

D.U.P. NO. 2023-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

ESSEX COUNTY,

Respondent,

-and-

Docket No. CO-2022-205

CWA LOCAL 1081,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Communication Workers of America Local 1081 (Local 1081) against Essex County (County). The charge alleges the County violated section 5.4a(1) and (2) of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1, et seq. (Act) when it threatened to discipline Local 1081 President for his speech to Local 1081 unit members during an after-hours, off-premise virtual union meeting. The Director found that although the President's comment was made at a union meeting, that did not insulate him from reprimand for his objectionable behavior, which included using the term "girlfriend" when referring to a former black female employee of the County. Also, the Director found that the County's investigation was based on a legitimate and substantial managerial concerns, specifically the administration and enforcement of the County's affirmative action plan.

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Appearances:

For the Respondent,
(Sylvia Hall, Director of Labor Relations)

For the Charging Party,
David Tykulsker & Associates, attorneys
(David Tykulsker, of counsel)

REFUSAL TO ISSUE COMPLAINT

On April 8, 2022, Communication Workers of America Local 1081 (Local 1081) filed an unfair practice charge (charge) against Essex County (County)^{1/}. The charge alleges that on or about February 22, 2022, the County threatened to discipline Local 1081 President David Weiner (Weiner) for his speech to Local 1081 members at an after-hours, off-premises virtual union meeting. Local 1081 alleges that the County's actions violate

^{1/} The charge was accompanied by an Application for Interim Relief. On April 11, 2022, the request for interim relief was denied and the parties were advised that the charge would be processed in the normal course.

section 5.4a (1), (2) and (3)^{2/3/} of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1, et seq. (Act).

On May 10, 2022, an informal exploratory conference was held with the parties. The parties were unable to reach a voluntary settlement.

On May 9, 2022, the County filed a letter denying that it engaged in any unfair practice and urging dismissal of the charge. The County agrees that no disciplinary action has been or will be taken against the President of Local 1081, and accordingly, the charge should be dismissed.

On May 31, 2022, Local 1081 filed a letter arguing that by reprimanding and threatening the President of Local 1081 with

2/ On April 12, 2022, the Director wrote to Local 1081, advising that the alleged a(3) portion of the charge failed to satisfy the pleading standards set forth in N.J.A.C. 19:14-1.3. Local 1081 was provided seven (7) days to withdraw or amend the charge to comply with the pleading standards. Local 1081 was further advised that failure to amend or withdraw the a(3) portion of the charge would result in dismissal of the a(3) allegations. Local 1081 did not amend or withdraw the charge within the required seven (7) days. The 5.4a(3) allegation will not be addressed in this decision.

3/ 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,(2)Dominating or interfering with the formation, existence or administration of any employee organization, and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employee in the exercise of the rights guaranteed to them by the act.

discipline for union-related speech made at an off-hours, off-site union meeting, the County violated section 5.4a(1) of the Act, as well as section 5.4a(3)^{4/}. Specifically, Local 1081 argues the County's February 22, 2022 letter to Weiner ". . . constitutes a reprimand."

The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011) aff'd P.E.R.C. No. 2021-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

On or about January 6, 2022, David Weiner, President of Local 1081 (President) addressed members during an off-hours, off-site virtual (Zoom) union meeting. During the meeting, the President referred to the former Director of the County's Division of Family Assistance and Benefits as "girlfriend."

On or about January 7, 2022, a Local 1081 unit member filed a discrimination/harassment complaint with the County alleging that the President's use of the term "girlfriend" to describe a black woman is "offensive, inappropriate and racist."

County Policy Number CHAP VI-11 provides in pertinent part:

^{4/} As indicated in fn. 2, the 5.4a(3) allegation was dismissed when Local 1081 failed to withdraw or amend it within seven (7) days following our April 12, 2022 letter.

. . . the County of Essex to provide a working environment which is conducive to efficient and professional work performance and is free from harassment of any kind including sexual harassment and harassment based on race, color, religion, national origin, disability, sexual orientation or any other bias prohibited by law.

The County investigated the complaint. On February 22, 2022, the President received a letter from the County advising that the investigation had been completed and was considered closed by the Office of Inspector General or the Affirmative Action Office. The letter advised that, "Based on the investigation, there has been a finding of a violation of a County Policy and Procedure or other law and your respective department will take appropriate action." No disciplinary charges were brought against the President.

ANALYSIS

The 5.4a(1) allegation

N.J.S.A. 34:13A-5.4a(1) prohibits employers from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." The standards for evaluating 5.4a(1) charges were initially set forth in New Jersey College of Medicine and Dentistry, P.E.R.C. No 79-11, 4 NJPER 421, (¶4189 1978), and revised and restated in New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73 5 NJPER 550 (¶10285 1979):

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tends to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. Id. at 551, n.1

The first inquiry is whether the employer's actions tend to interfere with protected rights and the second is whether the employer had a legitimate and substantial business justification for its actions. The totality of evidence and particular facts of each case are to be examined and a balancing of the parties' interests made.

The ability of union members to hold meetings is essential to their rights under the Act to form, join or assist an employee organization. N.J.S.A. 34:13A-5.3. Their ability to freely discuss issues like negotiations or grievance strategies, and keep those discussions confidential, is crucial to achieving consensus, developing goals and planning. Meetings also function as the forum for conducting union business. Denying the protection of free expression in union meetings diminishes the rights guaranteed by section 5.3, and chills employees' participation in their organizations.

Although the Commission has permitted public employees latitude in offensive speech and conduct in the context of union-related activities, conduct that is beyond the bounds of

propriety is not protected activity under the Act. See State of New Jersey (Trenton State College), H.E. No. 90-48, 16 NJPER 337 (¶21139 1990), adopted P.E.R.C. 91-1, 16 NJPER 419 (¶21175 1990; State of New Jersey, Dept. of Treasury (Glover), P.E.R.C No. 2001-57, 27 NJPER 167 (¶32056 2001); State of New Jersey, Dept. of Human Services (Garlanger), P.E.R.C No. 2001-52, 27 NJPER 167 (¶132057 2001). In State of New Jersey (Trenton State College), the Hearing Examiner found that the employee's status as a union employee representative did not insulate him from reprimand for objectionable behavior, which included statements that were perceived as sexist and racist.

Generally, under 5.4a(1), employers may not trespass into internal union affairs and deliberations by questioning employees about interactions in union meetings. Moreover, having to report on co-workers generally intensifies interpersonal conflicts, inhibits communication and creates mistrust. But in City of Hoboken, P.E.R.C No. 2016-79, 42 NJPER 559 (¶154 2016), a complaint was brought by an employee alleging he was subjected to a hostile work environment and threats of physical violence during two union meetings. The employer requested reports regarding the alleged threats from employees who attended the union meetings. The Commission found that the matter stopped being an internal union matter once the complaint was filed, bringing the matter into the public domain.

The second consideration is whether the County's business justification for its action was legitimate and substantial and outweighed the employees' interests. Relevant to this determination are the County's responsibilities to maintain order and morale, ensure proper supervision and minimize conflict within the County.

In Hillsborough Tp., P.E.R.C. No. 2000-82, 26 NJPER 207 (¶31085 2000), the Commission considered a township's investigation of a police union's president's letter to a neighboring police union. The union membership had directed the president to draft and send the letter and never intended that it be made publicly known. However, the letter became publicly known. The chief ordered an investigation because the letter implied that officers were giving family members preferential treatment in carrying out their duties. The investigation consisted of internal affairs interviews and compelled written statements delving into the membership's processes and decision to send the letter. The Hearing Examiner found and the Commission agreed that the investigation interfered with the officers' 5.4a(1) rights but concluded that the Township had a legitimate business justification and legal duty to investigate that outweighed the interference into the employees' protected activity. That the letter was from one union to another; that the idea evolved at a union meeting and the president's conduct

was off-duty did not prevent the township from investigating the letter or the president's role in the matter. The Commission weighed heavily the township's legitimate concerns that the police were in fact improperly showing favoritism in performing their duties and that the public would perceive that the department was not enforcing the laws impartially.

In Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013), the Director dismissed in part an Association's charge that the Board targeted a union vice president for investigation of gender discrimination because of his union activity. The Director reiterated that employers have a legitimate and substantial business justification for administering and enforcing affirmative action plans to avoid complaints under anti-discrimination laws, citing Jersey City Ed. Ass'n. v Jersey City Bd. of Ed., 218 N.J. Super. 177, 187-188 (App. Div. 1987) (employer's implementation of an affirmative action plan is a proper exercise of its managerial prerogative). Finally, in Montclair Bd. of Ed., H.E. No. 2007-9, 33 NJPER 171 (¶59 2007) in a contested transfer case, a Hearing Examiner found that a teacher was transferred (not for disciplinary reasons), pursuant to the Board's obligation, in response to a hostile work environment charge, to take steps to address alleged harassment.

Here, the County conducted the investigation pursuant to a complaint filed by a Local 1081 unit member. Although Weiner's

comment was made at a virtual, after-work hours union meeting, that context did not insulate him from a reprimand (if the February 22nd letter is deemed a "reprimand") for objectionable behavior, i.e., saying "girlfriend" in reference to a former black female employee of the County^{5/}. Also, like the circumstances in Rockaway Tp., the County had a legitimate and substantial business justification for administering and enforcing its affirmative action plans to avoid complaints under anti-discrimination laws. The County's investigation was an attempt to address a legitimate concern about Weiner's remark that was perceived as racist by a unit employee. Accordingly, the 5.4a(1) allegation is dismissed.

The 5.4a(2) Allegation

In Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986), the Commission discussed the standards for a violation of section 5.4a(2) of the Act:

Domination exists when the organization is directed by the employer, rather than the employees Interference involves less severe misconduct than domination so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's . . . rights; it must be aimed instead at the employee organization as an entity. 12 NJPER at 765.

^{5/} No facts or allegations indicate that the investigation delved beyond the immediate context of the allegedly offensive term.

The type of activity prohibited by 5.4a(2) is "pervasive employer control or manipulation of the employee organization itself" North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980). Here, no facts have been alleged that indicate pervasive manipulation or control of the administration of Local 1081. The County's investigation was based on legitimate and substantial managerial concerns. Accordingly, the 5.4a(2) allegation is dismissed.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: September 20, 2022
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by September 30, 2022.