P.E.R.C. NO. 93-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY),

Respondent,

-and-

Docket No. CO-H-92-99

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1034

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, Local 1034 against the State of New Jersey (Department of Environmental Protection and Energy). The charge alleged that the employer violated the New Jersey Employer-Employee Relactions Act when -- as part of a reclassification of unclassified employees into classified, non-competitive titles -- it slotted Anil Singh into the title of Hazardous Site Mitigation Engineer I instead of the title of Site Manager. The Commission finds that Singh's reclassification was a legitimate assessment of his fitness for a sensitive high-level position rather than an act of retaliation for his union activity.

P.E.R.C. NO. 93-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND ENERGY),

Respondent,

-and- Docket No. CO-H-92-99

COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1034

Charging Party.

Appearances:

For the Respondent, Hon. Robert J. Del Tufo, Attorney General (Stephan M. Schwartz, D.A.G.)

For the Charging Party, Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(David B. Beckett, of counsel)

DECISION AND ORDER

On October 4, 1991, the Communications Workers of America, Local 1034 filed an unfair practice charge against the State of New Jersey (Department of Environmental Protection and Energy). The charge alleges that the employer violated subsections 5.4(a)(1), (2), (3) and (5)[1/] of the New Jersey Employer-Employee Relations

---

1/ These subsections provide that public employers, their representatives or agents are prohibited 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. (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...."

Act, N.J.S.A. 34:13A-1 et seq., when -- as part of a reclassification of unclassified employees into classified, non-competitive titles -- it slotted Anil Singh into the title of Hazardous Site Mitigation Engineer 1 instead of the title of Site Manager. The charge specifically alleges that this placement violated an agreement on slotting criteria and was in retaliation for Singh's activity as shop steward.

On January 30, 1992, a Complaint and Notice of Hearing issued. On February 5, 1992, the employer filed an Answer denying that Singh's placement violated any agreement or constituted retaliation.

On April 28 and May 6, 1992, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by September 8, 1992.

On February 19, 1993, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 93-17, 19 NJPER 142 (¶24071 1993). With respect to the alleged violation of subsection 5.4(a)(3), he concluded that CWA had not proved that anti-union hostility motivated Singh's placement and that the employer had proved that Singh would not have been made a Site Manager even absent his protected activity.

On April 21, 1993, after receiving extensions of time, CWA filed exceptions. It objects to several findings of fact and to the Hearing Examiner's conclusions concerning subsection 5.4(a)(3).

On April 29, 1993, the employer filed a response. It urges that we accept the Hearing Examiner's findings and conclusions.

FINDINGS OF FACT

We have reviewed the record. We make these findings of fact.

Since January 1981, Anil Singh has worked for the Department of Environmental Protection (DEP) (now called the Department of Environmental Protection and Energy) (1T97-1T98). From March 1987 to March 1991, he occupied the unclassified title of Site Manager and worked in the Division of Hazardous Site Mitigation (now called the Division of Publicly Funded Site Remediation) (1T21, 1T103). That division cleans up toxic and other hazardous waste sites (1T22). When Singh was a Site Manager, Anthony Farro was Director of the Division; Ed Putnam was Assistant Director; Ferdinand (or Ted) Metzger was Chief of the Bureau of Site Management; and Akhil Verma was chief of Singh's section and thus Singh's supervisor (2T6). Effective March 9, 1991, the Department of Personnel ("DOP") reallocated the Site Manager title from the unclassified service to the classified service. As a result, 26 Site Managers were reassigned to various classified titles (R-5). Singh was slotted into the position of Hazardous Site Mitigation (HSM) Engineer I, the next highest title to Site Manager. It is this reclassification that Singh contends was motivated by hostility toward his shop steward activity. We will now review the events

leading to the reallocation of the Site Manager title and the facts concerning Singh's reassignment and protected activity.

In 1983, the Commissioner of Environmental Protection created a Hazardous Site Mitigation Administration and the Department of Civil Service created a Site Manager title. That title was unclassified and did not have a title hierarchy or salary range. Thus, the two dozen or so unclassified Site Managers had a wide range of responsibilities and salaries and no job security (1T22-1T24, 1T29-1T30). They were also unrepresented.

CWA petitioned this Commission to have the Site Manager title included in its negotiations unit of professional employees. In 1987, we granted that request. State of New Jersey (Department of Environmental Protection), P.E.R.C. No. 87-116, 13 NJPER 281 (¶18117 1987).

CWA then sought to have the Site Manager title reallocated from the unclassified service to the classified, non-competitive service. DEP and CWA worked together in a common cause to get DOP's approval (1T61; 2T8-2T9). Farro did not undermine that cooperation by criticizing CWA.[2/]

On September 20, 1989, DEP Assistant Commissioner Jim White wrote CWA staff representative Jeffrey Scott a letter (CP-1)

2/ The Hearing Examiner credited Farro's testimony based upon his forthrightness and demeanor (H.E. at 8, n. 11). Farro did not tell the Site Managers that the union would "sell them." While some managers complained to Farro about the union, he told them that he could not be involved in union business and they had to deal with the union, not him (2T44-2T45).

confirming the understandings reached at a meeting. The letter stated that DEP would petition DOP to reallocate the Site Manager title to the classified, non-competitive service and assign it a P-31 salary range. Employees holding the title of Site Manager would be slotted into a series of titles including HSM Specialist, HSM Engineer, and Site Manager; their seniority would be retroactive to when they had received the unclassified Site Manager title. Farro would develop job descriptions and performance dimensions for the new Site Manager title and CWA and DEP would develop criteria for slotting former Site Managers into different titles. CWA would review the staffing pattern before its submission to DOP.

In January 1990, White gave Scott a document entitled Slotting Criteria (R-2).[3/] The purpose of this document was to guide the placement of employees "into a salary range commensurate with their experience, education and the job description requirements." New hires and current Site Managers would be placed into one of the following titles and salary ranges: HSM IV (trainee/entry level) (range 20), HSM III (range 23), HSM II (range 26), HSM I (range 29), and Site Manager (range 31). The document then listed the initial and the final criteria for placements. The initial criteria were "education and experience" and "current salary." To avoid having employees immediately top out in a salary

3/ White had not reviewed earlier drafts; he "was brokering this at the top and looking at the final thing." (2T27).

range, the seventh step would be "typically" used as a slotting cutoff; thus, employees who would fall in the eighth or ninth step in a lower range or the third or fourth step in a higher range would "normally" be placed in the higher range. The final criteria were "job performance" and "equitability." Job performance included "qualitative PAR ratings (i.e. project targets and milestones) as well as the quantitative aspects (i.e. ability to work independently, quality of work)." A chart showed anticipated placements based on years of experience as a Site Manager and current salary. The document finally stated that all personnel actions would be initiated simultaneously, effective as of the employee's anniversary date and with seniority retroactive to the date of hire.

On February 21, 1990, White met with Scott and Farro and reviewed the proposed slotting criteria. It was agreed that Farro would slot employees according to those criteria and Scott would review the slottings (R-7; 2T15, 2T21, 2T48-2T49). Management retained discretion to place an employee with five or more years of experience in either the Site Manager or HSM Engineer I title based upon that employee's ability to act independently (2T48).

On April 4, 1990, a list was generated slotting the 27 unclassified Site Managers (R-8). In compiling the list, Farro did not independently determine placements since they involved positions five or six levels below his. Instead, he relied on the recommendations of the Assistant Director, the bureau chief, and the

section chief (2T54-2T55, 2T80-2T83). Only six employees were to be placed in the new Site Manager title, the position charged with cleaning up the "more complex" sites (R-5). All these employees had higher salaries than Singh and all but one had more experience as a Site Manager. According to this chart, Singh was to be placed in the next highest title, HSM Engineer I. He would receive a raise of about $1700, about $1000 more than he would initially receive if slotted into the classified position of Site Manager.

In April 1990, Scott met with Farro and White to review this list. They recognized that Singh and a few other employees near the top of the salary range might be displeased so they agreed to a grievance procedure (2T9-2T10, 2T50-2T51).

On May 24, 1990, DEP Commissioner Judith Yaskin wrote DOP Commissioner Andrew Weber a letter (R-1) seeking approval of the proposal to convert employees in the unclassified title of Site Manager to classified, non-competitive titles. A copy of this letter was sent to Scott, but not the attachments (1T53). The letter stated that CWA had agreed to the attached slotting criteria (R-2) and that employees slotted in at the eighth or ninth step could grieve their placement, including a departmental hearing.[4/]

4/ CWA has not proved that the parties agreed to slotting criteria in a different document (CP-2). This undated document differs from the document submitted to DOP in several respects. Instead of initial and final criteria, the document speaks of criteria generally and then lists "education and experience," "current salary," and "modifying criteria." The modifying criteria

Footnote Continued on Next Page

On February 5, 1991, DEP sent DOP a revised job specification for Site Manager and classification standards for determining what sites were "more complex" (CP-3).[5/] DOP approved DEP's reallocation proposal effective March 9, 1991 (R-5).

A shop steward since 1988 (1T103, 1T148), Singh worked with Scott during the process leading to the reallocation of the Site Manager title and the reclassifications of the previous Site Managers (1T123). He was CWA's primary contact with the Site Managers (1T41), but did not participate in reclassification meetings between DEP and CWA representatives (1T64). Farro turned down Singh's request to have Scott attend DEP staff meetings (1T123-1T124). While management knew of Singh's role as shop steward (R-3; 1T103), no evidence shows any hostility toward Singh's reallocation/reclassification activity.

Sometime in the fall of 1990, the Site Manager position of Ray Morales was abolished (1T129-1T130). Singh tried to get CWA involved on his behalf. The record does not reveal whether a

---

4/ Footnote Continued From Previous Page

include the desire to avoid topping out, job performance, and equitability. This document also assumes that a Site Manager with five or more years of experience and a salary above $52,332 would be placed in the new Site Manager title. (Singh's salary was $49,577.46, so his salary would not have entitled him to a Site Manager title under CP-2.) Finally, the document does not address the effective date of the personnel actions or retroactive seniority.

5/ Singh testified that his work experiences met these standards (1T107-1T118).

grievance was filed. In any event, Singh did not handle grievances. Instead, CWA staff representatives Scott and John Seiler handled all grievances (1T195, 2T38).

Singh testified that when he asked Verma about Morales, Verma informed him that his actions were being closely watched and that he should not affiliate himself with Morales (1T132-1T133). When Verma was asked whether he had told Singh that he was being closely watched because of his union activities, Verma testified: "No, I can't think of telling him that" (2T104-2T105). When Verma was asked if he had told Singh that Singh could get a better evaluation if Singh stopped associating with Morales, Verma testified: "I can't remember anything like that" (2T104). The Hearing Examiner accepted Singh's testimony on this point. We will too for purposes of this decision.[6/] After his conversation with Verma, Singh removed himself from the Morales case (1T183). Farro did not instruct Verma to tell Singh that he should not associate with Morales and Singh never approached Farro about Morales (2T62).

6/ The Hearing Examiner stated that he "must" credit Singh's testimony because it was "uncontradicted" given Verma's "non-recollection." (H.E. at 8 n. 12). We disagree. Uncontradicted testimony need not be credited. Langley v. Allstate Ins. Co., 206 N.J. Super. 365 (App. Div. 1985). And testimony that a witness does not recall saying something should not mechanically and invariably be treated as a failure to deny. Instead, the questions asked, the answers given, the plausibility and consistency of the testimony, the demeanor of the witnesses, and the other circumstances of the case should be considered in determining whom to credit and why.

On October 29, 1990, the Director of DEP's Division of Personnel issued a memorandum to the executive staff concerning time off to confer with union representatives (CP-10). Consistent with the parties' contract, this memorandum stated that employees could not use working time to confer with union representatives or stewards, but stewards could request working time to investigate grievances (1T186). The memorandum was left on Singh's chair four times within two weeks (1T131-1T132). Singh may have received it from his own work managers since it addressed the rights of stewards.

Verma filled out Singh's performance assessment review for the 1989 and 1990 work years. For both years, Verma rated Singh a "2" -- "moderately above standard" (CP-7; CP-8). No one on Verma's staff received a "1" -- "significantly above standard" (2T104-2T105). Singh asked Verma what he had to do to receive a "1."[7/] Singh testified that Verma told him that he should work on weekends and holidays and cut down on union activities (1T128-1T129). Verma could not recollect telling Singh that he would receive a "1" if he stopped his union activities (2T104). The

7/ It is unclear when this conversation occurred. Singh's testimony suggests that it occurred either after he received the 1989 PAR or after he received the 1990 PAR. Verma's testimony suggests that it occurred after Singh received an interim rating of 3 on his 1989 PAR (1T129; 2T103-2T104; CP-7).

Hearing Examiner accepted Singh's testimony. We will too for purposes of this decision.[8/]

In late February or early March 1991, Singh complained to Farro about his slotting. Singh claimed that his section chief, Verma, and his bureau chief, Metzger, had recommended that he be slotted into a classified Site Manager title. Farro responded that if his supervisor and boss had recommended that placement and someone had undermined their recommendation, he would fire that person and put Singh in his or her place (1T140; 2T57). Farro told Singh that he would be willing to talk to Verma and Metzger to ensure that the wrong decision had not been made (2T57-2T58).

Farro and Verma discussed Singh's placement. Verma explained, to Farro's surprise, that Metzger had not consulted Verma about the reslotting (2T100-2T101). Verma told Farro that he did not feel Singh was ready for the Site Manager title (2T58). Farro asked Verma to put his recommendation in writing (2T58, 2T101). Verma did so, in a memorandum dated March 26, 1991. That memorandum stated:

8/ The Hearing Examiner again incorrectly stated that he "must" accept Singh's testimony. We reject his finding that Verma told Singh that higher-ups wanted Singh to give up his union activities. Singh's vague testimony appears to have been based upon "impressions". For example, Singh testified that Verma was "under the impression" that "higher-ups" wanted him to tell Singh to cut down on union activities and that Singh had the "impression" that it was coming from "higher-ups." (1T180-1T182). Moreover, the Hearing Examiner absolved Farro of any anti-union animus and there is no indication that Putnam or Metzger had any such animus.

> This is in response to your request for my recommendations concerning slotting of Mr. Anil Singh per the new Site Manager reclassification titles. You explained to me that since Mr. Singh reported in my section, you need my direct input as I had not been involved in the final slotting decisions earlier.
>
> As you are aware Mr. Singh joined BSM in 1987. His performance as a Site Manager has been above standard (PAR rating of 2) for the past two years. He has continuously progressed in the job and has shown potential of further growth.
>
> Having reviewed the job descriptions and requirements of the new classified titles for earlier P-98 Site Managers, I agree with the recommendations for Mr. Singh to be slotted to the HSMA-1 title.
>
> In closing I recommend that Mr. Singh be considered for the Site Manager's position as soon as an opportunity arises, in light of the fact that he continues to progress in his work and providing this does not change. I have found Anil to be a very competent, highly reliable and conscientious member of my Section and willing to take on additional responsibilities.

Farro neither told Verma what to write nor edited the memorandum (2T59, 2T102).[9/]

Farro and Metzger also discussed Singh's placement. In particular, they discussed a March 19, 1991 memorandum that Singh had written and Metzger had signed at Singh's request (CP-11). That memorandum stated that Metzger and Singh had discussed his reclassification three times in October 1990 and twice in March 1990

9/ Verma was laid off shortly afterwards. We reject CWA's suggestion that Verma's memorandum and testimony were colored by his knowledge of the impending layoff and a hope for reemployment.

(Singh probably meant to write 1991) and that based on Singh's performance over the past two years, Metzger had "presented a reconsideration" to his superiors concluding that Singh would perform satisfactorily in the classified Site Manager title. The memorandum further stated that Metzger had not indicated to Singh that his work was less than exemplary and that, contrary to Metzger's recommendation after reconsideration, Singh was still to be slotted in the HSM Engineer I title. Farro questioned Metzger about this memorandum, but what Metzger told Farro did not reflect what Metzger had signed. Metzger "was not very strong with regard to whether Anil should get the promotion or not." (2T72).

Given his conversations with Verma and Metzger and Verma's memorandum, Farro declined to reverse the decision to slot Singh in the HSM I title. Farro believed that Singh should not receive the higher title because he needed direct supervision and was not ready to act independently (2T96). Farro does not reverse promotion decisions at much lower levels "unless there's something that's standing right out and hits me in the face." (2T61).

Only six of the 26 previous Site Managers were slotted into the classified Site Manager title (R-5). Singh was placed in the HSM Engineer I title and received a $1700 raise (R-8; 2T65). When Singh complained that he would not get another raise for 18 months, Farro asked DOP to allow Singh to retain his current anniversary date so that Singh would get a raise within six months. That request and Farro's appeal were turned down (2T65-2T66).

Singh grieved his placement (1T144). After a departmental hearing, that grievance was denied. Singh also filed a classification appeal with DOP, asserting that his duties were inappropriate to his new title. That appeal was also denied (R-5). Singh performs the same duties as an HSM Engineer I as he had performed as an unclassified Site Manager (1T153-1T154).

ANALYSIS

CWA has not excepted to the Hearing Examiner's recommendation that we dismiss the allegations concerning subsections 5.4(a)(2) and (5). In the absence of exceptions, we adopt that recommendation.

We next consider whether Singh's reclassification was discriminatorily motivated in violation of subsections 5.4(a)(1) and (3). In re Bridgewater Tp., 95 N.J. 235 (1984), sets forth the standards for evaluating such claims.

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the 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 rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as

pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

CWA has established that Singh engaged in protected activity. As a shop steward, Singh was the primary contact with Site Managers. He also met with Ray Morales about CWA's possibly representing Morales. Singh, however, did not participate in reclassification meetings with DEP and CWA officials or file any grievances.

CWA has also established that management officials knew that Singh was a shop steward. Farro also knew that Singh wanted Scott to attend internal staff meetings. And Verma knew that Singh had spoken to Morales.

We next consider whether CWA has established, by a preponderance of the evidence, that hostility toward Singh's protected activity motivated his reclassification as an HSM Engineer

I. We do not express any opinion concerning the merits of that reclassification.

CWA contends that the employer's illegal motivation is shown by its violation of the parties' agreement on slotting criteria. CWA did not prove that the parties agreed to adopt its version (CP-2) of the slotting criteria. Even if it had, that document's chart would not have dictated that Singh be made a Site Manager given his salary. Moreover, under either party's version of the slotting criteria, avoiding topping out was simply a consideration, not a mandate. The parties recognized that there would be exceptions to the "normal" or "typical" placement and thus adopted a grievance procedure for dissatisfied employees. Finally, neither version eliminated the employer's discretion to consider the qualitative and quantitative aspects of its employees' job performance, including the ability to act independently. Of the 26 previous Site Managers, only five were reclassified as Site Managers and entrusted with overseeing the "more complex" clean-up projects.

The reclassification decisions were made in April 1990. Director Farro did not make these decisions, instead relying on the recommendations of lower-level management. Nothing in the record suggests that Assistant Director Putnam or bureau chief Metzger expressed or harbored any anti-union animus, and section chief Verma did not have any input at this stage. Nor was Singh treated so differently from the other reclassified employees that an inference

of discriminatory motivation is warranted. All the employees slotted as classified Site Managers had higher salaries than Singh and all but one had more DEP experience. Singh himself received a $1700 raise as a result of his reclassification, $1000 more than he would have initially received as a classified Site Manager, and he continues to perform the same duties as he did before the reclassification, duties that DOP found are appropriate for an HSM Engineer I. Under all these circumstances, we conclude that the decision to reclassify Singh as an HSM Engineer I was not discriminatorily motivated.

We also conclude that Farro's decision in March 1991 to uphold Singh's reclassification was not discriminatorily motivated. The Hearing Examiner found that Farro was a forthright and credible witness who was not motivated by anti-union animus. Indeed, when Singh complained that he would not receive a raise for another 18 months after his reclassification, Farro championed his cause before DOP. And when Singh complained about his reclassification, Farro met with Metzger and Verma to determine whether he should reverse that decision. While Singh wrote and Metzger signed a memorandum indicating that Metzger had "presented a reconsideration" and now recommended Singh's promotion, Metzger did not make similar statements in his discussions with Farro or take a strong stance one way or the other. Verma wrote his own memorandum agreeing that Singh should be slotted into the HSM Engineer I title, praising

Singh's performance, and recommending that Singh be considered for the classified Site Manager title as soon as an opportunity arose if he continued to progress. Verma's memorandum accorded with his oral opinion that Singh was not yet ready for the Site Manager position. Farro thus found no basis for overturning Singh's reclassification and elevating him to one of the few classified Site Manager positions.

The Hearing Examiner found that Verma suggested that Singh cut down on union activities and not associate with Morales. However, the Hearing Examiner incorrectly ruled that these statements were irrelevant under Local Lodge No. 1424, I.A.M. v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 45 LRRM 3212 (1960) since they occurred more than six months before the charge was filed (H.E. at 18-19). While Bryan bars holding that statements outside the statute-of-limitations constitute independent unfair practices, Bryan does not bar considering such statements as evidence of discriminatory motivation infecting a personnel decision within the statute-of-limitations. See Township of Bloomfield., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd App. Div. Dkt. Nos. A-1521-87T1, A-3091-87T1, and A-3090-87T1 (10/26/89), certif. den. 121 N.J. 633 (1990); Mechanics Laundry and Supply, Inc., 240 N.L.R.B. No. 40, 100 LRRM 1243 (1979); see also Hardin, The Developing Labor Law, at 1792 (3d ed. 1992). Thus, Verma's statements cannot be held to be independent violations of subsection

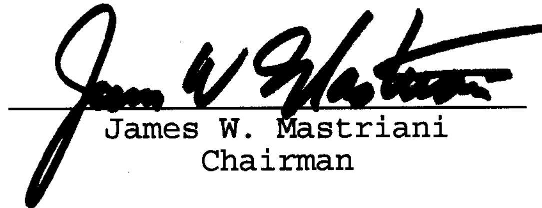
5.4(a)(1), but can be considered in determining whether Singh's reclassification was discriminatorily motivated.

Nevertheless, given our review of the record, we are not persuaded that Verma's statements motivated Singh's reclassification. In 1989 and 1990, Verma rated Singh as performing "moderately above standard," the highest rating Verma gave any employee. As we have already stated, Verma played no part in the April 1990 decision to reclassify Singh as an HSM Engineer I. When Farro later asked Verma whether Singh's reclassification should be overturned, Verma responded that while Singh was not yet ready for that position, he should be considered for the next opening if he continued to make progress. On the whole, Verma's memorandum evaluated Singh positively and did not suggest that its author harbored any animus toward Singh. Singh's reclassification resulted in a raise for continuing to perform the same duties and only five of the unclassified Site Managers were placed into the classified Site Manager title. In short, under all the circumstances, we believe that Verma's recommendation was a legitimate assessment of Singh's fitness for a sensitive high-level position rather than an act of retaliation for Singh's union activity. We therefore conclude that Farro's decision not to overturn Singh's reclassification did not violate subsections 5.4(a)(1) and (3).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: June 24, 1993
Trenton, New Jersey
ISSUED: June 25, 1993

H.E. NO. 93-17

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

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-92-99

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1034,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a complaint alleging that the Department of Environmental Protection violated Sections 5.4(a)(1), (2), (3) and (5) of the Act. A CWA Shop Steward claimed that his protected activities as Steward between June 1989 and April 1991 were the motivating reason that he was not slotted into the preferred job title of Site Manager. The inquiry was directed to an entire record analysis under Bridgewater. The proofs failed to show that animus was a "motivating force" or a "substantial reason" for the adverse action of DEP.

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.

H.E. NO. 93-17

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

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-92-99

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1034,

Charging Party.

Appearances:

For the Respondent, Hon. Robert J. Del Tufo, Attorney General (Stephan M. Schwartz, D.A.G.)

For the Charging Party, Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(David B. Beckett, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 4, 1991, and amended on October 19, 1991, by the Communications Workers of America, Local 1034 ("Charging Party" or "CWA") alleging that the State of New Jersey ("Respondent" or "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 the State and CWA were parties to a collective negotiations agreement, covering a unit of Professional employees, during the term July 1, 1989 through June 30 1992; Anil Singh ("Singh"), an employee within this unit at the Department of Environmental

Protection ("DEP"), is a Shop Steward involved in union activities; CWA entered into an agreement with the State concerning employees in the title of Site Manager and as a result, the State agreed that it would not place employees in a salary range where the employee would be above Step 7, i.e., in order to avoid "topping out" employees who would otherwise be denied merit increments; employees with sufficient experience and qualifications were to be placed in the title of Site Manager but, contrary to this agreement, the State placed Singh in the lower level position of Hazardous Site Mitigation Specialist ("HSMS") Engineer 1 in salary range 29 at Step 8; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) & (5) of the Act.[1/]

A Complaint and Notice of Hearing was issued on January 30, 1992, and the Respondent's Answer was filed with the Commission on February 5, 1992. Hearings were held on April 28 and May 6, 1992, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and

---

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. (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."

argue orally. Oral argument was waived (2 Tr 134) and each party filed its post-hearing brief by September 8, 1992.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The State of New Jersey is a public employer within the meaning of the Act, as amended, and the Communications Workers of America, Local 1034 is a public employee representative within the meaning of the same Act.

2. Singh has been employed by the DEP since January 1981 (1 Tr 97, 98). He has held a variety of positions since his date of hire, including Supervising Environmental Engineer and, since March 1987, Site Manager, in the Division of Hazardous Site Mitigation.[2/] At the time of the instant hearing, Singh's title was HSMA Engineer I. His supervisors have been Section Chief Akhil Verma and Bureau Chief Ferdinand "Ted" Metzger. [1 Tr 100-105; CP-4; 2 Tr 99, 100].

3. At the request of DEP, the Department of Civil Service[3/] created the job title of Site Manager in 1983, there having been a group of approximately two dozen employees in various titles prior thereto. These employees became unclassified under Civil Service. When CWA learned of the Site Manager title, it filed

---

2/ Singh's duties as Site Manager are described at 1 Tr 104.

3/ Now the Department of Personnel ("DOP").

an appeal with the Department of Civil Service, arguing that these employees should be within a CWA collective negotiations unit. DEP's position was that Site Managers were management titles. CWA then filed a clarification of unit petition with the Commission in 1984, and in 1987, the Commission ruled that the Site Manager title should be placed within the Professional Unit and should no longer be a management title.[4/] Thereafter, the title of Site Manager fell within the negotiations unit of CWA Local 1034, the Charging Party herein. [1 Tr 22-27].

4. Since 1983, the Site Manager title had been a "no range title," meaning that Civil Service did not assign a range value to it (1 Tr 28, 29). In 1988, CWA Senior Staff Representative Jeffrey Scott began working through DEP Commissioner Christopher Daggett, in order to get the Site Manager title converted to "classified non-competitive" service (1 Tr 27-31).

5. In 1989, Daggett designated William J. White, an Assistant DEP Commissioner, to seek an agreement on the development of "slotting" criteria for the Site Manager title (1 Tr 30-32). Following several meetings, an agreement was reached on September 8, 1989, wherein the Department of Personnel would be asked by DEP to convert the Site Manager title from unclassified service to

---

4/ See State of New Jersey (DEP), P.E.R.C. No. 87-116, 13 NJPER 281 (¶18117 1987).

non-competitive service at a P-31 salary range (1 Tr 30-34; CP-1).[5/]

6. In or around April 1991, Singh was slotted into the position of "HSMA Engineer I" in Range 29 at Step 8. But, according to Singh, he had been recommended for the position of Site Manager at Range 31 by his supervisors. The slotting decision had been preceded by a detailed memorandum from Singh to Bureau Chief Metzger on March 19, 1991 (CP-11; 1 Tr 137-139). Singh testified credibly that his duties remained the same as between his prior appointment to the Site Manager title and his current assignment to HSMA Engineer I. [See R-2, R-5 and 1 Tr 153-156].

7. Also, prior to the slotting of Singh in April 1991, Anthony Farro, the Director of Publicly Funded Site Remediation, had called Singh into his office in late February or early March 1991 (2 Tr 57). Farro stated that Singh was to be slotted into HSMA Engineer I at Step 8 and that he would be serving for 18 months at that Step (1 Tr 139, 140).[6/] Farro next stated that the reason for this decision was because his Bureau Chief (Metzger) and his Section Chief (Verma) had not recommended him for Site Manager (R-4; 2 Tr 58-60, 101, 116). Singh contradicted Farro, stating that both

---

5/ See documents exchanged between Scott, White and others between September 20, 1989 and May 24, 1990. (CP-1, CP-2; R-1, R-6, R-7 & R-8; 1 Tr 33-40, 57, 58, 146; 2 Tr 7-29, 69).

6/ This action had occurred due to a service reallocation on February 23, 1991, which reclassified, inter alia, twenty (20) Site Manager positions, including Singh's (R-5, p. 2).

his Bureau Chief and his Section Chief had recommended him (2 Tr 57).[7/] Farro again reviewed Singh's placement and decided that it should remain unchanged. [1 Tr 135-143, 161-169; 2 Tr 41, 61; CP-11].

8. The right of Site Managers to grieve their slotting, and to obtain a departmental hearing, was provided for in a May 24, 1990 letter from Judith A. Yaskin, the Commissioner of DEP, to Andrew Weber, the Commissioner of DOP, (R-1, §6; 1 Tr 54-57). Singh exercised his right to grieve (appeal) his slotting and his appointment to the title of HSMA Engineer I on April 15, 1991. This was followed by a memorandum dated April 26, 1991, from Singh to Farro, challenging Farro's order of April 22, 1991. [CP-13; R-1, ¶6, R-2; 1 Tr 50-52, 54-57, 144-146; 2 Tr 9, 10, 90, 92, 95, 221]. On July 11, 1991, following a desk audit on May 16, 1991, DOP rejected his appeal (R-5, p. 3; 1 Tr 149, 150). Thus, his appointment and title remained the same.

9. Singh was designated a CWA Shop Steward on June 14, 1989, representing approximately 24 Site Managers (R-3; 1 Tr 148, 149). I find as a fact that Singh's activities as a Shop Steward since 1989 constituted protected activities, which were well known to the management of DEP. [1 Tr 103, 122-124]. [1 Tr 41, 63, 64, 67-69]. Also, as Shop Steward, Singh served as a liaison to Scott,

---

7/ I do not credit Singh's contradiction (see R-4 and 2 Tr 58-60, 101, 116).

supra, regarding various union matters (1 Tr 40, 41, 65, 66, 123, 126).[8/]

10. In 1990 or 1991, Section Chief Verma stated to Singh during a PAR evaluation meeting that in order to improve his rating he should work on weekends and holidays "...and also cut down your Union activities..." (1 Tr 128, 129, 180).[9/] Verma's testimony was that he had no recollection of saying "...anything like that," in response to a question as to whether or not he stated to Singh that he could receive a "1" if he stopped his union activities (2 Tr 104). Thus, I must credit the specific recollection of Singh on this issue since Verma's "non-recollection" does not constitute a denial. [1 Tr 128, 129 v. 2 Tr 104].[10/]

11. In or around September or October 1990, Singh attempted to get CWA involved in the case of Raymond Morales, a Site

---

8/ The ultimate question to be resolved in this proceeding is whether or not CWA's proofs satisfy the third part of the test established by our Supreme Court in Bridgewater Tp. v. Bridgewater Tp. Public Works Ass'n, 95 N.J. 235 (1984), i.e. did DEP management manifest the requisite hostility or anti-union animus toward Singh in retaliation for his exercise of protected activities as a Shop Steward for CWA?

9/ Singh was imprecise as to which of two PAR evaluation meetings he was referring to, one being in January 1990 (CP-7) and the other being in February 1991 (CP-8). A precise finding is not required since, even if relevant to the conclusion herein, either PAR meeting occurred more than six months prior to the filing of the instant Unfair Practice Charge on October 4, 1991.

10/ See also, Singh's uncontradicted testimony that Verma said that he was acting on behalf of "higher ups" (1 Tr 180-182).

Manager whose title was being terminated. During the time that Singh was representing Morales on behalf of CWA, he, alone was given a copy of a Memorandum, dated October 29, 1990, from the Director of the Personnel Division of DEP to all "Executive Staff" on the subject of stewards' rights (CP-10; 1 Tr 131, 132). Singh testified that the "management" of DEP was aware of what he was doing in the matter of representing Morales but Farro testified credibly[11/] that Singh never approached him on behalf of Morales (2 Tr 62, 63). Additionally, Singh's supervisor, Verma, had informed him that his actions were "...being closely watched and I was told not to affiliate myself with Ray Morales..." (1 Tr 132). [1 Tr 129-134].[12/] However, Farro also testified credibly that he never advised Verma to tell Singh that he should not associate with Morales (2 Tr 62).

12. On August 8, 1989, Scott wrote to Director Barbara Grabowski of DEP, complaining that Farro had stated to the Site Managers that the union is "...going to sell you out..." (CP-12). Farro credibly denied making this statement (2 Tr 41, 42). After August 8th, Scott never attributed any additional alleged anti-union remarks to Farro (2 Tr 43).

11/ In crediting Farro as against either Singh or Scott in this proceeding, I have done so based upon Farro's demeanor and forthrightness as a witness.

12/ Also, in connection with the Morales incident, Verma again said that he had no recollection of having told Singh that he was "being watched closely" because of union activities. Therefore, I must credit the uncontradicted testimony of Singh regarding Verma on the Morales matter. [1 Tr 132 v. 2 Tr 61, 104, 105].

13. In 1990, Singh was present at a meeting where Farro stated that "...the Union will sell you...," referring to Site Managers (1 Tr 125; 66). Farro acknowledged that at various meetings with Site Managers, in the absence of a union representative, there were managers who were critical of the union. Farro's response is credited, i.e. that "as management" he could not get involved in "union business" and that he made no statement to the Site Managers about the union (2 Tr 44, 45, 63).[13/]

ANALYSIS

The Unfair Practice Charge alleges that the Respondent State violated Sections 5.4(a)(1), (2), (3) and (5) of the Act. These alleged violations of the Act will be dealt with seriatim.

The Respondent State Did Not "Independently" Violate Section 5.4(a)(1) Of The Act By Its Conduct Herein.

I am here considering the question of whether the Respondent State "independently" violated Section 5.4(a)(1) of the Act. If other subsections of the Act have been violated then, following National Labor Relations Board precedent, I may find a "derivative" violation of Section 5.4(a)(1), based on these related violations.[14/] This latter question, however, awaits a

---

13/ The effort of the Charging Party to demonstrate that Farro manifested anti-union animus was based solely upon hearsay. However, under the "residuum rule," I cannot base a finding upon hearsay in the absence of independent corroborating evidence: See, for example, 1 Tr 65-90 and Weston v. State of New Jersey, 60 N.J. 36 (1972).

14/ See Galloway Tp. Bd. of Ed., P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).

determination of whether or not the Respondent State "independently" violated Section 5.4(a)(1).

The standard for such a determination has been set forth by the Commission in Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988) where it was stated that a public employer "independently" violates Section 5.4(a)(1) of the Act if its action/conduct tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: see Jackson Tp., supra, adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Also, the Charging Party need not prove an illegal motive in order to establish an independent violation of Section 5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

I have no difficulty in concluding that there was no conduct engaged in by the representatives of the State which tended to interfere with Singh's statutory rights within the meaning of Jackson and the cases cited thereafter. In so concluding I have taken into consideration that the Charging Party need not prove an illegal motive in order to establish an independent violation.

Therefore, I will recommend dismissal of the Charging Party's allegation that the State "independently" violated Section

5.4(a)(1) of the Act. The question of a possible derivative violation of this subsection of the Act must await my determination as to whether either of the other three subsections of the Act have been violated.

The Respondent State Did Not Violate Section 5.4(a)(2) Of The Act By Its Conduct Herein.

The Commission has established a clear-cut rule for determining when a public employer has violated Section 5.4(a)(2) of the Act. This may be found in Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 599 (¶17224 1986) where it was stated that: "...To establish such a violation, it must be proved that...participation (by a supervisor in a union meeting) constitutes domination or interference with the formation, existence or administration of the employee organization..." (12 NJPER at 600). The Commission has further refined its test for finding such a violation, namely, that the employer's conduct must:

> ...constitute pervasive employer control or manipulation of the employee organization itself...Duquesne University, [198 NLRB No. 117] 81 LRRM 1091 (1972)...Kurz-Kasch, Inc., [239 NLRB No. 107] 100 LRRM 1118 (1978)...
>
> North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). [Emphasis supplied].

To the same effect, see like holdings of the NLRB: Deepdale General Hospital, 253 NLRB No. 92, 106 LRRM 1039 (1980); On a Corp., 285 NLRB No. 77, 128 LRRM 1013 (1987); and Bell Energy Management. Corp., 291 NLRB No. 23, 130 LRRM 1499-1501 (1988).

It is plain as a pikestaff that the Respondent State has engaged in no conduct, based upon the instant record, which meets the above rule for a violation of Section 5.4(a)(2) of the Act. The conduct of Farro, by his presence at meetings of the Site Managers, plainly fails to satisfy the requisite of "...domination or interference with the formation, existence or administration..." of CWA. As the Commission had earlier noted, the offensive conduct must "...constitute pervasive employer control or manipulation..." of the union as an organization. Obviously, this factor is not present in the instant case and, thus, I must recommend dismissal of the Section 5.4(a)(2) allegation.

The Respondent State Did Not Violate Section 5.4(a)(5) Of The Act By Its Conduct Herein.

To the extent that the Respondent may have violated Section 5.4(a)(5) of the Act, which would be most difficult to conclude on the facts established in this record, I would have to conclude that no violation occurred by its conduct, based upon New Jersey Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). In that case the Commission ended many years of confusion as to when an unfair practice charge presented a true refusal to negotiate in good faith within the meaning of Section 5.4(a)(5) of the Act as opposed to those instances where the unfair practice charge presented a mere breach of contract claim. The Commission concluded that the latter cases should be resolved, if possible, under the parties' negotiated grievance procedures. In an attempt to clarify the demarcation

between the two situations, the Commission provided several examples of instances in which it would "entertain unfair practice proceedings under Section 5.4(a)(5)."

1. Repudiation of an established term and condition of employment: This is most clearly illustrated by an employer's decision to abrogate a contract clause based upon its belief that the clause is outside of the scope of negotiations. An unfair practice proceeding would be entertained to determine whether or not the employer has already repudiated a contract clause based on its belief that the clause is non-negotiable or, alternatively, where the employer has raised a scope of negotiations defense to a contract claim. As a corollary, a claim of repudiation might also be supported by a contract clause "...that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause..." (10 NJPER at 423). (Emphasis supplied).[15/]

2. Specific indicia of bad faith: It is here required that such indicia of bad faith be "...over and above a mere breach of contract..." (10 NJPER at 423).

15/ See also, Middletown Tp. Bd. of Ed., P.E.R.C. No. 92-14, 17 NJPER 408 (¶22194 1991)[no repudiation]; Tp. of Barnegat, D.U.P. No. 91-19, 17 NJPER 172 (¶22071 1991)[no repudiation - employer relied upon contract]; N.J. Dept. of Human Services, D.U.P. No. 91-12, 16 NJPER 579 (¶21254 1990)[employer relied on contract]; and Passaic Cty. Reg. Bd. of Ed., D.U.P. No. 89-5, 15 NJPER 54 (¶20019 1988)[good faith contract dispute - no claim that employer repudiated a contract term].

3. Vindication of the policies of the Act: An unfair practice proceeding will be entertained where the charge indicates that the policies of the Act, rather than a mere breach of contract, "...may be at stake..." (10 NJPER at 423).

The proofs in this case fail to establish that anything more than a breach of contract occurred, if that. Further, from the record, it does not appear that the Charging Party has seriously sought to establish a violation of this subsection of the Act. This is evident from the post-hearing brief filed by CWA, which concentrates almost exclusively upon its proofs that the Respondent State violated Section 5.4(a)(3) of the Act.

The Respondent State Did Not Violate Section 5.4(a)(3) Of The Act When It Failed To "Slot" Anil Singh Into The Title Of Site Manager In Or Around April 1991.

Although CWA's Unfair Practice Charge has alleged violations of Sections 5.4(a)(1), (2), (3) and (5) of the Act, three of which I have addressed previously, counsel for each party has limited his argument to whether or not the Respondent State had violated subsection (a)(3). I note here only that if a Section 5.4(a)(3) violation is found, then a derivative subsection (a)(1) violation will also be found: see Galloway, supra.

In Finding of Fact No. 9 above, I found as a fact that, following Singh's designation as a Shop Steward on June 14, 1989, his various activities, i.e., involvement with Morales in late 1990, and assisting Scott, constituted protected activities under our Act, which were well known to the management of DEP. In this same

Finding of Fact No. 9, I stated that the ultimate question to be resolved in this proceeding was whether or not DEP management had manifested the requisite hostility or anti-union animus toward Singh in retaliation for his exercise of protected activities as Shop Steward within the meaning of the tests established by our Supreme Court in Bridgewater Tp. [supra @ Findings of Fact Nos. 6, 7 & 9].

In Bridgewater, the Supreme Court articulated the following tests in assessing employer motivation: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the public employer's decision; and (2) once this is established, the public employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).

Further, the Court stated in that case that no violation may be found unless the Charging Party has proved by a preponderance of the evidence on the record as a whole that protected activity was a substantial or a motivating factor in the employer's adverse action. This may be done by direct or circumstantial evidence which demonstrates that the employee engaged in protected activity, that the employer knew of this activity, and, finally, that the

employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].16/

If I should conclude that the requisite burden of proof as to hostility or anti-union animus has been met by CWA, then I must, under Bridgewater, decide whether or not the State's proofs that the failure to have slotted Singh into the title of Site Manager at Range 31 rather than into HSMA Engineer I at Range 29 would have occurred even in the absence of Singh's protected activities. This defense requires proof by a preponderance of the evidence.

* * * *

Now consider the following: the job title of Site Manager was created in 1983 and was unclassified under Civil Service (F/F #3); following a Commission decision in 1987, the Site Manager title was placed in the Professional Unit and Singh became a Site Manager in March 1987 (F/F #2, 3); by the latter part of 1989, agreement had been reached to convert the Site Manager title from unclassified service to non-competitive service (F/F #4, 5); in or around April 1991, Singh was slotted into the position of HSMA Engineer I in

---

16/ Note, however, that the Court in Bridgewater stated further that the "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..." (Emphasis supplied). (95 N.J. at 242).

Range 29 although his duties remained the same as when he was a Site Manager (F/F #6);[17/] prior to Singh's slotting in April 1991, Farro had in February or early March 1991, advised Singh that he was to be slotted into HSMA Engineer I for 18 months due to a service reallocation made on February 23, 1991, affecting 20 other Site Manager positions, including Singh's (F/F #7); Farro told Singh that the reason for this decision of slotting him into HSMA Engineer I was because Bureau Chief Metzger and Section Chief Verma had not recommended him for Site Manager (F/F #7); Singh contradicted Farro, stating that both had recommended him but, when Farro again reviewed Singh's placement as HSMA Engineer I, he decided that it should remain unchanged (F/F #7); in 1990 or 1991, Verma told Singh that in order to improve his PAR rating he should work weekends and holidays and "cut down your Union activities" and, also, Verma stated that he was acting on behalf of "higher ups" (F/F #10); in or around September or October 1990, Singh sought to involve himself on behalf of Morales, a Site Manager whose title was being terminated, and, during that time, Singh alone was given a copy of an October 29, 1990 memo from DEP Personnel, regarding the rights of stewards and their representation (F/F #11); although Singh testified that DEP management was aware of what he was doing regarding Morales, I have

---

17/ Pursuant to a right to grieve the slotting decision by the DEP, he did so on April 15, 1991. Then, following the exchange of certain memoranda and a desk audit on May 16, 1991, his appeal of the DEP slotting decision was rejected. [(F/F #8].

credited the testimony of Farro that he was never approached by Singh on behalf of Morales (F/F #11); Verma has been found to have told Singh that his actions were being "closely watched" and that he should not affiliate himself with Morales but, however, Farro never advised Verma to tell Singh that he should not associate with Morales (F/F #11);[18/] on August 8, 1989, Scott complained that Farro had stated to Site Managers that the union was going to "sell you out," but this was credibly denied by Farro and Scott never attributed anything additionally to Farro by way of anti-union remarks (F/F #12); in 1990, Singh was present at a meeting where he said that Farro stated that the "Union will sell you," but I have credited Farro's response that "as management" he could not get involved in "union business" and that he had made no such statement to Site Managers about the union while, at the same time, acknowledging the dissatisfaction and criticism of certain of the Site Managers about the union at his meetings with them (F/F #13).

Based upon my Findings of Fact above, I have concluded that the proofs of CWA, based upon the whole-record, are wanting. I find the Commission's decision, cited by CWA at p. 12 of its Brief, worthy of quoting at this point:

18/ The testimony found in Findings of Fact Nos. 10 & 11, involving Verma, is all time-barred under the six-month rule in Section 5(c) of the Act. Thus, no Finding of Fact for purposes of my ultimate decision can be based upon the Verma testimony. However, under Local Lodge No. 1424, I.A.M. v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 416, 45 LRRM 3212 (1960), the facts as found in ¶'s 10 and 11 could be considered for background purposes only.

> ...No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by...evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards protected activity...If the charging party meets this burden, a violation will be found unless the employer proves, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct...
>
> [Boro of Tinton Falls, P.E.R.C. No. 89-108, 15 NJPER 270, 271 (¶20117 1989)].

I cannot find that CWA has proved by "...a preponderance of the evidence on the entire record..." that Singh's protected activities in discharging his duties as a CWA Shop Steward since mid-1989 were a "...substantial or motivating factor..." in the adverse action of his having been slotted by DEP (Farro) into the HSMA Engineer I title as opposed to the Site Manager title in the spring of 1991.

There are just too many shortcomings in CWA's proofs. Plainly, Singh's having been an active and visible Shop Steward is a plus. But, having credited Farro's testimony as against the key points made by Singh (see F/F #7, 11-13), Singh is left essentially with his testimony, which I have credited, as against that of Verma. However, none of the Verma statements to Singh, either in 1990 or 1991,[19/] are probative vis-a-vis the ultimate finding of an unfair practice because they are untimely under the six-month rule in our Section 5(c) or under Bryan Mfg. Co., supra.

19/ See Findings of Fact Nos. 10 & 11.

Further, Bridgewater teaches that the "mere presence" of animus is "not enough." The manifested animus must have been "a motivating force or a substantial reason" for the DEP's failure in this case to have slotted Singh into the Site Manager title in the spring of 1991. CWA's proofs, based upon the Verma testimony, are not sufficient to satisfy the "motivating force" or "substantial reason" requisites set down by the Court in Bridgewater. [See 95 N.J. at 242].

* * * *

I have also assumed, arguendo, that even if CWA's proofs did satisfy the Bridgewater requisites in all respects, I am persuaded that the State has demonstrated by a preponderance of the evidence that the same adverse action (non-slotting to Site Manager) would have occurred in the absence of Singh's protected activities. My Findings of Fact are more than adequate to demonstrate that the State had a legitimate justification in making the assignment that it did, irrespective of whether the CWA and Singh thought that in so doing its representatives were acting with anti-union animus.

I have already found the testimony of Farro in this proceeding to be worthy of credit vis-a-vis Singh on the issue of whether or not Farro manifested anti-union animus. In Finding of Fact No. 7, I have found that Farro said that the reason for his decision to slot Singh into HSMA Engineer I at Step 8 was because Bureau Chief Metzger and Section Chief Verma had not recommended him for Site Manager (2 Tr 58-60, 101, 116; R-4). Singh's contradiction of Farro is of no weight at this stage of the proceeding (2 Tr 57).

* * * *

Thus, unlike my decision in Tinton Falls, supra, I must recommend that the Complaint in this proceeding be dismissed, based on a whole-record analysis under Bridgewater Tp.

CONCLUSIONS OF LAW

1. The Respondent State (DEP) did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) or (5) by its conduct herein in having determined that the Charging Party's Shop Steward, Anil Singh, was, in the spring of 1991, to be slotted into the title of HSMA Engineer I, Range 29 at Step 8, rather than into the title of Site Manager at Range 31.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the Complaint be dismissed.

Alan R. Howe
Hearing Examiner

Dated: February 19, 1993
Trenton, New Jersey