P.E.R.C. NO. 2010-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BLACK HORSE PIKE
REGIONAL SCHOOL DISTRICT,

Respondent,

-and- Docket No. CI-2008-020

JAMES CALLISTA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands an unfair practice charge filed by James Callista against the Black Horse Pike Regional School District to the Director of Unfair Practices for complaint issuance. The charge alleges that Callista was terminated by the Board in retaliation for his attempts to organize a union of substitute teachers. The Director found that the District subcontracted its substitute teacher staffing and that the subcontractor was Callista's employer. Since the subcontractor was a private employer, the Director refused to issue a complaint on the ground that the Act does not cover private employees. On appeal, Callista argued that he was jointly employed by the District and subcontractor and therefore should be protected by the Act. The Commission holds that it will exercise jurisdiction over a public joint employer and that Callista try to prove a joint employment relationship and a violation of the Act.

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.

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Appearances:

For the Respondent, Wade, Long, Wood & Kennedy, LLC, attorneys (John D. Wade, of counsel)

For the Charging Party, Legal Services of New Jersey, Workers Legal Rights and Farmworker Projects, attorneys (Keith Talbot, of counsel)

DECISION

On April 9, 2009, after extensions of time, James Callista appealed a decision of the Director of Unfair Practices. That decision refused to issue a complaint based on an unfair practice charge Callista filed against the Black Horse Pike Regional School District. D.U.P. No. 2009-8, 35 NJPER 36 (¶15 2009). The charge alleges that the public employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2) and (3),[1/] by terminating Callista for

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

trying to organize a union of substitute teachers. We remand the case for complaint issuance.

Callista alleges that he has been employed as a substitute teacher for 25 years at the Triton Regional High School. After receiving a pay cut, he allegedly asked his co-workers about organizing a union and also contacted UFCW Local 152. Callista further alleges that in January 2008, he was fired by the school's vice-principal after he used a cell phone and a computer in a classroom. He contends that the termination was in retaliation for his trying to form a union for substitute teachers.

N.J.A.C. 19:14-2.1 provides that the Director of Unfair Practices shall issue a complaint:

> if it appears . . . that the allegations of the charge, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues. . . .

On January 9, 2009, the Director wrote to the parties that he was inclined to find that the complaint issuance standard was not met. The Director stated that the District denied violating

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1/ (...continued)
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."

the Act, claiming that it was not Callista's employer. The District asserted that it subcontracted substitute teacher staffing to Source 4 Teachers, a private employer, and that Callista remains employed by Source 4 Teachers, but has declined work assignments.

Among other things, the Director found that the District subcontracted its substitute teacher staffing to Source 4 Teachers; Callista's 2007 W-2 identifies Teacher Placement LLC as his employer; and Teacher Placement LLC and Source 4 Teachers are different names for the same company. The Director concluded that Source 4 Teachers appears to be a private employer, making Callista a private employee outside our jurisdiction. The Director also noted that Callista alleged no facts indicating that the District knew of his organizing efforts. The Director permitted the parties to submit additional documents, affidavits or other evidence and a letter brief in support of their positions.

On February 11, 2009, Callista filed a response. Among other things, he claimed that he was a District employee because he performed a service for Triton Regional High School within the confines of the school. He also questioned how he could not be employed by Triton if the vice principal and principal were able to fire him.

On February 20, 2009, the Director issued his decision refusing to issue a complaint. He found that Callista was employed by a private employer, Source 4 Teachers, and that the Act's protections extend only to public employers and public employees. He again noted that Callista alleged no facts indicating that the District knew of his organizing efforts.

In his appeal, Callista argues that for purposes of the Act, he was jointly employed by the temporary agency and the District and that his organizing efforts should therefore be protected by the Act. He notes that the Act's definition of employer is similar to the definition of employer in the Fair Labor Standards Act, 29 U.S.C. §203(d) ("FLSA"), and that the FLSA definition is broad enough to include joint public/private employers. He also cites to the New Jersey Wage and Hour law, where joint employment allegedly exists in the wage law context. Callista asserts that the District retains continued control over subcontracted employees and that our jurisdiction is therefore appropriate. Callista urges a remand for full consideration of his termination.

The District responds that Callista's allegations are without factual substantiation. It asserts that it provided the Director with supporting information from Source 4 Teachers. However, the District argues that even if Callista's factual

allegations are correct, he has failed to allege that the District knew of his organizing efforts.

We conclude that if Callista can prove that the temporary agency and the District are joint employers, then his allegation that the District terminated him in retaliation for protected activity might constitute an unfair practice. We believe that the Act prohibits public employers, even in their capacity as joint employers with private entities, from interfering with the rights of employees over whose terms and conditions they have some effective control to organize a union or to refrain from doing so. We understand that our remedial authority would be limited to the public employer, but we need not speculate on any possible remedies at this stage of the proceedings.

N.J.S.A. 34:13A-5.3 grants public employees the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity. N.J.S.A. 34:13A-3 defines public employee as any person holding a position, by appointment or contract, or employment in the service of a public employer. Although a joint public/private employer is not a public employer, one of its component parts is a public employer.

Association of Retarded Citizens, Hudson Cty. Unit, P.E.R.C. No. 94-57, 19 NJPER 593 (¶24287 1993) ("ARC"), addressed the public/private joint employer issue, but is not controlling

because the public employer was not a party to the case and the public employer was found not to be a joint employer. In ARC, we considered an argument that the State of New Jersey and a private non-profit organization ("ARC") were joint employers. A union had sought to represent employees of the ARC. The National Labor Relations Board ("NLRB") had declined jurisdiction, finding that the State exercised sufficient control over essential terms and conditions of employment to preclude the non-profit from engaging in meaningful bargaining. The union then filed an action in the Superior Court. The Court referred the matter to us to consider, among other things, who was the employer and whether the employees had rights under the Act and the New Jersey Constitution. We concluded that the ARC employees had no rights under the Act. We noted that we have never found joint employer status when one entity, like ARC, is a private sector employer outside our jurisdiction and the other entity, like the State, is a public employer in general, but is not a party in the case before us.[2/] We stated that our conclusion was consistent with the ARC-State contracts, all of which specified that ARC was the employer of the employees, and with the labor relations practices

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2/ In ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976), the Executive Director found that the Commission did not have jurisdiction over ARA, a private employer that was minimally a joint employer of food service employees at Glassboro State College and might have been the sole employer. Callista does not seek to have us assert jurisdiction over the private employer.

in at least two other counties, which involved negotiations between ARC and its employees without the State's participation.[3/]

The New York Public Employment Relations Board has held that under its authorizing statute, its jurisdiction does not extend to a joint employer, where one party is a private employer. Niagara Frontier Transp. Auth., 13 PERB 3003, 3004 (1980); CSL §201.6(b). But other states have reached a different conclusion. In re North Mason Transportation Ass'n, 1986 WL 327135 (Wash. Pub. Emp. Rel. Com.) (school district was either sole employer or dual employer of bus drivers and private employer was not an essential party; election directed); In re University of Delaware, 2009 WL 2005366 (Del. Ch. 2009) (court affirms PERB's decision that subcontracted part-time employees of private

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3/ We note that Res-Care, Inc., 280 NLRB 670 (1986), a case we cited in ARC, was overruled by Management Training Corp and Teamsters Local 222, 317 NLRB 1355 (1995). Res-Care had held that, in deciding whether it would assert jurisdiction over a private employer with close ties to a public employer, the NLRB would examine the control over essential terms and conditions of employment retained by the private and public employers to determine whether the private employer was capable of engaging in meaningful collective bargaining. In Management Training Corp., the Board held that whether there are sufficient employment matters over which unions and private employers can bargain is a question better left to the parties at the bargaining table and, ultimately, to the employee voters in each case. Management Training Corp. also overruled Ohio Inns, Inc., 205 NLRB 528 (1973), which had held that it would not effectuate the policies of the National Labor Relations Act to assert jurisdiction over a private employer where the state was a joint employer.

company that provided dining services to the public university were employees of joint employer subject to PERB jurisdiction); see also Jackson Cty. Public Hospital, 280 N.W.2d 426 (Iowa Sup. Ct. 1979) (court adopted rationale of NLRB decision in Ohio Inns, Inc., and held that Iowa Public Employment Relations Board did not have jurisdiction over joint public/private employer; Ohio Inns, Inc. has since been overruled, see fn. 3).

Callista alleges that the Board fired him for trying to organize a union of substitute teachers who are jointly employed by the Board and a private employer. If he were able to prove his case, we would be able to order the Board to cease and desist from interfering with the organizing efforts and to offer to re-employ Callista.[4/] We note that the Board has indicated that it, not the private employer, has placed a restriction on where Callista may work.

Under all these circumstances, Callista should be given an opportunity to prove that the District and the private contractor are joint employers and that the District retaliated against him because of his attempt to organize a union of substitute teachers.[5/] There are a number of proof hurdles that Callista

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4/ Because this is an unfair practice case, we need not address whether we would certify a majority representative where public and private employers were joint employers.

5/ Absent direct evidence of anti-union animus, Callista will have to prove that he engaged in protected activity, the

(continued...)

must get over before a violation will be found, but at this stage, his allegations, if true, might constitute an unfair practice so a complaint should issue.

ORDER

The matter is remanded to the Director of Unfair Practices to issue a complaint.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioners Colligan and Watkins were not present.

ISSUED: October 29, 2009

Trenton, New Jersey

5/ (...continued)
District knew of his protected activity, and that the District was hostile to that protected activity. In re Tp. of Bridgewater, 95 N.J. 235 (1984). The Director noted that Callista had not alleged any facts indicating that the District knew of his organizing efforts. An individual employee, however, may not be able to obtain information about employer knowledge at this stage of a proceeding.