

H.E. NO. 94-2

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

In the Matter of

NORTH BERGEN MUNICIPAL UTILITIES  
AUTHORITY,

Respondent,

-and-

Docket No. CO-H-93-108

UTILITY WORKERS UNION OF  
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner denies a motion for summary judgment on a charge alleging that a public employee was suspended and discharged for engaging in protected activities. He found several genuine issues of material fact and was obliged to deny the motion.

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  
Ruderman & Glickman, attorneys  
(Mark S. Ruderman, of counsel)

For the Charging Party  
Bredhoff & Kaiser, attorneys  
(Glenn A. Fine, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On October 16, 1992, the Utility Workers Union of America, AFL-CIO, filed an unfair practice charge against the North Bergen Municipal Utilities Authority. The charge alleges that Harold Klein was suspended without pay and then fired in retaliation for his activities on behalf of the Union. The charge alleges that Klein filed a representation petition on or about August 27, 1992, and was fired "after a consent agreement for an election was reached on September 17, 1992." The Authority's acts allegedly violate

subsections 5.4(a)(1), (3) and (4)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On December 22, 1992, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On January 5, 1993, the Authority filed a letter, stating that its November 9, 1992 statement of position is its Answer to the charge. The letter argues that the Commission does not have jurisdiction and that the allegations do not violate the Act. The Authority agrees that Klein was suspended for six days in August 1992 for "being out without any excuse." It denies knowing about Klein's protected activities before August 25, 1992. It also asserts that pursuant to an eligibility list for a plumber position issued by the Department of Personnel on June 10, 1992, it appointed the only veteran on the list, in keeping with N.J.A.C. 4A:4.8(c)(3)i) and (ii). The list had three names; the veteran was listed first and Klein was listed third.

On February 16, 1993, the Authority filed a Motion for Summary Judgment, together with a request to stay a scheduled

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<sup>1/</sup> 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. (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. (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."

hearing, supporting brief and affidavits. On February 17, 1993, the Commission's Chairman referred the matter to me for disposition. N.J.A.C. 19:14-4.8. I granted the stay.

On February 25, 1993, the Union filed a brief, together with supporting documents and affidavits in opposition to the Authority's motion. On March 8, 1993, the Authority filed an additional letter in rebuttal and on March 25, 1993, the Union filed a "further submission."

Based upon documents filed, I make the following:

FINDINGS OF FACT

1. On or about March 11, 1991, Harold Klein was hired provisionally as a plumber by the North Bergen Municipal Utilities Authority. He was hired after an interview with Nicholas Sacco, Mayor of North Bergen Township. The provisional appointment was pending a Department of Personnel open competitive examination for the permanent position.

2. Sometime later in 1991, Klein contacted the Union to discuss organizing employees at the Authority. He met with Union representatives in early 1992, but no organizing was conducted.

3. On June 18, 1992, the Department of Personnel issued a certified list of three names for the permanent position of plumber at the Authority. Klein was listed third and had a final score of 80. Donald Montesano was listed second with a final score of 83. Anthony Sidoti, a veteran, was listed first with a final score of 72.25.

4. In June 1992, Klein learned of the list and discussed it with Mayor Sacco. Sacco allegedly advised Klein "not to worry about the list" and that he would be "issued a position with the Authority."

5. In July 1992, Klein spoke with Union representatives and they decided to conduct an organizing campaign. Klein openly discussed organization with employees at the Authority.

6. On or about July 31, 1992, Klein was charged with violating Authority rules, specifically falsifying plant data. He was suspended from work on August 1, 2 and 4, 1992.

7. On August 7, 1992, Klein punched his time card "in" at 21:56, about one hour before his shift began. He left the MUA to get food and did not return until 23:30, about 30 minutes after his shift began.

Executive Director Santo Grasso met Klein upon his return to the Authority. Grasso allegedly told Klein that he would "get him" or words to that effect, but did not elaborate.

Klein was suspended for six days -- August 11, 12, 13, 16, 17 and 20, 1992 -- for failing to provide an excuse for his tardiness. Klein did not appeal the discipline.

8. On or about August 25, 1992, Klein circulated an organizing petition during a work break at a training class at the central plant.

9. On August 27, 1992, Klein filed a representation petition on behalf of the Union seeking to represent all "non-supervisory, non-managerial and non-confidential employees" of the Authority. (Docket No. RO-93-28).

10. On September 17, 1992, the Union and Authority signed a consent agreement for secret ballot election for a unit of "regular blue collar employees, craft and professional employees in the wastewater operation" of the Authority. A craft option and professional option were also agreed upon. The election was scheduled for and conducted on October 22, 1992. The Union lost all of the elections. No objections to the elections were filed.

11. On September 22, 1992, Executive Director Grasso sent Klein a letter, advising that it selected the first candidate on the DOP list for the permanent plumber position. The letter advised that since Klein was provisionally employed, his appointment would be terminated on September 25, 1992. Grasso wrote that DOP rules "mandate that a provisional cannot be serving in a position once a certification list is issued."

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant...is entitled to its requested relief as a matter of law....

[N.J.A.C. 19:14-4.8(d).]

"Material facts" are those which tend to establish the existence or non-existence of an element of the charge or of a defense that is derived from the controlling substantive law. See Lilly, Introduction to the Law of Evidence [West Publishing Co. 2d ed. (1978) at p. 18] and McCormick on Evidence [West Publishing Co. 2d ed. (1978) at p. 434].

Summary judgment will be granted with great caution. The moving papers are considered in a light most favorable to the opposing party, and all inferences of doubt are drawn against the movant in favor of the opponent of the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954).

The Union has alleged that Klein was suspended and discharged in retaliation for his protected activities and in retaliation for his filing of a representation petition. The Authority asserts that the Commission has no jurisdiction over the Department of Personnel appointment process and it exercised no discretion in the appointment decision. It also denies knowing about Klein's union activities before August 25, 1992, when it had already legitimately disciplined him for violations of policy. Finally, it asserts that Klein's alleged performance of "personnel" work for Township officials is not protected under the Act.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court approved a standard for deciding if an employer's acts violate subsection 5.4(a)(3) of the Act. Under the test,

...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. [Citation deleted.] Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.

[Bridgewater at 244.]

No violation will be found unless the charging party has provided by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by 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 activity. Id. at 246.

This test is also applied to alleged violations of 5.4(a)(4) of the Act. Hunterdon Cty. Bd. of Chosen Freeholders and CWA, 116 N.J. 322, 335 (1989).

I deny the motion because some material facts are disputed. Klein asserts that he "openly discussed starting a union" with other Authority employees in July 1992, and that his organizing "became well known throughout the Authority." Given the size of the operation (40 or so employees), I must allow an inference (for purposes of this motion) that the Authority knew of these efforts, disputing its assertion that it first learned of Klein's protected activity in late August 1992.



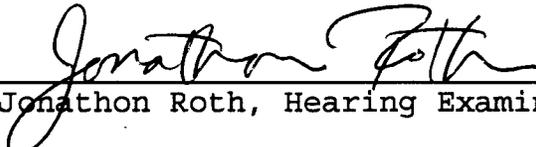
Also in dispute is the legitimacy of Klein's first suspension. He contends that the Authority log book for July 31, 1992 "does not indicate" that he performed two sets of readings. He also denies he performed two readings. John Erikson, Authority Superintendent, asserted that Klein did "perform two sets of readings" on July 31.

Also in dispute is the alleged disparate treatment, *i.e.*, the six-day suspension, Klein received for not reporting to his shift on time on August 7, 1992. Klein alleges that the Authority Executive Director stated, or used words to the effect, that he "would get" him. Although Klein concedes that he was one-half hour late reporting to his shift, his allegations, viewed in a light favorable to him, include the possibility that the discipline he received exceeded that meted out to other employees in similar circumstances. Such an allegation is appropriate under 5.4(a)(3) of the Act. See, for example, NLRB v. Shepard Laundries Co., 440 F.2d 856, 766 LRRM 3080 (5th Cir. 1971); Hammermill Paper Co. v. NLRB, 658 F.2d 155, 108 LRRM 2001 (3rd Cir. 1981); Diversified Products, 272 NLRB No. 162, 117 LRRM 1458 (1984).

Finally, Klein asserts that in June 1992, he was advised by the mayor of North Bergen not to be concerned about the Department of Personnel list and that his employment would be retained. This allegation conflicts with the Authority's termination of Klein about three months after it became clear that he was not entitled to be appointed as "plumber", pursuant to the Department of Personnel

eligibility list and Administrative Code.<sup>2/</sup>

I deny the Respondent's motion for summary judgment and set the matter for hearing on dates set forth in the attached Notice Rescheduling Hearing. All discovery issues raised previously must be resolved before the first scheduled hearing date.

  
Jonathon Roth, Hearing Examiner

DATED: July 14, 1993  
Trenton, New Jersey

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<sup>2/</sup> The facts do not establish the Mayor's relationship to the Authority as a public employer. Even if the mayor assured Klein of employment, the Association has the burden of showing that the Authority could have retained Klein's employment in a specific comparable position, and that Klein would have been designated to fill it.