

P.E.R.C NO. 94-109

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-H-93-25

COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1040,

Charging Party.

SYNOPSIS

In a matter consolidated with tenure charges before the Commissioner of Education, the Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, Local 1040 against the State of New Jersey (Department of Corrections). The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act when it filed tenure charges against Jacqueline-Holmes Williams with the Commissioner of Education. The charge specifically asserts that the tenure charges were baseless and were filed to retaliate against Holmes-Williams for pressing grievances, supporting unfair practice charges, and serving as a CWA shop steward. The case is now transmitted to the Commissioner of Education to consider the tenure charges.

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Appearances:

For the Respondent, Deborah T. Poritz, Attorney General
(Edward H. O'Hare, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Lisa Morowitz, of counsel)

DECISION AND ORDER

On July 16, 1992, the Communications Workers of America, Local 1040, a majority representative, filed an unfair practice charge against the State of New Jersey (Department of Corrections), a public employer. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4), and (7),^{1/} when it filed tenure charges against Jacqueline

^{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

Holmes-Williams, a teacher at Riverfront State Prison, with the Commissioner of Education. The tenure charges sought the termination of Holmes-Williams because she allegedly violated a department policy by becoming too friendly with an inmate, thus compromising prison security. The unfair practice charge specifically asserts that the tenure charges were baseless and were filed to retaliate against Holmes-Williams for pressing grievances, supporting unfair practice charges, and serving as a CWA shop steward.

On September 11, 1992, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The employer filed an Answer denying that the tenure charges were unfounded or retaliatory.

The Commissioner of Education and the Chairman of the Commission issued a joint order consolidating the tenure charges and the unfair practice charge for hearing before an Administrative Law Judge ("ALJ"). P.E.R.C. No. 93-78, 19 NJPER 170 (¶24087 1993). On April 1, 2, 12, and 13 and May 17 and 18, 1993, ALJ Mary Ann Burgess

1/ Footnote Continued From Previous Page

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. (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. (7) Violating any of the rules and regulations established by the commission."

conducted a hearing. The parties examined witnesses,^{2/} introduced exhibits, and filed post-hearing briefs.

On December 29, 1993, the ALJ issued her Initial Decision. Concluding that the employer had proven that Holmes-Williams had subverted discipline at Riverside State Prison by being unduly familiar with an inmate, she recommended that the Commissioner of Education sustain the tenure charges. Concluding that CWA had not proven that the protected activity of Holmes-Williams was a substantial or motivating factor in the decision to file the tenure charges, she recommended that the Commission dismiss the unfair practice charge.

The joint order consolidating the tenure charges and unfair practice charge for hearing also specified a three-step process for reviewing the ALJ's initial decision. First, the Commission would decide whether Holmes-Williams was engaged in activity protected by the New Jersey Employer-Employee Relations Act and whether hostility towards protected activity was a substantial or motivating factor in the bringing of tenure charges. Second, the Commissioner of Education would determine whether the tenure charges were brought for legitimate business reasons and should be sustained. Third, if an unfair practice was found, the matter would be returned to the Commission to consider what relief was appropriate under the New Jersey Employer-Employee Relations Act.

^{2/} A tape recording was made of the testimony, but neither party asked that transcripts be prepared.

On February 15, 1994, CWA filed exceptions on primarily legal grounds. It asserts that it submitted sufficient circumstantial evidence to establish that the employer was hostile towards the protected activity of Holmes-Williams and that this hostility motivated the decision to bring tenure charges. It also asserts that the employer's reason for dismissing Holmes-Williams --undue familiarity with an inmate-- was a pretext and that the ALJ erred in admitting the testimony of a handwriting analyst who was not qualified to give an expert opinion.

On March 22, 1994, the employer responded to CWA's exceptions. It asserts that the ALJ correctly concluded that anti-union animus did not motivate the tenure charges; Holmes-Williams did violate department policy against undue familiarity with inmates; and the handwriting analyst was a properly qualified expert.

We accept the ALJ's findings of fact concerning the unfair practice charge (Initial Decision at 62-67). We add to findings no. 2 and 3 that Holmes-Williams was named Shop Steward of the Year for 1991 and that she ran for the State Senate in 1991. We add to finding no. 5 that Cinthia McGovern, the immediate supervisor of Holmes-Williams, estimated that more grievances were filed in 1991 than in earlier years, even though she did not recall the precise number of grievances filed. We add to finding no. 13 that Holmes-Williams asked for CWA representation during the January 22, 1992 meeting because she believed the meeting had turned

disciplinary. Her request was denied because Greg Bartkowski, the general supervisor of Holmes-Williams, did not believe that the purpose of the meeting was disciplinary. The meeting ended.

In re Bridgewater Tp., 95 N.J. 235 (1984), sets forth the standards for evaluating allegations that a discharge was discriminatorily motivated in violation of subsections 5.4(a)(1) and (a)(3). 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.

Holmes-Williams was engaged in a great deal of protected activity. Between January 29, 1991 and January 10, 1992, she filed at least 16 grievances on her own behalf and she had filed many grievances in prior years as well. She also served as a CWA shop steward, earning an award as the 1991 steward of the year in the Department of Corrections. In addition, she attended union conventions and unsuccessfully ran for the State Senate on a slate of union activists. Her supervisors, McGovern and Bartkowski, knew of her protected activity.

There is no direct evidence of managerial hostility towards Holmes-Williams because of her protected activity. CWA asserts that the circumstantial evidence proves that McGovern and Bartkowski were hostile towards this activity and relies upon three events: (1) McGovern's referral of Holmes-Williams and two other teachers to the Employees Advisory Service in December 1991; (2) a meeting attended by McGovern, Bartkowski, and Holmes-Williams on January 22, 1992, and (3) a grievance filed by Holmes-Williams and sustained on February 7, 1992. The ALJ's findings of fact (Initial Decision at 64-65) about the referral and the meeting establish that they were part of a good faith attempt to improve staff relationships, not an

attempt to curb protected activity.^{3/} The grievance involved whether Holmes-Williams should have been given an interim or a final evaluation. There is no evidence that its filing or resolution disturbed her supervisors.

Even if CWA had proved that McGovern and Bartkowski were hostile towards protected activity, the ALJ properly found that such hostility did not motivate the tenure charges. McGovern and Bartkowski were not part of that decision or the investigation preceding it. Instead the investigation was conducted by the Internal Affairs Unit after it received a tip from a reliable informant that Holmes-Williams and an inmate had been seen kissing. The investigation began in September 1992, before any of the three events relied upon by CWA to suggest anti-union animus, and produced the evidence that led to the decision to ask Holmes-Williams to resign. The decision was made by the Superintendent of Riverfront without any input from McGovern or Bartkowski. There is no evidence in the record suggesting that the Superintendent harbored any hostility towards protected activity.

We therefore conclude that CWA has not demonstrated that hostility towards protected activity was a substantial or motivating factor in bringing the tenure charges.

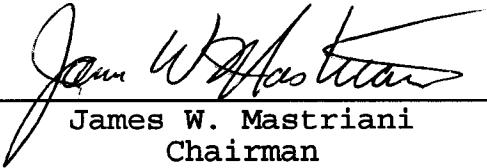
^{3/} CWA asserts that the referral to EAS constituted an independent violation of subsection 5.4(a)(1). That allegation was not pleaded in this unfair practice charge and will not be considered now. An unfair practice charge (CO-92-188) concerning the referral is still pending.

CWA asserts that the ALJ erred in finding that a handwriting analyst was an expert and in accepting his testimony. We decline to consider that question since it concerns the admissibility and sufficiency of the evidence to sustain the tenure charges. We will forward the record to the Commissioner of Education to consider the tenure charges.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: April 28, 1994
Trenton, New Jersey
ISSUED: April 29, 1994