

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY MOSQUITO
EXTERMINATION COMMISSION,

Respondent,

-and-

Docket Nos. CO-H-95-169
CO-H-96-22 & CO-H-96-27

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, LOCAL 1044,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission severs and dismisses two unfair practice charges from a consolidated Complaint. The charges were filed by the Communications Workers of America, AFL-CIO, Local 1044 against the Burlington County Mosquito Extermination Commission. The charges allege that the BCMEC violated the New Jersey Employer-Employee Relations Act when its superintendent suspended Michael Muench, an inspector, for 53 days, allegedly in retaliation for filing a grievance and reporting a pilot's possible pesticide misapplication to the Department of Environmental Protection; when it discharged Muench, allegedly in retaliation for his filing grievances and reporting the asserted misapplication to DEP; and when it suspended Daniel Stevenson, a shop steward, for 10 days, allegedly for his role in pressing a group grievance involving Muench.

The Complaint was consolidated with a series of appeals filed by Muench with the Merit System Board and hearings were conducted by an Administrative Law Judge. The ALJ found that none of the personnel actions was motivated by hostility toward grievances filed by Muench or the complaint filed with the DEP and all were based on legitimate operational concerns and proven misconduct. No evidence was presented on the charge concerning the suspension of Daniel Stevenson.

The Commission declines to consider whether the Act was violated by any disciplinary actions besides those contested in the charges and also declines to consider whether a new hearing on the termination issue should have been held after the first ALJ recused himself. Absent any exceptions or evidence in the record concerning the third charge involving the Stevenson suspension, the Commission severs that charge and dismisses it.

The Commission is satisfied that the ALJ reviewed the evidence and determined that the suspensions in question and the termination were motivated by legitimate business reasons, not hostility towards Muench's grievances or his DEP complaint. The Commission also agrees with the ALJ's conclusion that the 1994 suspensions and the 1995 termination were not motivated by hostility towards Muench's protected activity and the Commission has no basis for rejecting that conclusion on this record. The Commission therefore dismisses the first unfair practice charge concerning Muench's suspensions. The Commission does not issue an order with respect to the second charge (CO-96-22) at this juncture and will transmit the record to the Merit System Board for its consideration of CWA'S request to reopen the hearing on the termination. The Commission asks the MSB to send to the Commission its decision on that request so the Commission can consider whether further action on that charge is necessary.

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

BURLINGTON COUNTY MOSQUITO
EXTERMINATION COMMISSION,

Respondent,

-and-

Docket Nos. CO-H-95-169
CO-H-96-22 & CO-H-96-27

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, LOCAL 1044,

Charging Party.

Appearances:

For the Charging Party, Weissman & Mintz, attorneys
(Sharra E. Greer, on the exceptions)

For the Respondent, Capehart & Scatchard, attorneys
(Craig D. Bailey)

DECISION

On November 21, 1994, the Communications Workers of America, AFL-CIO, Local 1044, a majority representative, filed an unfair practice charge (CO-95-169) against the Burlington County Mosquito Extermination Commission ("BCMEC"), a public employer. The charge alleges that the BCMEC violated 5.4a(1) and (4)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1

^{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. (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.

et seq., when the BCMEC's superintendent suspended Michael Muench, an inspector, for 53 days, allegedly in retaliation for filing a grievance and reporting a pilot's possible pesticide misapplication to the Department of Environmental Protection ("DEP").

On July 27, 1995, Local 1044 filed another charge (CO-96-22). This charge alleges that the BCMEC violated 5.4a(1), (3), (5) and (7)^{2/} when it discharged Muench, allegedly in retaliation for his filing grievances and reporting the asserted misapplication to DEP.

The next day, CWA filed a third charge (CO-96-27). This charge asserts that BCMEC violated 5.4a(1), (3), and (5) when it suspended Daniel Stevenson, a shop steward, for 10 days, allegedly for his role in pressing a group grievance involving Muench.

On September 19, 1995, the Director of Unfair Practices issued a consolidated Complaint on the three charges. The employer's Answer denied that any unfair practices had been committed.

^{2/} N.J.S.A. 34:13A-5.4a(3), (5) and (7) 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; (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; (7) Violating any of the rules and regulations established by the commission."

Muench also filed several appeals with the Merit System Board ("MSB"). These appeals contested a series of suspensions (including those encompassed in CO-95-169), a demotion, and his termination. The MSB transmitted these appeals to the Office of Administrative Law for determination as contested cases.

Motions were made to have the unfair practice charges and the MSB appeals consolidated for hearing before an Administrative Law Judge ("ALJ") and to have a predominant interest determination made. The MSB and the Commission agreed that the charges and appeals should be consolidated. The agencies further agreed that after an ALJ issued an initial decision, the Commission would first determine whether Muench engaged in activities protected under the Employer-Employee Relations Act and, if so, whether hostility towards such activity was a substantial or motivating factor in the suspensions challenged by the charges and in Muench's termination. The MSB would then determine whether those personnel actions and the other personnel actions challenged in the appeals were for legitimate business reasons and were otherwise warranted under Civil Service law. If violations of the Civil Service law were found, the MSB would remedy such violations and if violations of the Employer-Employee Relations Act were found, the Commission would determine what relief was warranted under its statute.

Before the predominant interest determination was made, the parties and the ALJ agreed that a one-day hearing would be conducted on the Civil Service appeal of the termination. At the

outset of the hearing, CWA's attorney stated that given the nature of the hearing, CWA would only touch upon the issue of bad faith or illegal motive and that issue would be explored in more detail in subsequent hearings (Tr.4).

The ALJ who conducted that hearing recused himself before deciding the Civil Service appeal of the termination or conducting hearings concerning the other personnel actions. ALJ Robert W. Scott was then appointed to conduct further hearings and issue an initial decision on all personnel actions. Judge Scott reviewed a transcript of the hearing on the termination and decided he need not rehear that issue since the witnesses in that hearing testified in the hearings before him and he was able to assess their credibility.

On July 17, 1998, Judge Scott issued his initial decision. While Muench had filed numerous grievances, Judge Scott found that none of the personnel actions was motivated by hostility toward those grievances or the complaint Muench filed with DEP and all were based on legitimate operational concerns and proven misconduct. Judge Scott, however, reduced the length of certain suspensions imposed in 1992, 1993 and 1994.^{3/} Finally,

^{3/} The demotion and the 1992 and 1993 suspensions were not at issue in the unfair practice charges. The first unfair practice charge encompasses a 45-day suspension imposed in July 1994, a six-day suspension imposed in September 1994, and a two-day suspension contested through arbitration. Judge Scott upheld the 45-day suspension and converted the six-day suspension into a reprimand.

Judge Scott noted that the third unfair practice charge centered on Stevenson's suspension and no evidence had been presented concerning that suspension.

On October 6, 1998, having received extensions of time, CWA filed exceptions with the MSB and the Commission. With respect to CO-95-169 and CO-96-22, CWA argues that Judge Scott granted a motion to dismiss based on an improper assumption that the DEP complaint was unprotected activity. It also asserts that the evidence makes clear that the personnel actions were in retaliation for that complaint and Muench's grievances. CWA did not file any exceptions concerning CO-96-27.^{4/}

On November 4, 1998, the employer filed a response urging the Commission to adopt Judge Scott's findings and conclusions concerning the unfair practice charges. It asserts that Judge Scott did not grant a motion to dismiss and instead concluded that CWA had not proven its charges on the merits.

The Commission received extensions of time in which to consider the exceptions and response. We limit our review to the matters raised in the exceptions concerning the unfair practice charges and the questions identified in the predominant interest determination. We decline to consider whether the Act was violated by any disciplinary actions besides those contested in

^{4/} Absent any exceptions or evidence in the record concerning Stevenson's suspension, we sever that charge from the consolidated Complaint and dismiss it.

the charges. We also decline to consider whether a new hearing on the termination issue should have been held after the first ALJ recused himself. That hearing was based on the Civil Service appeal and the rehearing issue has been presented to the MSB instead of us.

CWA asserts that Judge Scott granted a motion to dismiss based on an improper assumption that the DEP complaint was unprotected activity. We do not read the initial decision that way. The decision does not state that Judge Scott was considering or granting a motion to dismiss nor does it address the issue of whether or not the DEP complaint was protected activity. Instead, the discussion of the unfair practice issues (ID at 13-14) and the related findings of fact (ID at 15-16) satisfy us that Judge Scott reviewed the evidence and determined that the suspensions in question and the termination were motivated by legitimate business reasons, not by hostility towards Muench's grievances or his DEP complaint. Judge Scott wrote:

In support of his complaints, Muench testified that between 1991 and 1995 he filed more than twenty grievances. He said he believed that half of these grievances were never acted on by the respondent. My review of the grievances leads me to conclude that every time Muench received some criticism for his actions, either orally or in writing, he assumed that he was being threatened and he filed a grievance. Other than Muench's testimony, there is nothing to support his claim, and, as I have indicated throughout this opinion, I had difficulty accepting Muench's testimony.

Contrary to his complaint that the respondent committed an unfair labor practice by

suspending him for forty-five days in July 1994 because he was filing grievances and because he reported a misapplication of pesticides, the evidence shows that Muench was suspended because he made a false report of a misapplication of pesticides, he failed to submit a report concerning the alleged misapplication after he was asked to do so, and he failed to inform his superiors that based upon his complaint, representatives from the Department of Environmental Protection were going to inspect the site of the alleged misapplication. Contrary to Muench's complaint that he was terminated in June 1995 for union activities and filing grievances, the evidence shows that he was terminated because on at least three occasions in sixteen days, he failed to perform his duties and he filed false reports as to the work performed.

And in finding no. 7, he found:

(7) Muench was suspended for the July 1994 incident because he failed to file a report concerning an alleged misapplication of pesticide and failed to inform his superiors that State inspectors were going to visit the site of the alleged misapplication, not because he filed grievances and reported a misapplication. Muench was terminated in June 1995 because he failed to do his duties on three different occasions and reported that he had, not because of any union activity or because he filed a number of grievances with the respondent.

While Judge Scott also concluded "based upon the evidence offered by Muench" (ID at 17) that no unfair practice occurred, it is apparent to us that he was not granting a motion to dismiss by virtue of this one phrase but rather reiterating his analysis and findings that he could not accept Muench's testimony or conclude that hostility towards his grievances or the DEP complaint motivated the suspensions or termination.

We next consider the merits in light of the issues framed by the predominant interest order; the standards for analyzing discrimination claims set forth in In re Bridgewater Tp., 95 N.J. 235 (1984); and CWA's contention that the evidence established that the disciplinary actions were taken in retaliation for Muench's grievances and complaint. The employer knew that Muench had engaged in protected activity by filing a number of grievances over the years and a September 17, 1991 reprimand (Exhibit A-5) from the superintendent to Muench shows his antipathy towards Muench's grievances at that time. We will also assume (without deciding) that Muench's report to DEP about an alleged misapplication of pesticides was a protected complaint concerning the safety of BCMEC employees. Compare West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER ____ (¶____ 1999) (shop steward's PEOSHA complaint was protected activity). Nevertheless, Judge Scott concluded that the 1994 suspensions and the 1995 termination were not motivated by hostility towards these activities and we have no basis for rejecting that conclusion on the record presented to us. The required motivational nexus between protected activity and personnel action has not been proven. Bridgewater at 242.

Given our conclusions, we will dismiss the unfair practice charge (CO-95-169) concerning Muench's suspensions. However, CWA has asked the MSB to reopen the hearing concerning Muench's termination. If that request is granted, the record might change and further review might be warranted. We will

therefore not issue an order with respect to CO-96-22 at this juncture and will transmit the record to the MSB for its consideration of that request and the remaining issues. We would ask the MSB to send us its decision so we can consider then whether further action on CO-96-22 is necessary.

ORDER

The unfair practice charges in CO-95-169 and CO-96-27 are severed from the consolidated Complaint and are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: February 25, 1999
Trenton, New Jersey
ISSUED: February 26, 1999