H.E. NO. 89-15

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF LABOR,

Respondent,

-and- Docket No. CO-H-88-94

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner issues an interlocutory decision, denying the motion of the State to dismiss the unfair practice charge or for a Motion for Summary Judgment on the ground that there are genuine issues of material fact, which must be resolved at a plenary hearing. The gravamen of the unfair practice charge was that an employee in the Department of Labor was denied his request for paid leave to attend a Safety Coalition Meeting on the ground of an alleged "conflict of interest." Serious questions of fact exist both as to possible disparate treatment and also retaliatory action for the exercise of protected activities.

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

November [illegible], 1988

Richard Fornaso, D.A.G.
Department of Law & Public Safety
CN 112
Trenton, NJ 08625

Re: State of NJ (Dept/Agency)
-and-
C.W.A., AFL-CIO
Docket No. CO-H-88-94

Dear Sir:

Please admit service of this letter and the enclosure(s) herewith by returning the copy, appropriately executed, to this office by interoffice mail.

Very truly yours,

Edmund G. Gerber
Director of Unfair Practices

EGG:ARH:[illegible]
Enc.

Service of a copy of this letter and any enclosure(s) mentioned therein are hereby acknowledged.

STATE OF NEW JERSEY

By: ______________________
Name   Date

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Appearances:

For the Respondent, Hon. Cary Edwards, Attorney General
(Michael L. Diller, D.A.G.)

For the Charging Party, Steven P. Weissman, Esq.

HEARING EXAMINER'S INTERLOCUTORY DECISION
ON RESPONDENT'S MOTION TO DISMISS
AND/OR MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 6, 1987, by the Communications Workers of America, AFL-CIO ("Charging Party" or "CWA") alleging that the State of New Jersey, Department of Labor ("Respondent" or the "State") has 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. (Act), in that Edward R.

Squibb,[1/] an employee in the CWA's professional unit at the Department of Labor has been an outspoken critic of certain policies of the Department; on September 1, 1987, the State denied a CWA request to have Squibb released from work to attend a CWA-sponsored meeting, which request was denied, notwithstanding a provision in the CWA-State collective negotiations agreement for paid release time to attend such a meeting; the State has approved release time for other CWA employees to attend like meetings; the State has stated that Squibb's attendance would create an appearance of conflict of interest; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) of the Act.[2/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 7, 1988. Pursuant to the Complaint and Notice of Hearing, initial hearing dates were scheduled for July 18 and July 19, 1988 in Trenton, New Jersey. The State filed its Answer to the Complaint on July 1, 1988, in which it admitted several of the allegations but

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1/ Incorrectly identified in the Unfair Practice Charge as "Edmund Squibb."

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."

denied any knowledge that Squibb was an "outspoken critic of certain policies in the Department of Labor" and, additionally, that the State has approved released time for other CWA-represented employees to attend similar meetings; and, finally, the State has denied that Squibb's attendance at this union meeting created at the very least "...the appearance of a conflict of interest..."[3/]

However, due to scheduling conflicts between counsel for the parties and the Hearing Examiner the matter was rescheduled to September 28 and September 29, 1988, but, prior to hearing, these dates were adjourned pending receipt of the State's Motion to Dismiss and/or Motion for Summary Judgment prior to hearing. This Motion, addressed to the Hearing Examiner, was received on October 4, 1988, and on October 25, 1988, the opposing response of CWA was received by the Hearing Examiner.

The decision which follows is in accordance with N.J.A.C. 19:14-4.7, and is based upon the following:

INTERIM FINDINGS OF FACT[4/]

1. The State of New Jersey, Department of Labor is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

3/ The relevance of the conflicts between the allegations in the Unfair Practice Charge and the Answer of the State will be apparent hereinafter.

4/ These facts are found on the basis of the Unfair Practice Charge, the Answer, the supporting affidavit of David Collins, dated September 29, 1988, and a letter from John Loos of CWA to a Commission representative, dated June 2, 1988.

2. The Communications Workers of America, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Edward R. Squibb is a public employee within the meaning of the Act, as amended, and is subject to its provisions. Squibb is employed in the professional unit represented by CWA at the Department of Labor.

4. The current collective negotiations agreement between the parties for the professional unit provides in Art. XXVI, §B, "Leave of Absence for Union Activity," that the State agrees to provide leaves of absence with pay for designees of the union to "...attend Union activities..." The State has also agreed to a total of 735 days of such leave during each of the three contract years between July 1, 1986 and June 30, 1989. This paid leave is to be used for participation in regularly scheduled meetings "...and for training programs or other Union activity for which appropriate approval by the State is required and which approval shall not be unreasonably withheld..." (emphasis supplied) [Art. XXVI, §B(2a)]. Also, the agreement provides that application for use of such leave shall be made in writing or orally 18 days in advance.

5. Of 2,000 requests made by CWA each year, approximately 1% of which are denied. [Collins' Affidavit, ¶3].

6. On August 7, 1987, CWA made a written request for paid released time for Squibb to attend a one-half day CWA Safety Coalition Meeting on September 23, 1987. On August 12th Collins

sent a letter to the Employee Relations Office of the Department of Labor, requesting its position with respect to the CWA's request for Squibb. The response of the Department of Labor was that Squibb's attendance at the meeting "...represents a conflict with...(his)...duties as an Occupational Safety Consultant in our Office..." The Department of Labor representative went on to state that Squibb makes on-site inspections relative to occupational safety and that the Department must ensure absolute impartiality. Finally, the representative stated that "...the possibility of a conflict is obvious..." Based upon this response, Collins, too, agreed that Squibb's attendance at the meeting "...would in fact constitute a conflict of interest..." [Collins' Affidavit, ¶4 and attachments].

7. On September 1, 1987, Collins sent a letter to CWA, advising him of his decision with regard to Squibb's attendance at the Safety Coalition Meeting. There was no further response from CWA until the filing of the instant Unfair Practice Charge on October 6, 1987. [Collins' Affidavit, ¶7].

8. CWA alleges in its Unfair Practice Charge that the State has approved released time for other CWA-represented employees to attend similar meetings and the State in its Answer has denied this allegation. Thus, the Hearing Examiner is unable to make even an Interim Finding of Fact on the issue raised, that of whether or not the State treated the request for Squibb's attendance at the Safety Coalition Meeting differently from that of other employees like situated.

DISCUSSION AND ANALYSIS

The State in its moving papers seeks either a Motion to Dismiss or a Motion for Summary Judgment in its favor. A motion to dismiss is governed by N.J.A.C. 19:14-4.7, which provides only that if the motion is granted by the Hearing Examiner before the filing of his Recommended Report and Decision, then the Charging Party may obtain review by the Commission, provided the request for such review is filed within ten days of the order of dismissal. This rule does not, however, provide guidance as to the standard to be applied by the Hearing Examiner in determining whether to grant or deny the motion to dismiss.

However, the Hearing Examiner is unable to perceive any significant difference between the standard for disposing of a motion to dismiss and that of a motion for summary judgment, which is provided for N.J.A.C. 19:14-4.8. This rule provides in Section (a) that "...Any motion in the nature of a motion for summary judgment may only be made subsequent to the issuance of the complaint and shall be filed with the chairman of the commission, who shall refer the motion to either the commission or the hearing examiner..." Thus, it appears to the Hearing Examiner that he may treat the Respondent's Motion to Dismiss as a motion for summary judgment even though not filed with the Chairman and referred to the undersigned.

N.J.A.C. 19:14-4.8(b) establishes the standard which the Commission utilizes in deciding whether or not to grant a motion for

summary judgment, namely, that "...there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...," in which case summary judgment may be granted and the requested relief ordered.

The Commission has, in many cases, followed the New Jersey Civil Practice Rules (R.4:46-2) and a leading decision of the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rules and Judson apply the same standard.

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

The Hearing Examiner is persuaded that the Respondent's Motion either to Dismiss or for Summary Judgment in its favor must be denied. The basic reason for this decision is that there are genuine issues as to material facts, appearing in the moving and responding papers filed in this matter. The Hearing Examiner has already indicated in ¶8 of the above Interim Findings of Fact his concern over this issue raised by the pleadings, that of possible disparate treatment as between the State's denial of Squibb's

request to attend the Safety Coalition Meeting and the grant of the request of CWA for other employees like situated to attend. Plainly, if disparate treatment is involved then it may warrant the drawing of an inference of anti-union animus on the part of the State following a plenary hearing.

Also, the record papers at this point are inconclusive on whether or not Squibb was an "outspoken critic of certain policies in the Department of Labor," as alleged by CWA since the only response of the State is that it has no knowledge of this allegation and would put the Charging Party to its proofs. Plainly, this begs the question since this allegation, if proven, might well afford the basis for a finding that the State through its agents manifested anti-union animus toward Squibb and the CWA. This appears to be the heart of CWA's Section 5.4(a)(3) allegation.

Given the state of CWA's allegations and the Respondent's Answer to these allegations, as discussed above, there is no doubt whatsoever that, at this stage of the proceedings, serious and genuine issues of material fact exist and that under the above authority both within our Rules and those of the New Jersey Courts, the Respondent's Motion to Dismiss and/or Motion for Summary Judgment must be denied.

Even if the Hearing Examiner accepted the argument of the State that its motion should be decided under State of New Jersey, Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the result would be the same. The reason for this conclusion

is that a close reading of the Commission's decision in Human Services reveals four delineated exceptions where deferral to arbitration under the parties' collectively negotiated grievance procedure would not be ordered. At 10 NJPER 423 the Commission stated: "...We will also entertain charges which indicate that the policies of our Act, rather than a mere breach of contract claim, may be at stake. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978)..." In using the term "entertain charges" the Commission meant that it will permit the hearing process to run its course and will adjudicate whether or not a violation of the Act has occurred.

Plainly, in the instant case, there is the possibility that CWA can establish that an independent violation of Section 5.4(a)(1) occurred, if not a violation of Section 5.4(a)(3), by the conduct of the State's representatives in denying the request on behalf of Squibb to attend the Safety Coalition Meeting on September 23, 1987. The stated reason for denial, that of "conflict of interest," may be proven to be specious or a subterfuge. CWA should not be denied the opportunity prove such a fact at this stage of the proceeding.

In other words, this is not a simple case of "...a claimed breach, misinterpretation or improper application of the terms of this Agreement..." as set forth in the parties' contractual grievance procedure [Art. IV, §A(1)]. Thus, in the opinion of the Hearing Examiner, this is not a case which is appropriate for deferral to the arbitral process.

Finally, the Hearing Examiner finds no support for the Respondent's position in the case of N. J. Highway Authority, D.U.P. No. 87-17, 13 NJPER 514 (¶18192 1987) where a complaint was not issued because of gross deficiencies in the allegations of the charging party in that case, who had not alleged that the discipline imposed upon him was the result of his exercise of protected rights nor that the Authority in that case had infringed upon his rights guaranteed under our Act.

* * * *

Based upon the moving and responding record papers in this proceeding, and the above Interim Findings of Fact, the Hearing Examiner makes the following:

INTERLOCUTORY ORDER

The Respondent State's Motion to Dismiss and/or Motion for Summary Judgment is DENIED, and it is;

Further ORDERED that a plenary hearing is scheduled for January 20, 1989 at the Commission's offices in Trenton, New Jersey.

Alan R. Howe
Hearing Examiner

DATED: November 9, 1988
Trenton, New Jersey