

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF TREASURY),

Respondent,

-and-

PERC Docket No. CO-H-95-71
OAL Docket No. CSV 10708-94

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands this matter to the Administrative Law Judge for further proceedings and the issuance of a supplemental report. The ALJ's decision was issued on a consolidated appeal before the Merit System Board filed by George C. Glover and an unfair practice charge filed with the Commission by the Communications Workers of America, AFL-CIO. The charge alleges that Glover's suspension and termination violated the New Jersey Employer-Employee Relations Act. CWA asserts that Glover was suspended and terminated in retaliation for his efforts as a shop steward. In the unfair practice charge portion, the ALJ found that CWA had not shown that Glover's activity was protected and dismissed the charge. The Commission remands the matter to the ALJ to review the record with respect to certain events and provide a more detailed analysis. The Commission contends that the trier of fact is in the best position to answer these questions because they interrelate with witness credibility issues.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF TREASURY),

Respondent,

-and-

PERC Docket No. CO-H-95-71
OAL Docket No. CSV 10708-94

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
(Mary Cupo-Cruz, Senior Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION

On July 21, 1994, George C. Glover, a senior stock clerk employed by the State of New Jersey (Department of Treasury), was suspended for alleged conduct unbecoming a public employee, neglect of duty, failure to follow proper procedures, insubordination, and inhibiting the ability of a supervisor and manager to carry out their duties. On July 26, Glover received a Preliminary Notice of Disciplinary Action specifying eight incidents of alleged misconduct dating back to March 23, 1994. At a departmental hearing, the notice was amended to allege an April 15, 1994 incident as well. These charges formed the basis for Glover's termination from employment effective July 22, 1994.

Glover appealed his termination to the Merit System Board (MSB). The matter was transmitted to the Office of Administrative Law as a contested case.

On September 13, 1994, the Communications Workers of America, AFL-CIO filed an unfair practice charge alleging that Glover's suspension and termination violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(1), (3) and (5).^{1/} CWA asserts that Glover was suspended and terminated in retaliation for his efforts as a shop steward to represent Don Williams in work-related disputes with his supervisors on July 18, 19 and 20, 1994.

On January 3, 1995, a Complaint and Notice of Hearing was issued. The Answer asserts that the suspension and termination were warranted because Glover was not acting as a shop steward on July 18, 19 or 20; and even if he was, his actions exceeded a steward's proper role. The Answer also asserts that the suspension and termination were motivated and warranted by an accumulation of events evidencing Glover's disruptiveness.

^{1/} 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. (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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The MSB and the Commission issued a joint decision and order. The order consolidated the matters for a hearing and an initial decision by an Administrative Law Judge (ALJ). The order specified that the Commission would review the record and the initial decision first for the purpose of determining whether Glover had engaged in protected activity under the Act and whether any such activity was a substantial or motivating factor in his suspension and termination; the MSB would then review the record and the decision for the purpose of determining whether the suspension and termination were for legitimate business reasons and otherwise warranted under merit system law. The order further provided that, if appropriate, the matter would be returned to the Commission for consideration of specialized relief under its Act.

ALJ Joseph Lavery conducted 20 days of hearing beginning on December 5, 1995 and ending on August 4, 1997. Fifteen employer witnesses and two CWA witnesses testified and over 80 exhibits were introduced. Post-hearing briefs were submitted and the record was closed on March 2, 1998. The initial decision was issued on October 8, 1998.

In the MSB portion of the initial decision, the ALJ found that the employer proved each specified charge by a preponderance of the evidence. He affirmed the termination. In the unfair practice portion, the ALJ found that CWA had not shown that Glover's activity was protected under NLRB v. Weingarten Inc., 420 U.S. 251 (1975), nor had it carried its burden of persuasion under

In re Bridgewater Tp., 95 N.J. 235 (1984). The ALJ dismissed the charge.

The ALJ limited his consideration of the unfair practice charge to the events of July 18, 19 and 20, 1994 (ALJD32-33), dates specified in CWA's charge as involving Glover's conduct as a shop steward.^{2/} He found that Glover was not engaged in protected activity on July 18 or 19. In particular, he found no evidence that: (1) a disciplinary investigation had begun before the July 18 or 19 incidents; (2) Williams had requested Glover to represent him in his disputes with his supervisors; or (3) the questioning by Williams' supervisors constituted pre-disciplinary investigations (ALJD 41-42). He further found that even if initially protected, Glover's conduct on July 18 and 19 lost its protection when it exceeded the bounds of allowable advocacy (ALJD 43-45).

On January 4, 1999, CWA filed exceptions to the initial decision. It raises several points, including allegedly contradictory testimony between the employer's witnesses as to Glover's conduct on July 18 and 19, and allegedly contradictory testimony between these witnesses and Williams. Additionally, CWA asserts that the ALJ did not consider tape-recordings and

^{2/} The ALJ did not consider the events of July 13, 1994 since the charge did not address that date (ALJD36).

transcripts of the discussion between Glover, Williams, and supervisor James Lamont on July 19.^{3/}

On March 26, 1999, the employer filed a response urging us and the MSB to adopt the initial decision. Asserting that the alleged factual discrepancies are immaterial and the tape-recordings are unreliable, it stresses that Glover's conduct on each date was either unprotected when it began or lost its protection as tensions escalated. On July 21, CWA filed a reply reiterating the points made in its exceptions.^{4/}

We are charged with determining whether Glover engaged in protected activity and whether any such activity motivated the decisions to suspend and terminate him. Those determinations require a fact-sensitive analysis. We appreciate the ALJ's efforts in sorting through the voluminous record, but we need more assistance with respect to the events of July 18 and 19, 1994. In particular, we ask the ALJ to analyze in detail three matters: (1) the contents and credibility of Williams' testimony, especially insofar as this testimony concerns any requests for Glover's assistance; (2) the contents and significance of the memorandum (P-1) prepared by supervisor Patricia DeMarie on July 18, especially insofar as this memorandum conflicts with or

^{3/} We need not describe the other exceptions at this juncture.

^{4/} Our consideration of this case was delayed because we did not initially receive all the transcripts from the OAL. There was also a delay in transmitting the initial decision to us.


corroborates the testimony of other witnesses; and (3) the contents and reliability of the tape-recordings (P-14 and P-18) and transcripts (P-19 and R-51) of the July 19 discussion, especially insofar as these tape-recordings and transcripts conflict with or corroborate the testimony of Lamont and Williams concerning Glover's demeanor and actions. The trier of fact is in the best position to answer these questions because they interrelate with witness credibility issues. The answers are material to a protected activity analysis because they will shed light on whether Williams asked Glover to assist him at any time before or during the July 18 and 19 incidents; whether Williams' supervisors knew of any such requests; whether Williams could have reasonably believed discipline was imminent or possible on July 18 and 19; how and when Glover came to be involved in the discussions between Williams and his supervisors on those dates; and whether and how Glover was ordered to return to his work station on July 19.

For these reasons, we instruct the Administrative Law Judge to issue a supplemental report within 45 days of this decision. That report should provide the requested analyses and reaffirm, revise, or supplement the initial findings in light of those analyses. We stress that we are simply seeking more specificity and clarification concerning these factual matters. We have no opinion and intimate no opinion about the merits of the unfair practice charge.

ORDER

This case is remanded to the Administrative Law Judge for proceedings consistent with this opinion and the issuance of a supplemental report within 45 days of this decision.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: December 16, 1999
Trenton, New Jersey
ISSUED: December 17, 1999