

STATE OF NEW JERSEY
BEFORE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY POLICE
DEPARTMENT LAYOFFS,
Respondent,

-and-

OAL DOCKET NO.
CSV 9166-97

PBA LOCALS 51 & 51A,
Petitioners.

COUNTY OF HUDSON,
Respondent,

-and-

PERC DOCKET NOS.
CO-H-97-58 and
CO-H-97-59

PBA LOCALS 51 & 51A,
Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands a consolidated matter to the Administrative Law Judge to issue findings of fact and conclusions of law on whether the County of Hudson violated the New Jersey Employer-Employee Relations Act by transferring unit work to non-unit employees of the same public employer and whether the employer laid off union employees represented by PBA Locals 51 and 51A in retaliation for the exercise of rights protected by the Act. The Commission remands to the ALJ to apply In re Bridgewater Tp., 95 N.J. 235 (1984), and to make specific factual conclusions as to whether the unions met their burden of proving, by a preponderance of the evidence, that hostility toward the PBA's participation and success in interest arbitration proceedings was a substantial or motivating factor in the decision to eliminate the County police department and lay off its employees. The Commission also remands to the ALJ to make specific findings of fact as to whether the work traditionally performed by County police was transferred to non-unit employees of the same public employer.

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.

P.E.R.C. NO. 2004-14

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Appearances:

For the Charging Party, Cohen, Leder, Montalbano & Grossman, attorneys (Bruce D. Leder, of counsel)

For the Respondent, Scarinci & Hollenbeck, attorneys (Sean D. Dias, of counsel, Karen L. Sutcliffe, on the brief)

DECISION

On August 16, 1996, PBA Locals 51 and 51A filed unfair practice charges against the County of Hudson. The charges allege that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

specifically 5.4a(1), (3) and (5),^{1/} when it abolished the Hudson County Police Department and unilaterally transferred unit work to non-unit personnel employed by the Hudson County Sheriff. In addition, the charges allege that the layoff of police officers was in retaliation for the use of the interest arbitration process that resulted in an award of an automatic salary step system proposed by PBA Local 51.

On October 8, 1996, the unions filed a good faith layoff appeal with the Merit System Board. The appeal alleges bad faith based upon anti-union animus.

A Joint Order of the Merit System Board and the Commission Chair consolidated the charges and appeal for hearing before an administrative law judge. P.E.R.C. No. 99-41, 24 NJPER 530 (¶29246 1998).

Administrative Law Judge Jeffrey A. Gerson conducted a hearing on November 30, 2000, October 29, 2001 and January 30,

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2002. On April 22, 2003, he issued an Initial Decision which was received by this agency on May 15, 2003.

The Judge found that there was no transfer of unit work to non-unit employees; eliminating the County Police Department was in essence reorganizing to achieve economies and efficiencies; the County was therefore insulated from negotiations; and the savings that would benefit the public overcame the anti-union animus that might have existed. The Judge stated that:

If there were two reasons for the reorganization, one being the economies and efficiencies generated thereby, and the other being a fear of implementing the interest arbitration result, the action taken that most benefits the public must be accepted.
[Initial Decision at 7]

On June 6, 2003, the unions filed exceptions. They argue that the Administrative Law Judge erred in not finding that: the County violated N.J.A.C. 4A:8-1.4, which requires that a public employer take certain actions prior to a layoff; the County violated 5.4a(1) and (5) of the Employer-Employee Relations Act when it unilaterally transferred negotiations unit work from employees represented by PBA Locals 51 and 51A to employees represented by PBA Local 334 and FOP Local 127; and the layoff was in bad faith in violation of N.J.S.A. 11A:8-1 et seq. and in retaliation for the unions' exercise of protected rights in violation of 5.4a(3) of the Employer-Employee Relations Act and N.J.S.A. 11A:8-1. The unions seek back pay and special re-

employment rights for former members of the County Police Department not currently employed by the Sheriff's Department.

On July 7, 2003, the County filed an answering brief. It argues that the layoff was the exercise of a non-negotiable managerial prerogative to restructure County government and to implement corresponding personnel changes; and the County followed all procedural requirements for the layoff pursuant to N.J.A.C. 4A:8-1.4.

Pursuant to the Joint Order, we must first consider whether the employer transferred PBA unit work to non-unit employees of the same public employer and whether hostility to protected activity was a substantial or motivating factor in the decision to abolish the Hudson County Police Department. The matter will then be sent to the Merit System Board which will then determine whether the layoff was for legitimate business reasons and was otherwise warranted under Merit System law. Where appropriate, the matter will be returned to us for our consideration of whether specialized relief is warranted under our Act.

Pursuant to the Joint Order, we address only the unfair practice allegations. Public employers, in general, have a managerial prerogative to lay off employees and to reorganize the way they deliver governmental services. Local 195, IFPTE v. State, 88 N.J. 393 (1982). But an employer does not have a right

to exercise a managerial prerogative for anti-union reasons. Allegations that anti-union animus illegally tainted the exercise of a managerial prerogative are reviewed under tests established by our Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984).

Under Bridgewater, no violation of the Employer-Employee Relations Act 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. In this case, the charging parties have the burden of proving that hostility to the unions' participation and success in the interest arbitration process was a substantial or motivating factor in the decision to eliminate the Hudson County Police Department and transfer the duties of its employees to employees of the Sheriff's Office. This may be done by direct evidence or by circumstantial evidence showing that employees 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.

The Judge does not appear to have decided whether anti-union animus, i.e. hostility to the unions' participation and success in interest arbitration, was a motivating factor in the decision to abolish the Police Department and transfer functions to the Sheriff's Department. Instead, he concluded that even if that reason partially motivated the decision, another reason, the generation of economies and efficiencies, must be accepted as overcoming the illegal reason. That conclusion, however, was predicated on the case law applicable to good faith layoff appeals, see Peters v. City of Orange, 96 N.J.A.R.2d (CSV) 227 (1994), rather than the shifting burden analysis of Bridgewater. Under these circumstances, we remand this matter to the Judge to apply Bridgewater and make specific factual findings and legal conclusions as to whether the unions met their burden of proving,

by a preponderance of the evidence, that hostility to PBA Local 51's participation and success in the interest arbitration process was a substantial or motivating factor in the decision to eliminate the County Police Department and lay off all its employees. If the unions did not meet that burden, that unfair practice allegation should be dismissed. If the unions did meet that burden, the Judge should make specific factual findings and legal conclusions as to whether the County met its burden of proving, by a preponderance of the evidence, that it would have eliminated the Police Department, even absent the union's participation and success in the interest arbitration process. The Judge should review the testimony and exhibits and make any necessary credibility determinations in issuing findings of fact about the employer's motivation for abolishing the Police Department. He should then apply Bridgewater to his detailed factual findings so that this agency and, if necessary, the Merit System Board can review his recommendations of law.

In addition, the unfair practice charge alleges that the employer violated the Employer-Employee Relations Act by transferring unit work to non-unit employees of the public employer. The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by unit employees alone. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 575 (1998). In this

case, the unit work allegations focus on the police functions transferred from the County Police Department to the Sheriff's Department. The unions assert that, with regard to economic terms and conditions of employment, Sheriff's officers are County employees who did not perform the duties of the County police before the County Police Department was abolished.

We also remand this matter to the Judge to make specific findings of fact as to whether the work traditionally performed by County police was transferred to non-unit employees of the same public employer. If so, the Judge should then examine those facts in light of the unit work doctrine to determine whether the employer had an obligation to negotiate before acting, or whether the employer exercised a managerial right to reorganize the way it delivers government services allowing it, by necessity, to transfer job duties to non-unit employees without incurring a negotiations obligation. See, e.g., Maplewood Tp., P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985) (employer consolidating police and fire dispatching functions had managerial prerogative to employ civilian dispatchers); Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 85-69, 11 NJPER 47 (¶16025 1984) (board had prerogative to reorganize supervisory structure for custodial employees with consequence that some unit work was shifted outside negotiations unit).

ORDER

The unfair practice allegations are remanded to the Administrative Law Judge to issue findings of fact and conclusions of law on whether the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by transferring unit work to non-unit employees of the same public employer and whether the employer laid off unit employees in retaliation for the exercise of rights protected by the Employer-Employee Relations Act.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Katz, Ricci and Sandman voted for this decision. None opposed. Commissioner Mastriani was not present.

DATED: September 25, 2003
Trenton, New Jersey
ISSUED: September 25, 2003