P.E.R.C. NO. 2014-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

SKILLED TRADES ASSOCIATION, INC.,

Charging Party.

OAL DKT. NO. PRC 02872-11
P.E.R.C. DKT. NO. CO-2010-487

NEWARK HOUSING AUTHORITY
LAYOFF - 2010.

OAL DKT. NO. CSV 09080-10
AGENCY DKT. NO. 2010-4005

SYNOPSIS

The Public Employment Relations Commission remands an unfair practice case to the Administrative Law Judge (ALJ) in a consolidated matter with the Civil Service Commission. PERC instructs the ALJ to analyze the facts using the burden shifting analysis set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

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. 2014-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and-

SKILLED TRADES ASSOCIATION, INC.,

Charging Party.

OAL DKT. NO. PRC 02872-11
P.E.R.C. DKT. NO. CO-2010-487

NEWARK HOUSING AUTHORITY
LAYOFF - 2010.

OAL DKT. NO. CSV 09080-10
AGENCY DKT. NO. 2010-4005

Appearances:

For the Respondent, Samuel M. Manigault, attorney

For the Charging Party, Oxfeld Cohen, P.C., attorneys (Arnold Shep Cohen, of counsel)

DECISION

This case comes to us by way of exceptions to the Initial Decision of an Administrative Law Judge in a consolidated unfair practice case before this Commission and a good faith layoff appeal before the Civil Service Commission. On June 7, 2010, six employees of the Newark Housing Authority (NHA) filed good faith layoff appeals withe the Civil Service Commission. The Skilled Trades Association (STA) also filed an unfair practice charge and amended charge with the Public Employment Relations Commission (PERC) on June 15 and September 22 respectively. The charge, as amended, alleges the layoff targeted STA leadership in

retaliation for engaging in protected activity in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(3) and (5).[1/] The charge further alleges that the NHA changed the Civil Service title of Stanley Cimpric, a non-unit member, from carpenter to welder, to avoid the bumping rights STA Vice President Raymond Ramos held as a carpenter with more seniority.

On September 22, 2010, the Director of Unfair Practices issued a Complaint on the allegations contained in the first charge determining that the allegations, if true, may constitute an unfair practice. On September 28, Hearing Examiner Wendy Young accepted NTA's amendment to the Complaint.

A motion for Consolidation and Predominant Interest was filed with the Office of Administrative Law by the STA. On February 8, 2011, Administrative Law Judge Richard McGill issued an Order of Consolidation and Predominant Interest. The Order consolidated the PERC unfair practice case with the Civil Service layoff appeal and determined that PERC has the predominant interest. On March 11, the PERC case was transferred to the

---

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. ...[and](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."

Office of Administrative Law for hearing before an Administrative Law Judge (ALJ).

The ALJ issued an Initial Decision on February 26, 2014 dismissing the unfair practice complaint finding that the STA did not engage in protected activity significant enough to cause retaliation; the timing of the layoff in relation to the alleged protected activity was remote; and the NHA established that the layoff was due to legitimate business reasons. As to the Civil Service layoff appeal, the ALJ found it was instituted in good faith.

On March 12, 2014, the STA filed exceptions to the ALJ's Initial Decision. As to the PERC case, the STA asserts that the testimony established that the NHA targeted Civil Service carpenters for layoff in order to reach the President and Vice President of the STA in retaliation for their active filing of unfair practice charges and grievances against the NHA. The NHA did not file a response to the exceptions.

We have reviewed the record and remand the case back to the Administrative Law Judge to determine whether the STA's allegations of anti-union animus - hostility to the filing of unfair practice charges and grievances- was a motivating factor in the decision to layoff the STA employees.

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 In re Tp. of Bridgewater, 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. Conflicting proofs concerning the employer's motives are for us to resolve.

In rejecting the STA's protected activity allegations, the ALJ found:

> The STA's main argument is that the layoff was done in retaliation for its vigorous advocacy on behalf of its members. This argument is unpersuasive for several reasons. First, the grievances and unfair practice charges filed by the STA do not appear to have sufficient weightiness or significance, especially in light of the seemingly innocuous settlements, to cause the layoff of thirteen employees. One of the more significant disputes was an unfair practice charge concerning an allegation that the NHA assigned STA work to in-house personnel from other unions. This dispute was resolved by an Agreement which simply defined in some detail the types of work that will or will not be assigned to the workers from the STA or other in-house unions.
>
> The STA filed a grievance because employees were required to work with asbestos in a particular building. The parties agreed to a settlement which required NHA to provide training in regard to asbestos, to use licensed professionals to handle and remove asbestos in certain situations, to offer medical screening to employees who believe they have been exposed to asbestos, and to create a Health and Safety Committee with the STA as a member.
>
> Another dispute concerned ECBT workers who, according to the STA, should have been made permanent employees. The STA filed an unfair practice charge alleging that the NHA refused to produce personnel records so that the STA could identify new bargaining unit members. This dispute was resolved with an agreement by the NHA to provide the pertinent lists of employees.

> The STA also filed two grievances in regard to this situation. The dispute was resolved with an Agreement that gave the STA the right to solicit ECBT workers to voluntarily agree to contribute by checkoff of $10 per pay period to the STA.
>
> The disputes about the scope of work with the various unions are readily understandable in view of the absence of clear delineations, and the STA's concern about asbestos seems completely reasonable. The terms of the settlements do not seem to be particularly burdensome from the perspective of NHA. While unresolved disputes continued in 2010, the situation seems to offer little reason for retaliation by the NHA. [Initial Decision at 54-55].

The Judge does not appear to have decided whether anti-union animus, i.e. hostility to the STA's filing of grievances and unfair practices, was a motivating factor in the decision to layoff the STA unit members.[2/] Instead, his initial conclusion is that the protected activity was not burdensome enough to the NHA to warrant retaliation. The Act does not contemplate the significance of the protected activity. Further, as the Act promotes the prompt resolution of labor disputes, the fact that the parties resolved cases does not justify a finding that protected activity could not have been a motivating factor in an employer's actions. Both the courts and the Commission follow the evidentiary rule that offers to compromise are not admissible to prove that a disputed claim has, or lacks, merit. See Kas

---

2/ The ALJ's analysis begins with a finding that the layoff was for legitimate business reasons. A finding that must be made after a determination that the STA made a prima facie case.

Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 283 (App. Div. 2007); Township of Mantua, P.E.R.C. No. 82-99, 8 NJPER 302, 303 (¶13133 1982).

Second, the ALJ, relying on private sector discrimination cases interpreting federal law, found that the timing of the layoff was remote. Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity. City of Margate, P.E.R.C. No. 87-45, 13 NJPER 498 (¶18183 1987); Bor. of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). In many cases where the timing of a personnel action establishes hostility toward protected activity, the personnel action is unanticipated and takes place at a time or in a manner inconsistent with the ordinary course of business. Timing is one of the more significant factors in assessing motivation and from which hostility or animus may be inferred. Downe Tp. Bd. Ed.; Bridgewater. Further, the ALJ found allegations occurring after the filing of an unfair practice charge to be irrelevant. Allegations occurring after the filing of a charge are relevant to a retaliation analysis. Hunterdon Cty. and CWA, 116 N.J. 322 (1989)(employer violated Act both when it unilaterally established and then unilaterally discontinued safety incentive program after filing of unfair practice charge).

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 STA met its burden of proving, by a preponderance of the evidence, that hostility to the STA's protected activity was a substantial or motivating factor in the decision to layoff the STA members. If the STA did not meet that burden, that unfair practice allegation should be dismissed. If the STA did meet that burden, the ALJ should make specific factual findings and legal conclusions as to whether the NHA met its burden of proving, by a preponderance of the evidence, that it would have laid off the STA employees, even absent the STA's protected activity. See Borough of Haddon Heights, P.E.R.C. No. 2010-72, 36 NJPER 117 (¶49 2010) (Borough met its burden of proof that it would have implemented layoffs for economic reasons even absent any anti-union animus). The ALJ should review the testimony and exhibits and make any necessary credibility determinations in issuing findings of fact about the NHA's motivation for the layoff.[3/] He should then apply Bridgewater to his detailed factual findings so that this agency and the Civil Service Commission can review his recommendations of law.

3/ On page 58 of the Initial Decision, the ALJ observes that two supervisors were not called as witnesses and therefore discounts testimony related to comments they made. The ALJ may draw no inference or a negative inference from the NHA not calling them to testify and make a credibility determination as to the witnesses who testified regarding their statements.

In addition, the unfair practice charge alleges that the NHA violated the Employer-Employee Relations Act by changing the title of an employee to eviscerate the STA Vice President's bumping rights to that position. We also remand this matter to the Judge apply the Bridgewater analysis to that allegation.

ORDER

We remand the case back to the Administrative Law Judge to determine:

1. Whether the STA was involved in protected activity;

2. Whether the NHA was aware of the protected activity;

3. Whether the NHA was hostile to the protected activity;

4. Whether the NHA proved by a preponderance of the evidence that the protected activity was a motivating factor in the layoff and title change;

5. Whether the NHA submitted evidence of a legitimate business justification for the layoff and title change;

6. And, whether the NHA proved by a preponderance of the evidence on the entire record, that the adverse actions would have taken place absent the protected conduct.

BY ORDER OF THE COMMISSION

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

ISSUED: April 10, 2014

Trenton, New Jersey