P.E.R.C. NO. 89-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(HUMAN SERVICES),

Respondent,

-and-

Docket No. CO-H-88-213

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1040, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the State of New Jersey (Department of Human Services) in an unfair practice charge filed by Communication Workers of America, Local 1040, AFL-CIO. The Commission finds that CWA has alleged facts which, if true, would establish that a shop steward was disciplined in retaliation for his protected activity. The Commission also clarifies procedures for processing and reopening cases deemed withdrawn.

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Charging Party.

Appearances:

For the Respondent, Cary Edwards, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party, Michelle M. Dunham, Esq.

DECISION AND ORDER

On February 22, 1988, Communications Workers of America, Local 1040, AFL-CIO ("CWA") filed an unfair practice charge against the State of New Jersey (Department of Human Services) ("State"). The charge alleges that in January 1988, the medical director of the North Princeton Developmental Center called a shop steward "a union agitator" and the Center's superintendent called the shop steward "dangerous"; on February 4, the shop steward participated in a Commission compliance proceeding; on February 5, the Center's head nurse told the steward that the director of nurses had rescinded an agreement on a reprimand, and on February 16, 1988, the steward was "subjected to reprisal through a disciplinary action signed by [the]

supervisor of nurses." The charge concludes 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) and (2).[1/]

On April 21, 1988, a staff agent conducted an exploratory conference. The parties submitted statements of position.

On June 14, 1988, the Director of Unfair Practices wrote CWA's representative a letter asking about the status of the charge and requesting that an enclosed withdrawal form be executed if the matter had been resolved. The letter was not sent to the State's representative.

On June 29, 1988, the Director sent CWA's representative a second letter. This letter again asked about the status of the charge, but added that if no response was received by 5:00 p.m. on July 11, the charge would be deemed withdrawn pursuant to N.J.A.C. 19:14-1.5(d). This letter was not sent to the State's representative.

On July 14, 1988, the Director wrote CWA's representative a letter advising her that the charge was deemed withdrawn and the case closed. This letter was sent to the State's representatives.

In a letter dated July 15, 1988 (but without a Commission time and date stamp), CWA's representative reiterated the allegation

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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."

that the State had retaliated against the shop steward for his protected activity. This letter was not sent to the State's representative.

On August 3, 1988, the Director issued a Complaint and scheduled a hearing for August 26.

A State representative asked the Director to explain why he had declared the case closed on July 14 and then issued a Complaint on August 3. The Director wrote a letter stating that he had reopened the case because CWA's letter indicating its interest in pursuing this case had been sent before CWA could have received his letter deeming the charge withdrawn. The Director also noted that the State's rights had not been hurt: if the charge had not been reopened, CWA could have filed a new charge within the six month statute of limitations. This letter was not sent to CWA's representative.

On August 24, 1988, the State filed its Answer denying the Complaint's allegations; asserting that it had a legitimate business justification for disciplining the steward, and adding that the Complaint's other allegations did not indicate any unfair practice.

On August 26, 1988, the State moved for summary judgment. A supporting letter asserted that the facts alleged, even if true, did not establish an unfair practice and that it should have been given an opportunity to litigate the question of whether or not to reopen the matter.[2/]

2/ The parties agreed to postpone the scheduled pre-hearing conference and hearings.

On September 23, 1988, after receiving extensions of time, CWA's attorney responded that the motion should be denied since the allegations of reprisals, if true, would establish a violation and since the Director had acted within his discretion in reopening the case.

On September 27, 1988, CWA filed a proposed amendment alleging that the employer had also violated subsections 5.4(a)(3) and (4).[3/]

We share the State's concerns about the procedures used in processing and reopening this case. We will clarify the proper procedures.

The confusion here arose, in part, because letters from the Director to CWA about the case's status and from CWA to the Director about its interest in pressing its charge were not sent to the State's representatives. Instead the State received only the announcements that the case had been closed and a Complaint had been issued. No party should be subject to such surprises.

3/ These subsections prohibit public employers, their representatives or agents from: (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."

N.J.A.C. 19:14-1.5(d) provides:

> Where it appears to the Director of Unfair Practices that the charging party has no further interest in processing its charge, the Director of Unfair Practices may, upon appropriate notice, deem the charge to have been withdrawn. Unless otherwise stated, a withdrawal and dismissal under this subsection is without prejudice.

Once a charge is deemed withdrawn, a charging party has two options. First, it may file a motion with the Director of Unfair Practices to reopen the case. Compare N.J.A.C. 1:1-19.2. The employer could respond and the Director could then exercise his discretion in determining whether or not cause existed to reopen the case. Second, since the withdrawal is without prejudice, a charging party may file a new charge if still within the six month statute of limitations under N.J.S.A. 34:13A-5.4(c).

Here the Director gave CWA appropriate notice of his intent to deem the charge withdrawn. Not having received a timely response, he closed the case. When, however, CWA indicated its desire to litigate the matter, he reopened the case ex parte. He should have instead treated CWA's letter as a motion to reopen, had CWA serve that motion on the State, and entertained a response.

Despite these procedural defects, we will not dismiss the charge. Had the Director advised the parties that he would not reopen the case, CWA could have filed a new charge within the six month statute of limitations. Now it has lost that opportunity. We will not penalize CWA for relying on the decision to reopen.

We turn to the merits of the motion for summary judgment. Pursuant to N.J.A.C. 19:14-4.8(d), summary judgment may be granted

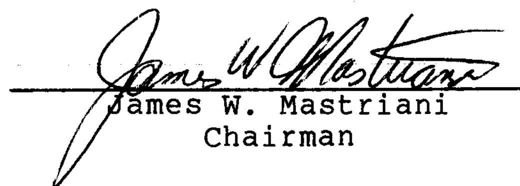
"[i]f it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...." But summary judgment is to be granted with extreme caution. 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).

We deny the motion. We need not parse the charge to determine whether each allegation, if true, would constitute an unfair practice. Reading the charge as a whole, we are satisfied that CWA has alleged facts which, if true, would establish that a shop steward was disciplined in retaliation for his protected activity. We of course intimate no opinion on the merits of any of these allegations. We simply hold that a hearing is needed before they may be resolved.

ORDER

The motion for summary judgment is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Bertolino voted in favor of this decision. Commissioner Wenzler was not present. None opposed.

DATED: Trenton, New Jersey
October 20, 1988
ISSUED: October 21, 1988