponderance of the evidence that protected activity was a substantial or motivating factor in the adverse personnel action. The Hearing Examiner found that the charging party met that burden. He concluded that McGhee's statement to Ellison that she should remember that she was only a provisional employee was designed to dissuade her from filing the grievance challenging the denial of her request to transfer to the day shift. After the denial, Ellison filed a grievance and subsequently resigned. The arbitrator hearing the grievance ordered Ellison reinstated to the day shift. She was fired just 22 days after returning to active duty. The warden's warning Ellison about filing a grievance coupled with the timing of the termination shortly after prevailing on the grievance convinced the Hearing

Examiner that Ellison's protected activity in filing the grievance was a substantial or motivating factor in her termination. We adopt the Hearing Examiner's conclusion on this issue.

Under Bridgewater, the burden then shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even absent the protected activity. The employer argues that Ellison was terminated pursuant to Department of Personnel ("DOP") statutes and regulations. After Ellison had resigned from her provisional position, but before she was reinstated by the arbitrator, DOP announced and administered a test for correction officer. Ellison sat for the test but designated that it be applied only to a State correction officer position. Under DOP regulations, if a provisional employee does not sit for an examination for his or her title, the employer will be notified by DOP and must take steps to separate the employee from the provisional title. Here, DOP never notified the County that Ellison had not asked that the test apply to the County. And the County never asked Ellison or DOP if the test that Ellison had taken could be applied to her County position. It is also not clear to us that the regulations applied to Ellison since she was not employed by the County at the time the test was announced or administered.

We believe that the County relied, in part, on this DOP requirement in justifying its decision to terminate Ellison and that therefore the reason was not pretextual. In October 1992, the warden had warned other provisional employees that they had to take

the examination or face being bumped by someone on the new Civil Service list. Terminating Ellison for not applying the examination to the County was consistent with that belief. We are not convinced, however, that the County proved by a preponderance of the evidence that it would have fired Ellison for this reason absent her protected conduct. On this record, we cannot discern whether the DOP rationale was independent and legally correct, or whether it was used to bolster a termination motivated by protected activity or some other reason.

The employer also argues that Ellison was terminated for insubordination. When Ellison returned to work, she was ordered to undergo complete retraining including exposure to pepper mace. The mace portion of the training had only been given to new hires, supervisors and Special Emergency Response Team members. Ellison refused to undergo pepper mace exposure as part of her retraining. Based on the credibility of the witnesses and the entire record, the Hearing Examiner concluded that Ellison never told the employer that medical reasons precluded her from being exposed to pepper mace. We have no basis to disturb that determination. We note that Ellison's own incident report did not mention that she had medical reasons for refusing the exposure. Instead her report stated that she was not a new hire, other officers returning from leave did not have to be retrained, and that the mace exposure was retaliatory and being done in a dangerous manner. Although the testimony that employees who fail to complete

any aspect of training are terminated appears to refer to new hires, the record as a whole supports the Hearing Examiner's conclusions that the employer viewed Ellison's refusal to be maced as insubordination and that this insubordination required her discharge. Thus, we adopt the Hearing Examiner's recommendation that the employer proved that it would have terminated Ellison for insubordination even absent her protected activity. Under Bridgewater, the Complaint must therefore be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Acting Chair

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

DATED: June 20, 1996
Trenton, New Jersey
ISSUED: June 21, 1996

H.E. NO. 96-11

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

In the Matter of

WARREN COUNTY,

Respondent,

-and- Docket No. CO-H-94-280

PBA LOCAL 302,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission, following a remand for clarification of his earlier Report and Recommended Decision, finds that Warren County did not terminate Deborah Ellison in retaliation for her having exercised rights protected by the New Jersey Employer-Employee Relations Act. The Hearing Examiner explained that although protected activity was a motivating factor in Ellison's termination, the County proved that it would have taken the same action even absent the protected activity.

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.

H.E. NO. 96-11

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

In the Matter of

WARREN COUNTY,

Respondent,

-and- Docket No. CO-H-94-280

PBA LOCAL 302,

Charging Party.

Appearances:

For the Respondent, David A. Wallace, attorney

For the Charging Party, Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, attorneys (Jacqueline Jassner, of counsel)

HEARING EXAMINER'S SUPPLEMENTAL REPORT AND RECOMMENDED DECISION

On March 17, 1994, PBA Local 302 (PBA or Charging Party) filed an Unfair Practice Charge (C-3)[1/] with the Public Employment Relations Commission (Commission) against Warren County (County or Respondent). The PBA alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

1/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "J" refer to Exhibits submitted jointly by the parties, exhibits marked "CP" refer to Charging Party exhibits and those marked "R" refer to Respondent exhibits. Transcript citations 1T1 refers to the transcript developed on October 13, 1994 at page 1, 2T and 3T refer to the transcripts developed on December 9 and December 16, 1994, respectively.

(Act), specifically sections 5.4(a)(1), (2) and (3),[2/] by terminating correction officer Deborah Ellison in retaliation for exercising rights protected by the Act.

On April 25, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On May 26, 1994, the County filed its Answer (C-2) generally denying the allegations contained in the Charge. Hearings were conducted on October 13, December 9 and December 16, 1994, at the Commission's Offices in Newark, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.

On June 20, 1995, I issued a Report and Recommended Decision, H.E. No. 95-26, 21 NJPER 255 (¶26164 1995). I recommended that the Commission dismiss the Complaint.

On November 28, 1995, the Commission issued P.E.R.C. No. 96-41, 21 NJPER ___ (¶_____ 1995), its Decision and Order directing that the case be remanded to me for a supplemental report. The Commission requested that I clarify whether or not Deborah Ellison's protected activity was a substantial or motivating factor in her

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2/ 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."

termination and, if so, whether or not the employer would have terminated Ellison even absent her protected activity. The Commission adopted my recommendation to dismiss the subsection 5.4(a)(2) allegation.

The County alleged two reasons for Ellison's termination. The County argued that Ellison, as a provisional employee subject to Civil Service law and Department of Personnel (DOP) Rules and Regulations, failed to file for and take an examination which had been announced for her title, the passage of which is required in order for her to have achieved permanent status in her title. The County also contended that Ellison was insubordinate when she refused to complete agency training by failing to submit to pepper mace exposure.

Upon the entire record, I make the following supplemental:

FINDINGS OF FACT

1. I take administrative notice of the following statutory provision and rule. N.J.S.A. 11A:4-5 states, in relevant part, the following:

> Once the examination process has been initiated due to the appointment of a provisional or an appointing authority's request for a list to fill a vacancy, the affected appointing authority shall be required to make appointments from the list if there is a complete certification, unless otherwise permitted by the Commissioner for valid reason such as fiscal constraints.

N.J.A.C. 4A:4-1.5(b) states the following:

> Any employee who is serving on a provisional basis and who fails to file for and take an examination which has been announced for his or her title shall be separated from the provisional title. The appointing authority shall be notified by the Department and shall take necessary steps to separate the employee within thirty days of notification, which period may be extended by the Commissioner for good cause.

2. Employees who fail to complete any aspect of agency training are terminated (1T144).

ANALYSIS

The Commission requested clarification of the analysis set forth in H.E. No. 95-26. I offer the following clarification.

Under In re Bridgewater Township, 95 N.J. 235 (1984), if a charging party has proven, by a preponderance of the evidence, that protected activity was a motivating factor in an adverse employment action, the burden then shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even absent the protected activity. I have found that the charging party established that the employee engaged in protected activity, the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. I reached these conclusions on the basis of Ellison's having filed a grievance contesting the denial of her request to transfer to the day shift and the warden's "reminder" that Ellison was only a

provisional employee. I found that the warden's "reminder" was designed to dissuade Ellison from exercising her right to file a grievance. Additionally, I found that the timing of the termination, together with the warden's statement regarding Ellison's provisional status, was sufficient evidence to infer that the employer was hostile toward her protected activity. Consequently, I found that the charging party proved that Ellison's protected activity was a substantial or motivating factor in the termination decision.

Having so concluded, under the Bridgewater standard, the burden shifts to the employer to prove, by a preponderance of evidence, that it would have taken the same action even absent the protected activity. The employer offers two co-equal reasons for terminating Ellison: (1) insubordination and (2) her failure to file for and take a DOP administered examination for permanent appointment to the correction officer position she held provisionally. Under Bridgewater, since the charging party has proven by a preponderance of the evidence that Ellison's protected activity was a substantial or motivating factor in her adverse personnel action, I must determine whether or not the employer's asserted reasons for the personnel action are pretextual. If the employer's reasons are not rejected as pretextual, the case becomes one involving dual motives. There are motives both unlawful under our Act and other motives contributing to the personnel action. In dual motive cases, the employer will not have violated the Act only

if it has proven, by a preponderance of the evidence, that the adverse action would have taken place even absent the protected conduct.

In H.E. 95-26, I addressed the employer's argument that Ellison was terminated because of insubordinate conduct. I found that Ellison refused to complete all aspects of the required agency training program, as ordered. Ellison did not submit to pepper mace exposure. I rejected Ellison's contention that she refused to undergo pepper mace exposure because of medical reasons. I found that Ellison never expressed to any County representative that pepper mace exposure would interfere with her ongoing medical treatment for an ear and sinus ailment. Consequently, I find that the County's assertion that it terminated Ellison because of her insubordinate conduct to not constitute a pretextual reason.

Since the County's alleged reason is not pretextual, Bridgewater now requires that the County prove, by a preponderance of the evidence, that it would have taken the same action even absent Ellison's protected activity. I find that the County has met its burden. Ellison's insubordinate refusal to complete agency training resulted in her failure to achieve the requisite level of training mandated for correction officers at the facility. Employees who fail to complete any aspect of agency training are terminated, and Ellison was treated in accordance with that standard. Consequently, I find that the County would have terminated Ellison even absent her protected activity.

The County also argues that Ellison was properly terminated pursuant to Civil Service law and DOP Rules and Regulations. I must analyze this reason asserted by the County in accordance with Bridgewater in the same manner that I analyzed the County's insubordination argument.

On October 31, 1992, DOP conducted an examination for law enforcement positions which included the County's correction officer positions. The examination resulted in DOP's dissemination of an eligibility/failure roster (R-11) to appropriate County officials including McGhee. Ellison's name was not included on R-11. The County argues that N.J.S.A. 11A:4-5 and N.J.A.C. 4A:4-1.5(b) required it to terminate Ellison once DOP issued the eligibility list from which permanent appointments to the correction officer position must be made. The County contends that pursuant to N.J.A.C. 4A:4-1.5(b), the employer must displace provisional employees whose names are not included on the DOP eligibility list with individuals named thereon. I find the County's course of action under its interpretation of Civil Service law and DOP Rules and Regulations to be reasonable and, thus, not pretextual. See also, DeLarmi v. Borough of Fort Lee, 132 N.J.Super. 501 (App. Div. 1975). A plain reading of the Civil Service statute and DOP Rules is supportive of the County's actions. Whether the County is actually correct in its interpretation of Civil Service law and DOP Rules and Regulations is not controlling, since under Bridgewater the issue which must be determined is whether the County's reason

for acting was merely pretext. I have found that it was not. Primary jurisdiction for a definitive determination regarding whether the County acted in accord with law, rules and regulations lies with DOP. Also irrelevant is the fact that Ellison was familiar with the DOP administered examination process, since that issue does not shed light on the County's motive for its personnel action.

Like the "insubordination" reason, the County bears the burden of proving, by a preponderance of the evidence, that it would have terminated Ellison under its alleged "Civil Service" rationale even absent Ellison's protected activity. On October 22, 1992, subsequent to Ellison's resignation[3/] and eleven months prior to her September 22, 1993 termination, McGhee posted a notice (CP-3) to all non-permanent, e.g. provisional, employees waiting to take the DOP administered corrections officer examination. He advised employees that if they had not received an examination notification from DOP by October 26, 1992, they must contact DOP. McGhee stated:

> It is very important that you take care of this matter, because you may be bumped by a person that appear [sic] on the new Civil Service list. [CP-3.]

CP-3 proves that Ellison's "Civil Service" termination was in accord with McGhee's long held understanding that a non-permanent employee would be displaced from his/her position by anyone whose name

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3/ See Finding of Fact number 6, H.E. No. 95-26.

appeared on the DOP eligibility list, if the employee failed to sit for the examination.

Thus, I conclude that the County's "Civil Service" reason for Ellison's termination constituted a motivating factor in its personnel action, and, based on its interpretation of Civil Service law and DOP Rules and Regulations, the County would have terminated Ellison even absent her exercise of protected activity.4/

Accordingly, on the basis of the entire record and the analysis set forth above, I make the following:

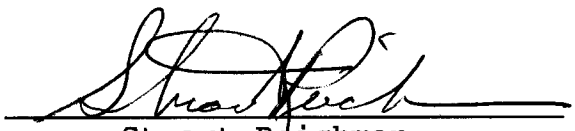
CONCLUSIONS OF LAW

Warren County did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by terminating Deborah Ellison.

4/ I note that had I found either of the two reasons put forth by the County to have been pretextual, that I would have had to consider that fact in evaluating the County's other asserted reason. The fact that an employer has expressed a reason which is rejected as pretextual requires closer scrutiny of other expressed reasons. Such is not the case in this matter.

RECOMMENDATION

I recommend that the Commission **ORDER** that the complaint be dismissed.



Stuart Reichman
Hearing Examiner

DATED: January 5, 1996
Trenton, New Jersey