

P.E.R.C. NO. 80-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF WILDWOOD,

Respondent,

-and-

Docket No. CO-79-257-84

C.A.P.E. LOCAL 1983, INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED
TRADES,

Charging Party.

SYNOPSIS

In an unfair practice proceeding the Commission, noting particularly the absence of exceptions, dismissed an unfair practice complaint which alleged that the City violated the Act by suspending one employee and discharging another because of their union activities. The Commission agreed with the Hearing Examiner that the union failed to prove that the suspension and discharge were motivated by anti-union animus.

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Appearances:

For the Respondent, Garelick, Groon & Dare, P.A.
(Mr. Paul W. Dare)

For the Charging Party, Tomar, Parks, Seliger,
Simonoff & Adourian, Esqs. (Mr. Howard S. Simonoff)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on March 26, 1979 by C.A.P.E. Local 1983, International Brotherhood of Painters and Allied Trades (the "Union") alleging that the City of Wildwood (the "City") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq (the "Act"). Specifically, the union alleged that the City violated the Act when it suspended Douglas Dunhour for five days and dismissed Raymond A. Jack for their activities on behalf of the union. These actions were claimed to be violative of N.J.S.A. 34:13A-5.4(a)(1) and (3).

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a

Complaint and Notice of Hearing was issued on April 20, 1979. A hearing was held on July 23, 1979 in Trenton, New Jersey before Commission Hearing Examiner Joan Kane Josephson at which time the parties were given an opportunity to examine and cross-examine witnesses and to present relevant evidence. Post-hearing briefs were submitted by the parties and the City filed a reply brief on September 5, 1979. On November 19, 1979, the Hearing Examiner issued her Recommended Report and Decision, the original of which was filed with the Commission. Copies were served upon the parties.

The Hearing Examiner concluded that the union failed to meet its burden of proof in demonstrating that the City's actions against Dunhour and Jack were motivated by anti-union animus. She concluded, after analyzing the entire circumstances surrounding the event which triggered the disciplinary action as well as the work records of the affected employees, that the City's actions were supportable. The disparate treatment between Jack and Dunhour and also between Dunhour and two other employees was explained to her satisfaction. Accordingly, the Hearing Examiner recommended that the Complaint be dismissed in its entirety.^{1/}

Section 19:14-7.3 of the Commission's Rules sets forth a procedure for filing exceptions to hearing examiners' recommended reports.

Paragraph b of that section specifies that, "Any exception which is not specifically urged shall be deemed to have been waived."

^{1/} She also found that the charging party failed to adduce evidence of an independent violation of subsection (a)(1) of the Act.

Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision.

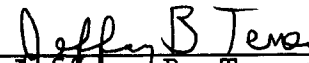
Based upon our independent review of the entire record in this proceeding and noting the absence of exceptions to the Hearing Examiner's Recommended Report and Decision, the Commission hereby adopts the Hearing Examiner's findings of fact and conclusions of law as well as her recommendation that the Complaint be dismissed in its entirety.

We agree that the union has failed to prove that the suspension and discharge of the two employees was motivated by anti-union animus or that it interfered with, restrained or coerced the employees in the exercise of rights guaranteed by the Act. Although Jack was succeeded by Dunhour as shop steward, there is simply no evidence linking the City's action in suspending Dunhour and discharging Jack with anti-union animus on the part of the City.

ORDER

For the foregoing reasons and upon the entire record herein, 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, Parcels, Hipp and Newbaker voted for this decision. Commissioner Graves voted against this decision.
DATED: Trenton, New Jersey
January 17, 1980
ISSUED: January 18, 1980

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C.A.P.E. LOCAL 1983, INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED
TRADES,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by C.A.P.E. Local 1983, International Brotherhood of Painters and Allied Trades against the City which alleged that the City suspended Douglas Dunhour and terminated Raymond A. Jack because of their activities on behalf of the Union.

The Hearing Examiner found that the Charging Party failed to prove that the City held animosity toward Dunhour and Jack because of their union activities. The City offered evidence that the discipline was because of violation of work rules and past employment records which was sufficient to overcome the Union's allegations that discriminatory discipline could be inferred from the timing of the events, disparate discipline given two other employees and application of work rules.

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 City of Wildwood
Garelick, Groom and Dare, P.A.
(Paul W. Dare, Esq.)

For C.A.P.E. Local 1983, International
Brotherhood of Painters and Allied Trades
Tomar, Parks, Seliger, Siminoff & Adourian, Esqs.
(Howard S. Simonoff, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 26, 1976 by C.A.P.E. Local 1893, International Brotherhood of Painters and Allied Trades (hereinafter the "Charging Party" or the "Union") alleging that the City of Wildwood (hereinafter the "Respondent" or the "City") 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. (hereinafter the "Act") in that the City on February 16, 1979 suspended Douglas Dunhour for five days and dismissed Raymond A. Jack allegedly for their activities on behalf of the Union, which was alleged to be a violation of N.J.S.A. 13A-5.4(a)(1) and (3) of the Act.^{1/}

^{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."

It appearing that the allegations of the above charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 20, 1979. Pursuant to the Complaint and Notice of Hearing, a hearing was held on July 23, 1979 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses and present relevant evidence. The parties chose to submit briefs in lieu of oral argument at the hearing. Simultaneous post-hearing briefs were submitted by both counsel. Counsel for the City additionally submitted a reply brief on September 5, 1979.

An Unfair Practice having been filed with the Commission, a question concerning an alleged violation of the Act exists and after hearing and after consideration of the briefs the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The City of Wildwood is a public employer within the meaning of the Act, and is subject to its provisions.
2. C.A.P.E. Local 1983, International Brotherhood of Painters and Allied Trades is a public employer representative within the meaning of the Act and is subject to its provisions.
3. Raymond A. Jack had been employed in the Wildwood municipal water utility since January 1972. At the time of his dismissal on February 15, 1979 he was a senior water repairer and as such repaired and installed water mains, hydrants, services, valves and meters. He worked in a truck regularly assigned to him and at the time of his suspension worked regularly with Douglas Dunhour.
4. Douglas S. Dunhour has been employed by the City for almost three years in the capacity of a laborer working with and assisting Jack until Jack's dismissal in the regular water department duties described above.
5. Jack held a position of union shop steward during some period of 1978 and late in that year he was succeeded by Dunhour who was shop steward at the time of this hearing. While it was generally known that

these men were shop stewards, grievances and other union business were generally handled with the City by Business Representative Maynard Sullivan. One informal grievance was verbally presented by Jack in the summer of 1978 and it led to some animosity with the former Water Superintendent who left the City prior to February 2.

6. On February 2, 1979 Jack and Dunhour were assigned to the maintenance truck which responds to calls to repair leaks as they are reported during the day. While on their return to the garage at noon-time they met Jack's girlfriend who had his car. Jack parked and secured the truck at that location and with Dunhour did a personal errand in Jack's car during their lunch hour. When they were dropped off back at the truck at the end of their lunch period, they could not locate the ignition key and proceeded to search the area in and around the truck for the key. At 1:00 P.M. the Water Utility Street Foreman Robert Zsitkovsky was unable to reach Jack on the the radio in the truck. Zsitkovsky was also unable to reach a truck manned by Ronald Grookett and Robert Hasson. Zsitkovsky and Robert H. Bebee, the City's water superintendent left the garage to look for the two trucks at their last assigned jobs that day but neither was there. On their return to the garage Grookett answered the radio check advising them they were away from the truck checking a meter and (Tr. 100) the men then saw Jack's truck parked on the street. This was some time between 1:15 and 1:30.^{2/}

7. They took Jack back to the garage and instructed Dunhour to remain with the truck. When they reached the garage Jack got out of their vehicle and left the garage without an explanation and returned to the truck. Zsitkovsky again went to Jack's truck. By this time the ignition key was located and Jack and Dunhour were returned to the garage and instructed to wait to talk to Superintendent Bebee.

^{2/} While there is a dispute as to whether the time was "a quarter or 20 after one" as Jack testified (Tr. 37) or 1:30 as Zsitkovsky testified (Tr. 100), I do not find this to be a factual dispute requiring a credibility finding since the hearing was five months after the event occurred and a ten minute difference can be accounted for by their best recollection of the event.

8. At approximately 3:00 P.M. Zsitkovsky told them Bebee would not meet with them but that they were to be docked one-half hour, they were to go home, and that they would not be allowed to work the next day, Saturday, which was their regularly assigned overtime Saturday. On the telephone advice of their union representation, Maynard Sullivan, they asked to have the discipline in writing, but were refused; filed a written grievance; and remained at the garage until 4:00 P.M., their normal quitting time. On the next day, Saturday, Jack and Dunhour went to the garage and remained there from 8:00 A.M. until 4:00 P.M.; however another crew was sent on the road to do their work.^{3/}

9. By memo of February 2, 1979, Superintendent Bebee informed Commissioner Richard A. Nordaby under whose authority the water utility falls of the February 2 events involving Jack and Dunhour and asked for Nordaby's decision on action to be taken. (CP-6 in Evidence) There is no mention of the one-half hour docking or withholding of overtime.

10. On February 7, Zsitkovsky advised Jack and Dunhour that Superintendent Bebee said that they would not be docked the half hour. Zsitkovsky asked them if they would withdraw their grievances^{4/} and they asked whether the Saturday overtime would be restored. Zsitkovsky agreed to check with Bebee on the overtime but never came back to them with an answer.

On about February 14 a memo dated February 8 (CP-1) in response to the grievance was given to Dunhour and Jack formally advising them that they would not be docked one-half hour and that employees with disciplinary action pending would not be permitted to work overtime.^{5/}

^{3/} Groomett and Hasson were advised they were to be docked one-half hour (Tr. 102). While the witnesses did not recollect the discipline to have been rescinded, letters to Groomett (CP-3) and Hasson (CP-4) from Bebee dated February 5 indicate that any future violation would lead to disciplinary action.

^{4/} While there is some dispute as to the meaning of the statement concerning the grievance, I am convinced from careful examination of the testimony (Jack Tr. 19; Dunhour Tr. 67) that Zsitkovsky asked if the grievances would be withdrawn because he felt the grievance was resolved in their favor and further processing would have been unnecessary.

^{5/} Dunhour did work either February 10 or 11, but apparently he had arranged on his own to switch weekends with another employee without the superintendent's knowledge (tr. 119). Overtime is regularly assigned to all employees on a rotation basis.

The following day the men received a Preliminary Notice of Disciplinary Action with recommendations of five days suspension for Dunhour and dismissal for Jack.^{6/} Disciplinary hearings were held on March 7 and the charges were sustained.

11. The City introduced evidence of seven disciplinary actions against Jack from 1977 to October 1978. There were four separate suspensions and one recommendation for dismissal by the former superintendent in addition to warnings. Discipline was for tardiness, unexcused absences and leaving job assignment without authorization. In August of 1977 Dunhour had received a warning of possible future disciplinary action because of tardiness and unauthorized absences.

THE ISSUE

Did the Respondent City violate Subsections (a)(1) and (a)(3) of the Act when it terminated Jack and suspended Dunhour?

DISCUSSION AND ANALYSIS

Charging Party argues that the Water Department management held animosity toward Jack and Dunhour because they were shop stewards who used the grievance procedure for others as well as themselves and used union remedies in the instant matter. They argue that the suspension and termination were not instituted until Jack and Dunhour refused to withdraw grievances over the lost overtime. They posit this is evidenced by the disparate discipline given Jack and Dunhour and Groomett and Hasson for the same infractions on the same day. They also argue that the discipline was inconsistent with established work rules and past disciplinary practices which raises an inference of improperly motivated actions.

The City responds that the record reveals no animosity because of union activities on the part of any current water department management employees and that the timing between the incident and notice of discipline was because of investigation, weekends and a holiday and

^{6/} Late in the afternoon of February 2 Superintendent Bebee consulted with Director of Personnel Louis C. Fiocca and discussed with him contemplated discipline of Dunhour and Jack (Tr. 149). Fiocca suggested no disciplinary action be taken until the matter could be discussed with Commissioner Nordaby. The Commissioner caused to be issued the preliminary disciplinary notices (Tr. 137).

preparation of documents and not because the employees pursued the grievance procedure. They argue that different discipline was imposed because the infractions differed and employees' past work records differed. The Respondent also argues that there was no violation of the City's work rules or policies in the imposition of the final disciplinary action.

The Respondent City Did Not Violate Subsections (a)(1) and (3) of the Act when it suspended Douglas Dunhour and terminated Raymond A. Jack

The undersigned is not convinced that Dunhour was suspended because of his activities as union shop steward as the charge alleges, or that Jack was terminated because of union activities as the charge alleges. Their relationship with the City as union shop stewards was minimal. While the City knew of their union position, the only evidence of any union business conducted by either of them was one verbal presenting of a grievance in the summer of 1978, and the only evidence of any kind of animosity toward them as shop stewards was by someone no longer with the water department. The most persuasive argument raised by the Union was that Dunhour and Jack received discriminatory treatment because they pursued a grievance which discrimination could be inferred from the chronology of events. I am not convinced however, that sterner discipline was imposed because the men did not withdraw the grievance. The union places great emphasis on the discussion with the foreman about withdrawing the grievance and the following disciplinary action. I am persuaded that the foreman asked whether the grievance would be withdrawn because he thought the half-hour matter was settled. Commissioner Nordaby who appeared as a witness was the person who made the determination as to the discipline and there was no evidence that he had any knowledge of or played any role in the grievance processing.

The incident involving Grookett and Hasson was quite different from the Jack/Dunhour incident. (Compare Findings of Fact 5, 6, and 7).

The City presented persuasive explanations for the sequence of events concerning the incident, grievance and ultimate discipline (See Finding of Fact 10, and n. 6) and when viewed with Jack's employment record,^{7/} they are sufficient for the undersigned to find that the

^{7/} Dunhour's role in the event was somewhat different from Jack's and certainly his work record differed as did the discipline he received.

the chronology of events, including the issuance of the preliminary notice of hearing the day after the formal denial of the grievance, followed an administrative course that was not irregular under the circumstances.

Finally, I do not find that discriminatory treatment can be inferred by an inconsistent application of established work rules. The work rules referred to provide a certain "forgiveness" policy for arriving late for work or leaving work early. (CP-2 in Evidence). I agree with the Respondent that the totality of events cannot be viewed merely as being late for work. Furthermore, Respondent's application of the work rules are sufficiently explained to overcome an inference that the policy was deliberately misapplied for discriminatory reasons.

In applying the above conclusions to the Commission's standard in cases alleging violations of subsection (a)(3),^{8/} I find the City did not violate Subsection (a)(3) of the Act by its conduct herein. Further, the Charging Party failed to adduce evidence of an independent violation of Subsection (a)(1) of the Act.^{9/}

* * * * *

Upon the foregoing and upon the entire record in this case, the Hearing Examiner makes the following:

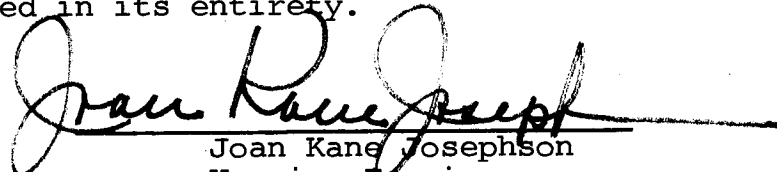
CONCLUSIONS OF LAW

The Respondent City did not violate N.J.S.A. (a)(1) and (3) when it suspended Douglas Dunhour for five days and terminated Raymond Jack.

RECOMMENDED ORDER

The Respondent City not having violated the Act it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

DATED: November 19, 1979
Trenton, New Jersey


Joan Kane Josephson
Hearing Examiner

^{8/} "A violation can be found if the charging party can prove either that anti-union animus was one of the motivating factors for the discriminatory conduct or that the effect of the employer's action was inherently destructive of rights guaranteed to employees by the Act..." City of Hackensack v. Winner, PERC No. 77-49, 3 NJPER 143, rev'd on other grounds 162 N.J. Super, (App. Div. 1975), pet. for certif. granted 78 N.J. 404 appeal pending Supreme Court Docket No. 15, 201.

^{9/} See New Jersey College of Medicine and Dentistry, PERC No. 79-11, 4 NJPER 421, 422 (1978).