P.E.R.C. NO. 2014-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY SUPERINTENDENT
OF ELECTIONS,

Respondent,

-and- Docket No. CO-2009-493

COMMUNICATION WORKERS OF AMERICA
AFL-CIO LOCAL 1032,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision in an unfair practice case filed by Communications Workers of America, AFL-CIO, Local 1032 against the Passaic County Superintendent of Elections. That decision recommended that the Commission find that the Superintendent violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (3), when it terminated unit employees in retaliation for protected activity. The Commission rejects the Superintendent's exceptions, finding that the Hearing Examiner's credibility determinations and comprehensive findings of fact including evidence of hostility to protected activity and inconsistent cost evaluations of subcontracting that were prepared after the employees were terminated, were supported by references to the transcripts and exhibits. The Commission holds that the Hearing Examiner did not err by finding the Superintendent's reasons for the terminations were pretextual and that the employees' protected conduct was a substantial and motivating factor in the decision to contract out those positions.

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 and Giantomasi, PA attorneys (Brian Kronick, of counsel)

For the Charging Party, Weissman and Mintz, PA, attorneys (Ann Marie Pinarski, of counsel)

DECISION

This case is before the Commission on exceptions filed by the Passaic County Superintendent of Elections to the Report and Recommended Decision of a Commission Hearing Examiner, H.E. No. 2011-12, 38 NJPER 35 (¶5 2011). The Hearing Examiner recommended that the Commission find that the Superintendent violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (3) by eliminating warehouse technician positions and terminating four employees represented by the Charging Party, Communication Workers of America, Local 1032, AFL-CIO, in retaliation for the technicians' pursuit of

grievances.[1/] The Hearing Examiner recommends that the Commission remedy the unfair practices by ordering the Superintendent to offer reinstatement and back pay to the technicians. We adopt her recommended decision and will order that the employees be offered reinstatement with back pay.

Hearing Examiner Elizabeth J. McGoldrick conducted hearings on January 19, 20, February 4, March 3, 4, and 11, 2011. The parties examined witnesses and presented exhibits.

On May 31, 2011 the Hearing Examiner filed her Report and Recommended Decision which is now before us to adopt, reject or modify.[2/] The Hearing Examiner found that:

> The terminated employees had engaged in conduct protected by the Act, primarily by

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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 to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ On June 13, 2011, two weeks after the Hearing Examiner issued her report, a lawsuit was filed in federal court asserting that many of the same facts present in this dispute violated federal civil rights statutes, the First and Fourteenth Amendments to the United States Constitution, the New Jersey Conscientious Employee Protection Act ("CEPA") and the New Jersey Constitution. On December 26, 2012, United States District Court Judge Faith S. Hochberg dismissed the federal claims. However, the Court refrained from deciding any claimed violations of New Jersey Law stating that the employees "may pursue their claims under the state constitution and the CEPA in state court or before the PERC." Malave et. al. v. Freytes, et. al., 2012 U.S. Dist LEXIS 181681 at 30.

> making complaints concerning working conditions and filing formal grievances and pursuing them to binding grievance arbitration;
>
> The Superintendent was aware of these activities;
>
> The Superintendent, through her statements and actions, was hostile to the employees' protected activity;[3/] and
>
> The Superintendent's assertion that she terminated the employees as part of a plan to subcontract their jobs was a pretext and/or an "after the fact" justification to terminate the employees.

The Superintendent has filed three exceptions and a supporting brief and the CWA has filed a brief in opposition to the exceptions. The Superintendent asserts:

> The Hearing Examiner erred by determining that the Superintendent's reasons for subcontracting the warehouse were pretextual;
>
> The Hearing Examiner failed to consider or address key facts in evaluating the Union's claim that the Superintendent was hostile to the Union;
>
> The Hearing Examiner's Report contains numerous factual inaccuracies and fails to

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3/ The hostility was exhibited by the Superintendent's statements that she did not give "two s___ts" about the Union, her statement that employees who staged a lunch time protest immediately after the terminations "better watch it because they will be next." In addition, the Hearing Examiner found that the timing of the terminations was significant as they occurred during the course of collective negotiations and shortly after a contentious conference call between the Superintendent and the employees concerning election day work hours and arrangements.

comprehensively recite and give weight to certain material facts.

Findings of Fact

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 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 fact supported by references to the transcripts and exhibits introduced into evidence. H.E. No. 2011-12 at pp. 4 to 46, 38 NJPER at 36 to 45. Her findings, many of which are based upon credibility determinations, including: direct evidence of hostility to protected activity; that cost evaluations of subcontracting were inconsistent; were prepared after employees were terminated; and were hidden from Union officials. She concluded:

> I find that the Cost Benefit Analysis document does not support the conclusion that Freytes had an objective belief that contracting out the warehouse operations would save money. I find it more likely that this document was prepared after the decision to subcontract was made, not in preparation for that decision.
> [H.E. No. 2011-12 at 53, 38 NJPER at 46]

The Exceptions assert that the Hearing Examiner made these factual mistakes:

- She assumed that the Superintendent's office was located in the County Administration Building;
- That the election day stipend of $590 received by Voting Machine Technicians in lieu of their normal salaries was also paid to other categories of employees;
- Whether the Union's chief spokesperson was aware, during collective negotiations, of the past practice regarding the $590 Election Day Stipends; and

- That the Hearing Examiner erred when, in her discussion of the procedural history, she stated that an arbitration award had been appealed to the Appellate Division of the Superior Court, rather than the trial division of the Court.[4/]

These contentions are not significant. They do not undermine the Hearing Examiner's Findings of Facts nor do they affect her legal analysis.

In re Tp. of Bridgewater, 95 N.J. 235 (1984), is the guide for assessing if adverse personnel actions are motivated by discrimination for the exercise of protected activities in violation of subsections 5.4a(3) and, derivatively, (1) of the Act. A Charging Party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse personnel action. This may be done by direct or by circumstantial evidence showing that the employee engaged in protected activity, the employer

4/ The statement that the arbitration award was reviewed initially in the Appellate Division may have been incorrect. But, the Appellate Division of the Superior Court in In re Arbitration Between FOP Lodge # 97, and Gloucester County Sheriff's Office, 364 N.J. Super. 294 (App. Div. 2003) reviewed and vacated a public sector grievance arbitration award even though the initial review of an arbitration award lies in the Law Division. See N.J.S.A. 2A:24-8. The Court's reported opinion does not cite to, or state whether or why the appellate panel was invoking original jurisdiction pursuant to R.2:10-5. In any case, the Hearing Examiner's error was trivial. So too is her statement about the location of the Superintendent's office.

knew of this activity and the employer was hostile towards 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.

The Hearing Examiner concluded that CWA proved, by a preponderance of the evidence, that employees' protected conduct was a substantial and motivating factor in the Superintendent's decision to contract out the warehouse operation and eliminate the technicians' positions. Further, given the confusing, speculative, and internally inconsistent evidence proffered by the Superintendent concerning cost-savings to be gained by terminating the employees in favor of subcontracting, the Hearing Examiner concluded the employer's reasons were a pretext, and did not establish another contemporaneous motive for its actions.

We reject the employer's contention that the Hearing Examiner erred by finding the Superintendent's reasons were a

pretext. In addition to her findings about the timing and accuracy of cost benefit studies, the Hearing Examiner found that the Superintendent was secretive about subcontracting and took pains to conceal those plans from the employees, including cautioning the vendor to hand deliver proposals and financial estimates. These findings involve credibility determinations that an agency head cannot overturn absent a lack of support in the record. The Hearing Examiner also properly concluded that the cost analyses were first prepared after the employees were targeted for layoffs and were inconsistent with one another. The Employer's arguments do not provide any basis for not adopting the Hearing Examiner's conclusion that CWA's proofs met the Bridgewater standards and that there was no contemporaneous, non-discriminatory motive for the layoffs.[5/]

Both direct (hostile statements) and circumstantial (close timing of protected activity and retaliation) evidence supports

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5/ The Superintendent argues that as she was not obligated to negotiate over subcontracting her failure to notify the Union was irrelevant. We disagree. An agreement to discuss economically motivated subcontracting resulting in layoffs is mandatorily negotiable. In re IFPTE Local 195 v. State, 88 N.J. 393, 409-410 (1982). The Hearing Examiner could consider the Employer's concealment of her subcontracting plans as evidence of hostility. Non-negotiable personnel actions that taken to discriminate are unfair practices. Id. At 424; Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, 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).

the Hearing Examiner's conclusion the Superintendent was hostile to protected employee activity. The Superintendent's contention that she allowed grievances to proceed through the negotiated procedure, does not neutralize the evidence of hostility in the record.[6/]

The Hearing Examiner's recommended remedy of offering reinstatement to the laid off employees with back pay and substantially the same working conditions that were present prior to their discriminatory terminations effectuates the purposes of the Act.

ORDER

A. The Passaic County Superintendent of Elections shall cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment.

6/ The case does not involve an alleged violation of N.J.S.A. 34:13A-5.4a(5) asserting that the Superintendent "refused to process grievances presented by the majority representative." Moreover, grievance procedures are normally self-executing, meaning that an employer's failure to respond to a grievance at the various steps of the procedure, does not prevent a majority representative from prosecuting it. See State of New Jersey (OER), P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988).

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment in retaliation for their protected activities.

B. That the Employer take the following affirmative action:

1. Offer to reinstate the warehouse technicians who were terminated on June 12, 2009, with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

2. Make the terminated employees, who accept offers of reinstatement, whole for all salary and benefits due from June 12, 2009 to the present, less mitigation, with interest at the rate set by Court Rules.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Boudreau was not present.

ISSUED: August 8, 2013

Trenton, New Jersey

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment.

WE WILL cease and desist in discriminating in regard to transfer decisions to discourage employees in the exercise of rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment in retaliation for their protected activities.

WE WILL offer to reinstate the warehouse technicians who were terminated on June 12, 2009, with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

WE WILL make the terminated warehouse technicians, who accept offers of reinstatement, whole for all salary and benefits due from June 12, 2009 to the present, less mitigation, with interest at the rate set by Court Rules.

Docket Nos. CO-2009-493 Passaic County Superintendent of Elections
(Public Employer)

Date: _____ By: _____

Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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