

P.E.R.C. NO. 2013-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY PROSECUTOR'S OFFICE,

Respondent,

-and-

Docket No. CO-2008-231

MACHINISTS AND AEROSPACE INTERNATIONAL
UNION DISTRICT 15,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's report and recommended decision that dismissed an unfair practice charge filed by the Machinists and Aerospace International Union District 15 against the Passaic County Prosecutors Office. The charge alleged that the Prosecutor violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-5.4a(1), (3) and (5) when he laid off two employees in retaliation for protected activity. The Commission dismisses the Union's exceptions finding that the evidence supports the Hearing Examiner's conclusion that the record did not establish that the employer was hostile to the employees protected activity.

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, Genova, Burns, Giantomasi and Webster (Brian W. Kronick, Esq., of counsel and on the brief)

For the Charging Party, Cohen, Leder, Montalbano & Grossman (Bruce D. Leder, Esq. of Counsel and on the brief)

DECISION

On February 11 and 15, 2008, the Machinists and Aerospace International Union District 15 filed an unfair practice charge and amended charge, respectively, with the New Jersey Public Employment Relations Commission (Commission) alleging that the Passaic County Prosecutor's Office (Prosecutor) violated subsections 5.4a(1), (3) and (5)^{1/} of the New Jersey Employer-

^{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 (continued...)"

Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it laid off employees Lisa Bresemann DeMarco and Christine Vozzella in retaliation for their exercise of protected conduct. The IAM specifically alleged, "[t]he sole reason for the layoff of these two (2) women is in retaliation for their Union activities."

The IAM seeks to rescind the layoffs and require the Prosecutor to offer DeMarco and Vozzella reemployment; compensate them for any loss in wages and benefits retroactive to March 1, 2008; and post the appropriate notice.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain the Prosecutor from laying off DeMarco and Vozzella on March 1, 2008. The Commission designee denied that application during a hearing on February 29, 2008. The written decision followed on March 7, 2008. Passaic County Prosecutor's Office, I.R. No. 2008-008, 34 NJPER 56 (¶20 2008).

A Complaint and Notice of Hearing was issued by the Director of Unfair Practices on April 24, 2008. The Prosecutor filed an Answer on May 7, 2008, denying the allegations and it listed several affirmative defenses.

1/ (...continued)
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."

Hearings were held on March 31, August 26 and December 1, 2009, and February 4 and May 4, 2010. Both parties filed post-hearing briefs by December 14, 2010, and the Hearing Examiner Stuart Reichman issued his Report and Recommended Decision on August 11, 2011, recommending dismissal of the complaint, Passaic County Prosecutor's Office, 38 NJPER 217 (¶75 2012).

On October 31, 2011 the Charging Party filed Exceptions to the Report and Recommendations of the Hearing Examiner, and on November 21 the Prosecutor filed a brief in opposition.

Charging Party excepts to the Hearing Examiner's conclusion that the evidence did not support its claim that the layoff was the result of Demarco and Vozzella's protected activity under the Act. In reaching this conclusion, the Hearing Examiner closely analyzed the facts presented to him during the course of the hearing. He found that the Prosecutor was presented with a budget cut for 2008 of over two million seven hundred thousand dollars (\$2,700,000) by the County. The prosecutor attempted any number of strategies to ameliorate this situation, including reducing automobile and cell phone expenses, utilization of forfeited funds, a Bigley Application^{2/} to the Superior Court to force the County to increase his available funding, utilizing

^{2/} A Bigley application is the name given to an application by a County Prosecutor whereby the Superior Court is asked to override the County's budget decision regarding the level of funding provided to the Prosecutor's Office. See In re Application of Bigley, 55 N.J. 53 (1969).

attrition and not filling staff vacancies, and finally consideration of layoffs. All of this was for the 2008 budget year, and was ongoing in late 2007 and early 2008. There were also various layoff formula under consideration.

The staff in the prosecutors office were in three categories of employees: Assistant Prosecutors who were attorneys and were in their own negotiations unit; sworn law enforcement personnel, investigators or detectives, represented by P.B.A. Local 265; and a unit of clerical employees including the 12 people with the unclassified title of "prosecutor's agent" whose duties were as follows:

"Functions as an agent of the Prosecutor under the supervision of an experienced Assistant Prosecutor, Detective or Investigator. Reviews case files and assists in their preparation, through witness interview, location and/or transportation. Transports certain types of evidence; does related work as required."

In 2006, the job description was revised by the State Department of Personnel to read:

"Under the direction of the County Prosecutor, performs non-law enforcement duties to assist the Prosecutor in one or more of the following areas: trial preparation; administration; media/community relations; research and data analysis; does other related duties as required." Demarco and Vozzella held this title.

After consideration of the various options available to him to meet the budget constraints, the Prosecutor determined to lay

off all twelve (12) prosecutors agents, five (5) additional clerical employees, at least ten (10) sworn law enforcement personnel, several attorneys and a number of unfilled positions.

District 15 excepts to the Hearing Officers Report and Recommended Decision claiming that the Findings of Fact contained therein are incorrect. We begin with the standard we apply in reviewing the Hearing Examiner's findings of fact. We cannot review these findings de novo. Instead, our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10 (c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due fact-finder's "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Warren Hill Reg. Bd. of Ed., P.E.R.C. No. 2005-

26, 30 NJPER 439 (¶145 2004), aff'd 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006); Trenton Bd. of Ed., P.E.R.C. No. 79-70, 5 NJPER 185 (¶10101 1979); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980); Hudson Cty., P.E.R.C. No. 79-48, 4 NJPER 87 (¶4041 1978).

The Hearing Examiner made comprehensive findings of facts (H.E. at 3-30). We have carefully reviewed the record to see if it supports his findings. As a rule, the Hearing Examiner's findings were tightly tied to the testimony of the witnesses and were supported by precise citations to the record. Further, when he found that the testimony of the lay witnesses was inconsistent or implausible, the Hearing Examiner gave reasoned explanations as to why he was crediting one witness and discrediting another. We therefore adopt and incorporate all his findings of fact. Absent any compelling contrary evidence, we expressly adopt his factual findings based on his credibility determinations and his reasonable inferences flowing from those determinations.

In light of our acceptance of the Hearing Examiner's finding of facts, we now turn to the analysis of those facts and their application to the law. In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation

will be found unless the Charging Party has proven, 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.

Here, the Hearing Examiner applied the Bridgewater Standards and found that based upon the evidence adduced at the hearing that DeMarco and Vozzella were engaged in protected conduct and the Prosecutor knew of their conduct. But the record does not support a finding that the Prosecutor was hostile to either DeMarco's or Vozzella's exercise of protected activities. As the Hearing Examiner found: "Most of the protected conduct DeMarco was involved with occurred years before the end of 2007 and early 2008 when the layoff issue was being considered and decided. Any "fears" DeMarco expressed as a result of negotiations with the Prosecutor occurred in reaching the Association's 2002-2004 collective agreement in 2003, the two grievances in 2005, and certainly before affiliating with the Charging Party in April 2006. The only evidence of a difficult exchange between DeMarco and Avigliano (the Prosecutor) in late 2007 was when he informed her of her layoff, and, understandably, it was DeMarco who

cursed, not Avigliano. Other than Vozzella's involvement on the negotiations team, the record is devoid of any evidence that would suggest animus towards her for her participation in protected conduct." (HE p34) Thus, in light of all of the facts and evidence before us, we conclude that the Prosecutor was not hostile to De Marco and Vozzella's protected conduct in deciding to lay them off in 2008.

As to the exception raised by District 15 to the failure of the Hearing Examiner to credit its argument that the animus of the Prosecutor was directed at the President of the PBA, (Marotta), for insisting that a number of male Prosecutor's Agents be laid off before any law enforcement members of the PBA were laid off, we find that exception without merit. First that allegation was not part of the charge, but was raised only in response to the Prosecutor's motion to dismiss after the close of the Charging Party's case. Second, the theory of Greg v. Suburban Cablevision Inc., 140 N.J. 623 (1995), and Kenrich Petrochemicals, Inc. v. NLRB, 134 LRRM 2673, 907 F.2d 400 (1990), that the Prosecutor violated the Act by retaliating against PBA President Marotta because of the exercise of his protected rights (threatening to file a grievance), that the retaliation was the layoff of DeMarco and Vozzella, and that since the alleged retaliation was in response to the exercise of protected conduct (Marotta's), the layoff of DeMarco and Vozzella violated the Act

is inapposite because the facts adduced demonstrate that while DeMarco was the girlfriend of Marotta, Vozzella had no relationship with Marotta, and there was no reason for her to have been the subject of retaliation for Marotta's protected activity. In fact, the conversations between the Prosecutor and Marotta suggests that the Prosecutor determined to lay off all of the Prosecutor's agents simply to avoid the threats from Marotta to sue if all the male agents were not laid off before any sworn officer were laid off, on the one hand, and the possibility that he would be sued for discrimination if he laid off only the male agents on the other hand.

Thus, in agreement with the Hearing Examiner we conclude that the Passaic County Prosecutor's Office did not violate 5.4a(1), (3) or (5) of the Act by laying off DeMarco and Vozzella.

ORDER

The unfair practice charge in this case is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Bonanni was not present.

ISSUED: September 27, 2012

Trenton, New Jersey