

P.E.R.C. NO. 85-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC CITY CONVENTION
CENTER AUTHORITY,

Public Employer-Petitioner/
Respondent,

-and-

Docket Nos. CO-85-110-64
and CU-85-11

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL
68-68A-68B

Employee Representative/
Charging Party.

SYNOPSIS

The Public Employment Relations Commission clarifies a negotiations unit composed of all engineers at the Atlantic City Convention Center Authority and represented by the International Union of Operating Engineers, Local 68-68A-68B to exclude the Chief Engineer. The Commission finds that the Chief Engineer is a supervisor within the meaning of the New Jersey Employer-Employee Relations Act.

The Commission also dismisses a Complaint based on an unfair practice charge that Local 68 filed against the Authority. The charge alleged that the Authority violated the Act when it warned the Chief Engineer about his use of sick leave, denied him sick leave and filed the Clarification of Unit petition. These acts were allegedly in retaliation against the Chief Engineer and the union's success in arbitration contesting his discharge. The Commission, in agreement with the Hearing Examiner, holds that Local 68 failed to establish that the complained of actions were taken in retaliation against the Chief Engineer's protected activities.

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INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL
368-68A-68B

Employee Representative/
Charging Party.

Appearances:

For the Respondent, John P. Miraglia

For the Charging Party, Zazzali, Zazzali & Kroll, Esqs.
(Paul L. Kleinbaum, of Counsel)

DECISION AND ORDER

On August 27, 1984, the Atlantic City Convention Center Authority ("Authority") filed a Clarification of Unit Petition with the Public Employment Relations Commission. The petition sought to remove the title of chief engineer from the unit represented by the International Union of Operating Engineers, Local 68-68A-69B ("Local 68") which currently includes all engineers employed by the Authority.

The Authority contends that the chief engineer is a "managerial executive," "confidential employee" and "supervisor" within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and therefore should be removed from the unit. Local 68 denies that the chief engineer fits

within any of these exclusions. It further contends that, even if the chief engineer is a "supervisor," the existence of an "established practice" warrants the continued presence of this position in the negotiations unit.

On October 15, 1984, the Administrator of Representation Proceedings issued a Notice of Hearing.

On October 25, 1984, Local 68 filed an unfair practice charge against the Authority. The charge alleged that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (4),^{1/} when it warned chief engineer James Sempsey about his use of sick leave, denied him sick leave and filed the above unit clarification petition, allegedly in retaliation against his and the union's success in arbitration contesting his discharge.

On November 2, 1984, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the unfair practice charge and an order consolidating the Petition and Complaint for hearing. The Authority then filed an Answer denying the allegations contained in the Complaint.

^{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; (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; and (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."

On November 16, 1984, Hearing Examiner Mark Rosenbaum conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

On February 1, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-27, 11 NJPER ____ (Para. ____ 1985) (copy attached). With respect to the petition, he concluded that chief engineer Sempsey, although not a "confidential" employee or a "managerial executive," was a "supervisor" within the Act by virtue of his role in hiring and disciplining. He further concluded that the "established practice" exception was not applicable since the identity of the employer changed pursuant to the Atlantic City Convention Center Authority Act of 1982. N.J.S.A. 52:27H-29 et seq. Therefore, he recommended removal of chief engineer from Local 68's unit. With respect to the Complaint, he applied the standards in In re Bridgewater Twp., 95 N.J. 235 (1984) and recommended dismissal. He found that the Authority would have warned Sempsey and denied him sick leave even in the absence of his protected activity. He further concluded that the charging party had not proved that the unit clarification petition was filed in retaliation against Sempsey's successful grievance.

On March 6, 1985, after having received an extension of time, Local 68 filed its exceptions. It contends that the Hearing Examiner erred in: (1) finding that the chief engineer is a "supervisor" and (2) concluding that an "established practice" did not exist which would justify retaining the chief engineer within

the negotiations unit. It did not except to the Hearing Examiner's determinations concerning the Complaint. On March 11, 1985, the Authority filed its response urging adoption of the Hearing Examiner's report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-6) are accurate. We adopt them here.

We agree, based on our review of the record and in the absence of exceptions, that the Authority did not violate the Act when it warned Sempsey about sick leave, denied him sick leave and filed the petition. Sempsey failed to establish that any of these actions were taken in retaliation against his protected activities. We adopt the Hearing Examiner's Bridgewater analysis.

We further agree, in the absence of exceptions, that Sempsey is neither a "managerial executive" nor a "confidential" employee within the meaning of the Act.

We now consider whether Sempsey is a supervisor, and if so, whether there is an "established practice" which would nevertheless warrant continued inclusion in the unit. We conclude, in agreement with the Hearing Examiner, that he is a supervisor and that the "established practice" exception is inapplicable. Therefore, we remove Sempsey from the unit.

Subsections 5.3 and 6(d) of the Act provide, respectively:

Nor, except where established practice, prior agreement or special circumstances dictate to the contrary shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same, have the right to be represented in collective negotiations by an

employee organization that admits nonsupervisory personnel to membership.

* * *

The division shall decide in each instance which unit of employees is appropriate for collective negotiations, provided that, except where dictated by established practice, prior agreement or special circumstances, no unit shall be appropriate which includes both supervisors and nonsupervisors.

Accordingly, we have defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend same. E.g., Cherry Hill Twp. Dept. of Public Works, P.E.R.C. No. 30 (1970). The record demonstrates that the chief engineer has the authority to make effective recommendations concerning hiring and discipline. With respect to hiring, Sempsey is consulted when an assessment of an applicant's technical skills is needed and his expertise in determining applicants' qualifications is heavily relied upon. See Bergen Pines County Hospital, D.R. NO. 83-8, 8 NJPER 535 (Para.13245 1982), aff'd App. Div. Docket No. A-564-81T2, 10 NJPER 77 (Para. 15042 1983) and Teaneck, E.D. No. 23 (1971). With respect to discipline, the Authority entrusts Sempsey under his job description with running the daily affairs of his department, reviewing time cards and monitoring lateness. In discharging these duties, he has recommended discipline and in particular has suspended an employee who was ultimately discharged.^{2/} Under all the circumstances of

^{2/} Given the recent change in employer identity and the Authority's investment of responsibility in Sempsey for these matters, we believe the Authority has established that Sempsey exercises his disciplinary authority with sufficient regularity to be a supervisor. Somerset County Guidance Center, D.R.No. 77-4, 2 NJPER 358 (1976).

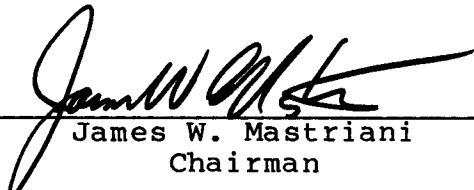
this case, we believe that the combination of Sempsey's responsibilities makes him a supervisor.

We now consider whether an "established practice" warrants the continued inclusion of the chief engineer. We conclude that it does not. It is well-settled that "established practice" refers to a pre-Act relationship. E.g. West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973). Such a relationship has not existed between these parties. To the contrary, the Authority was not even established until 1982. N.J.S.A. 52:27H-29. Further, given that the Authority is an independent entity, see N.J.S.A. 52:27H-37, it cannot be bound by a prior relationship which no longer exists.

ORDER

Local 68's negotiations unit is clarified to exclude the position of chief engineer.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Suskin and Wenzler voted in favor of this decision. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
April 25, 1985
ISSUED: April 26, 1985

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

In the Matter of

ATLANTIC CITY CONVENTION CENTER
AUTHORITY,

Public Employer-Petitioner/
Respondent,

-and-

Docket Nos. CU-85-11 and
CO-85-110-64

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL #68-68A-68B,

Employee Representative/
Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Chief Engineer employed by the Atlantic City Convention Center Authority is a supervisory employee within the meaning of the Act. The Chief Engineer should be clarified out of an existing unit of nonsupervisory employees employed by the Authority and represented by the International Union of Operating Engineers, Local 68-68A-68B. The Hearing Examiner also recommends that the Commission find that the Chief Engineer is neither a confidential employee or managerial executive within the meaning of the Act.

With respect to the unfair practice charges alleging that the Authority violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) of the Act by retaliating against the Chief Engineer for his successful challenge to his discharge, the Hearing Examiner recommends that the charges be dismissed in their entirety.

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.

STATE OF NEW JERSEY
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Docket Nos. CU-85-11 and
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INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL #68-68A-68B,

Employee Representative/
Charging Party.

Appearances:

For the Public Employer
John P. Miraglia, Representative and
Levine, Stallar, Sklar and Chan, Esqs.
(Lawrence A. Brodsky, of Counsel)

For the Employee Representative
Zazzali, Zazzali and Kroll, Esq.
(Paul L. Kleinbaum, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On August 27, 1984, a Clarification of Unit Petition was filed with the Public Employment Relations Commission ("Commission") by the Atlantic City Convention Authority ("Authority") seeking to remove the title of Chief Engineer from the unit represented by the International Union of Operating Engineers, Local 68-68A-68B ("Local 68") which currently includes all engineers employed by the Authority. The Authority asserts that the Chief Engineer is a managerial executive, a supervisory employee and/or a confidential employee within the meaning of the New Jersey Employer-

Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), all of which compels the removal of the Chief Engineer from the unit. Local 68 argues that the disputed title is not managerial, supervisory or confidential, and that the title should remain in the unit.

On October 15, 1984, the Commission's Administrator of Representation issued a Notice of Hearing on the Clarification of Unit Petition. On October 25, 1984, Local 68 filed an Unfair Practice Charge against the Authority, alleging that the Authority improperly issued a letter of warning to and denied sick days requested by the Chief Engineer in August and September, 1984. Local 68 alleged that the Authority's actions and its filing of the Clarification of Unit petition in August manifested retaliation for the Chief Engineer's successful challenge to his discharge by the Authority earlier in 1984, allegedly in violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4). ^{1/} The Authority filed an answer to these charges denying all allegations.

On November 2, 1984, Commission Designee Edmund G. Gerber issued a Complaint and Notice of Hearing on the Unfair Practice Charge, as well as an Order Consolidating Cases for hearing before me. Pursuant to that order, I conducted a hearing on November 16, 1984, at which both parties were given opportunities to examine and cross-examine witnesses, present evidence and argue orally.

^{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; (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."

The parties filed post-hearing briefs by January 15, 1985.

Based upon the entire record in these proceedings, the Hearing Examiner makes the following:

Findings of Fact

1. The Authority is a public employer within the meaning of the Act, is the employer of the employees who are the subject of the Petition and is subject to the provisions of the Act.

2. Local 68 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Authority and Local 68 are parties to a collective negotiations agreement covering the period January 1, 1982 through December 31, 1984 (Exhibit J-1) The agreement covers the Chief Engineer, Assistant Chief Engineer and engineers employed by the Authority.

4. The Authority was created by the Legislature in 1982 with the passage of the Atlantic City Convention Center Authority Act, N.J.S.A. 52:27H-29 et seq. Pursuant to that Act the Authority consists of seven members appointed by the Governor who serve without compensation. The board is empowered, inter alia, to enter into contracts for services and disposition of real or personal property, and to appoint such officers, employees and agents as it sees fit. With respect to the budget of the Authority, the seven Authority members act in an advisory capacity only. The ultimate budget must be approved by the Director of Local Government Services in the Department of Community Affairs, (N.J.S.A.

52;27H-32-43; T at pp. 42-43).

5. Prior to the enactment of the legislation reviewed above, the Atlantic City Convention Center was a sub-entity of the City of Atlantic City, which built the original facility in the 1920's (T at pp. 56-57). All engineers at the Authority have been represented by Local 68 from at least the early 1960's. Discussions between Local 68 and representatives of the City of Atlantic City concerned wages, sick days, health benefits and vacations. Ultimate agreements approximated City agreements with blue collar employees and were signed by representatives of Local 68 and the City (T at pp. 101-111).

6. The present Authority hierarchy includes the full-time Executive Director, Howard Persina, whose immediate subordinate is the Authority's Director of Facilities and Operations, Joseph Dolan. Dolan testified that the Authority has nine department heads who report to him, and that each department head is responsible for an annual submission of an estimated departmental budget (T at pp. 44 and 61).

7. James Sempsey has been Chief Engineer of the Authority since its creation in 1982. From 1976-1982, he was the Chief Engineer for the Atlantic City Convention Center (T. at pp. 69-70, 87).

8. Including the Chief Engineer, there are 13 engineers in the Authority's engineering department. State regulations set forth, inter alia, licensing requirements for engineers in the State of New Jersey. The regulations require that a chief engineer be located at any plant which employs more than one licensed

engineer. See N.J.A.C. 12:90-1.1 et seq.

9. In addition to his technical responsibilities, Sempsey prepares drafts of and operates within his departmental budget. The proposed budget is reviewed by the Director of Operations and Facilities and the Executive Director prior to submission to the Authority and ultimate approval by the Director of Local Government Services. The ultimate departmental budget for engineering reflects a balance between technical needs and budgetary constraints, as determined through the process outlined above (T at pp. 25-28). Sempsey can make purchases within established contracts or with approved vendors pursuant to a centralized purchasing procedure (T at pp. 28-29).

10. The Chief Engineer is also responsible for scheduling the engineering department employees' regular hours and overtime. In emergencies he can assign overtime without approval. In all other cases he obtains Dolan's approval. (T at pp. 30 and 73-74). Sempsey may alter the time cards of employees to reflect actual time worked (Exhibit E-1). The Chief Engineer has no role in the evaluation of employees in the department because no formal evaluation system exists at the Authority (T at p. 36). With respect to discipline of engineering department employees, the record reveals that Sempsey has disciplined one employee during his tenure as Chief Engineer. Sempsey recommended that the employee receive a three-day suspension. Director Dolan discharged the employee in question. ^{2/}

11. With respect to the hiring of personnel, the record reveals that Sempsey was actively involved in the hiring

^{2/} The record does not support Local 68's contention that Dolan ripped up Sempsey's recommendation in his presence (T at p. 71).

of four employees. In each case he met the applicant after the applicant interviewed with Mr. Dolan; Sempsey toured the plant with the applicant, discerning his demeanor and professional qualifications, and made recommendations to Dolan. Sempsey recommended the hiring of three of the four applicants. The Authority hired all four. In one hiring situation where the Authority sought to hire two applicants and interviewed three, Sempsey recommended a hiring order which was adopted by the Authority (T at pp. 82-84).

12. James Sempsey was discharged by the Authority effective March 1, 1984. He grieved this action and on July 2, 1984, an arbitrator reinstated Sempsey as Chief Engineer without back pay, but was made whole in all other respects. On August 3, 1984, Sempsey received a memorandum from Dolan indicating, inter alia, improper management of his department. The letter, in part, concerns events which occurred while Sempsey was not working for the Authority by virtue of the discharge. On August 29 and September 17, 1984, Sempsey filed grievances concerning denials of sick day requests (Exhibits U-3 and 4).

Analysis

I. CU-85-11

A. Confidential Status

Confidential employees are defined in the New Jersey Employer-Employee Relations Act as "...employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with

their official duties." N.J.S.A. 34:13A-3(g).

The record is void of any evidence of Sempsey's participation in the negotiations process on behalf the Authority. Moreover, his budgetary submissions, which include estimates of overtime costs in his department, are reviewed at four higher levels and cannot be viewed as substantial evidence of confidential status. Accordingly, I recommend the finding that the Chief Engineer is not a confidential employee within the meaning of the Act.

B. Managerial Executive Status

Managerial Executives are defined in the Act as "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices...." N.J.S.A. 34:13A-3(f).

The Commission set forth the guidelines for interpreting this definition of the Act in In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980):

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the method, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes of its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined

by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [6 NJPER, at 508].

I now proceed to apply the above standards to the record in this matter.

As noted above, the Chief Engineer heads a department of 13 engineers. Although Sempsey is responsible for the scheduling of unit employees he may grant overtime only with the approval of Director Dolan. Similarly, while he can make purchases they must be within the confines of established central purchasing procedures. Thus it is apparent that the Chief Engineer's discretion and independent judgment are quite limited.

With respect to budgeting and planning for the engineering department, the Chief Engineer position must be viewed in the context of the Authority's hierarchy. Although the Chief Engineer recommends purchases of new equipment and other items, all requests are initially reviewed by the Director of Facilities and Operations, then by the Authority's Executive Director, followed by review by the Authority and ultimately by the appropriate State official. In short, these recommendations are too far removed from actual implementation to indicate managerial executive status.

In the final analysis, the Chief Engineer is a technical expert on whom the Authority relies within his sphere of expertise. Although his department is important in the context of Authority operations, it is not of the size typically headed by a managerial executive. See e.g. City of Newark and Newark Superior Officers Ass'n,

P.E.R.C. No. 82-97, 8 NJPER 298 (¶13131 1982), and City of Trenton and AFSCME, Local 2281, D.R. No. 83-33, 9 NJPER 382 (¶14172 1983).

Accordingly, I recommend a finding that the Chief Engineer is not a managerial executive within the meaning of the Act.

C. Supervisor Status

N.J.S.A. 34:13A provides, in pertinent part:

5.3...nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership....

6(d)...The division shall decide in each instance which unit of employees is appropriate for collective negotiations, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors....

Preliminarily, I note that a determination of supervisory status requires far more than a written job description stating or testimony asserting that an employee may have the power to hire, discharge, discipline or effectively recommend the same:

[T]he bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisory within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised, with some regularity by the employees in question, the mere "possession" of the authority is a sterile attribute unable to sustain a claim of supervisory status. Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976).

With this caveat in mind, I review the responsibilities and actual job performance of the Chief Engineer to determine whether or not he is a supervisor within the meaning of the Act.

Sempsey has not discharged anyone during his tenure as Chief Engineer. In one case, however, he recommended discipline of an employee whom the Authority ultimately discharged. Although the discipline meted out was greater than that which Sempsey recommended, he effectively brought the disciplinary problem to the attention of management and management acted on the problem.

The record also reveals that Sempsey was actively involved in the hiring process. He recommended three of four applicants for engineer positions to the Authority. The Authority hired all four applicants. Thus, the Authority adopted a clear majority of the Chief Engineer's recommendations for the hiring of personnel in the department. Moreover, the Chief Engineer has a regular and critical role in the selection of these technically skilled job applicants.

In summary, while the Chief Engineer has not fired any one, he has effectively recommended discipline of one of his employees and plays an active role in the hiring of personnel. Accordingly, I recommend a finding that the Chief Engineer is a supervisor within the meaning of the Act.

As provided in the above-cited section of the Act, a supervisor can remain in a unit of nonsupervisory employees so long as established practice indicates the prior inclusion of supervisors in the same unit of nonsupervisory employees. In In re West Paterson, P.E.R.C. No. 77 (1973), the Commission determined that an established practice exists where, prior to the passage of the original Act in 1968, an employee organization spoke on behalf of a reasonably well-defined group of employees seeking improvement of

employee conditions and resolution of differences through negotiations with an employer who engages in the process with an intent to reach agreement.

The record indicates that Local 68 represented engineers since the early 1960's, and that the Chief Engineer position has always been in the unit represented by Local 68. The record also establishes that the City of Atlantic City and Local 68 conducted regular discussions concerning terms and conditions of employment with intent by both parties to reach an agreement.

I must find, however, that an established practice is not apparent. In view of the change in the employer status effected by the Atlantic City Commission Center Authority Act in 1982, any established practice which may have existed was between Local 68 and the City of Atlantic City, but not between Local 68 and the Atlantic City Convention Authority, the latter not having existed prior to 1982.

Accordingly, in the absence of finding an established practice, and having recommended a finding of supervisory status for the Chief Engineer, I recommend that the Commission find that the Chief Engineer is a supervisory employee and must be removed from the collective negotiations unit represented by Local 68.

II. Docket No. CO-85-110-64

Local 68 alleges that the Authority improperly issued a letter of warning to and denied sick days requested by Sempsey in August and September, 1984. It asserts that these actions and the filing of the above-reviewed Clarification of Unit Petition, manifests retaliation against the Chief Engineer for his successful

challenge to his discharge by the Authority early in 1984, in violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4). The record clearly reveals that the Authority did take the actions which Local 68 has alleged; I now review whether those actions constitute unfair practices.

Subsection 5.4(a)(4) of the Act refers specifically and exclusively to discharge or discrimination against employees who commit actions "...under this Act." To date, the Commission has given a strict construction to this subsection and has failed to extend it to activities related to employment, but not involving actions taken under the Act. See e.g., Randolph Township Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982), aff'd App. Div. Dkt. No. A-5077-81T2 (6/24/83), and Manchester Township and Manchester Township PBA Local 246, P.E.R.C. No. 83-161, 9 NJPER 392 (¶14178 1983). Accordingly, I recommend that the Commission dismiss the alleged violation of subsection (a)(4).

With respect to the alleged violations of subsections 5.4 (a)(1) and (3), I find that the allegations concerning the letter of warning and the denied sick days are both grievable matters and matters otherwise covered by the collective agreement between the parties. Moreover, while the letter and the sick day denials are close in time to the Sempsey's successful grievance concerning his discharge from the Authority, timing alone does not prove a violation of subsection (a)(3), and derivatively subsection (a)(1). Instead, the charging party must meet the two-fold test established in Bridgewater Township v. Bridgewater Public Works Association 95 N.J. 235 (1984). First, the charging party must make a prima facie showing sufficient to support an inference that protected activity

was a substantial or motivating factor in the respondent's adverse employment decision. Second, once the prima facie case is established, the burden shifts to the respondent to demonstrate that the same action would have taken place even in the absence of protected activity. See also, Mount Healthy City School District Board of Education v. Doyle, 492 U.S. 274 (1977).

Assuming that the timing of the above-referenced events supports an inference that Sempsey's grievance regarding discharge was a substantial or motivating factor in the respondent's letter of warning and denial of sick days, I conclude that the Authority would have taken these actions even in the absence of protected activity. The letter of warning appears to be a routine memorandum from management alerting a supervisory employee to a problem in his department and perhaps with his own work. ^{3/} The record also reveals the Authority's business justification for those denials of sick days. Specifically, one denial was based on Sempsey's failure to provide a doctor's note for the absence (Exhibit U-3) and the other denial was based on the fact that the doctor's note did not cover the date in question (Exhibit U-4). Accordingly, I conclude that the Authority has demonstrated that its letter of warning and denials would have taken place even in the absence of protected activity.

Local 68's allegation that the Authority filed its Clarification of Unit Petition in retaliation against Sempsey for

^{3/} Local 68 focuses upon a reference in the memorandum to events occurring in Sempsey's absence as an indicia of an alleged violation of subsection 5.4(a)(1) of the Act. However, the thrust of the memo pertains to events and responsibilities within Sempsey's control.

having grieved his discharge is not supported by the record. Indeed, having recommended that the Commission find that Sempsey is a supervisory employee who must be removed from the collective negotiations unit represented by Local 68, I must conclude that the Authority would have sought the removal of Sempsey from the unit through a Clarification of Unit Petition, even in the absence of his protected activity. Finally, I note that the Commission has previously indicated that the preferred practice for review of employee status under the Act is through the clarification of unit practice. Passaic County Regional H.S. Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976).

RECOMMENDATIONS


For the reasons reviewed above, the undersigned recommends that the Commission find as follows:

1. The Chief Engineer employed by the Atlantic City Convention Center Authority is not a confidential employee within the meaning of the Act.

2. The Chief Engineer is not a managerial executive within the meaning of the Act.

3. The Chief Engineer is a supervisory employee within the meaning of the Act, and no established practice exists which would warrant the inclusion of this supervisor in the negotiations unit represented by Local 68, which includes nonsupervisory employees. Therefore, the negotiations unit represented by Local 68 should be clarified to exclude the Chief Engineer.

4. The unfair practice charges in Docket No. CO-85-110-64 should be dismissed in their entirety.

A handwritten signature in cursive script, appearing to read "Mark A. Rosenbaum", is written above a solid horizontal line.

MARK A. ROSENBAUM
Hearing Examiner

Dated: February 1, 1985
Trenton, New Jersey