

P.E.R.C. NO. 2016-29

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 adopts the Initial Decision on remand of an Administrative Law Judge dismissing the Complaint in an unfair practice case filed by the Skilled Trades Association (STA) against the Newark Housing Authority (NHA). The Commission holds that the ALJ's findings of fact and credibility determinations support the NHA's proffered legitimate staffing and financial reasons as to the actual motivation for laying off some STA members; therefore the Commission adopts the ALJ's legal conclusion that the NHA did not violate the Act. Pursuant to an Order of Consolidation and Predominant Interest, the Commission transfers the Initial Decision on remand to the Civil Service Commission.

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, Samuel M. Manigault, attorney

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

DECISION

On September 3, 2015, an Office of Administrative Law (OAL) Administrative Law Judge (ALJ) issued his Initial Decision on remand pursuant to the Public Employment Relations Commission's (PERC) April 10, 2014 Order instructing him to analyze the facts using the burden shifting analysis set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). See P.E.R.C. No. 2014-70, 40 NJPER 509 (¶163 2014). For the reasons discussed below, we adopt the ALJ's Initial Decision on remand and 2014 Initial Decision.

Summary of Procedural History

On June 7, 2010, six Newark Housing Authority (NHA) employees filed good faith layoff appeals with the Civil Service Commission. The Skilled Trades Association (STA) also filed an unfair practice charge and amended charge with 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-5.4a(3) and (5). The charge further alleges that the NHA changed the Civil Service title of Stanley Cimpric 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 5.4a(3)^{1/} allegations determining that, if true, they may constitute an unfair practice. On September 28, Hearing Examiner Wendy Young accepted STA's amendment to the Complaint.

A motion for Consolidation and Predominant Interest was filed with the OAL by the STA. On February 8, 2011, ALJ Richard McGill issued an Order of Consolidation and Predominant Interest.

1/ This provision prohibits public employers, their representatives or agents from: "(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 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 OAL for hearing before an 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, asserting 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.

On April 10, 2014, PERC issued a decision remanding the case back to the ALJ to determine, consistent with the Supreme Court's test in In re Bridgewater Tp., 95 N.J. 235 (1984): (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; and (6) 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. P.E.R.C. No. 2014-70, 40 NJPER 509 (¶163 2014).

The ALJ's decision on remand made the following legal conclusions: (1) the STA was involved in protected activity; (2) the NHA was aware of the protected activity; (3) the NHA was not hostile to the protected activity; (4) anti-union animus was not a substantial or motivating factor in the layoffs or title change; (5) the NHA submitted evidence of a legitimate business justification for the layoff and title change; and (6) the layoff and title change would have taken place irrespective of the protected conduct.

In its exceptions, the STA asserts that the layoffs were made in bad faith for anti-union reasons and that STA leadership was a primary focus of the layoffs. It argues that the work of the laid-off employees continues to be performed by a regular pool of workers who work in an at-will status through the ECBT union. The NHA did not file a response.

Summary of Facts

As of June 2010, the STA had a total of forty-three members. On June 9, 2010, the NHA initiated a layoff of thirteen STA

members, including nine carpenters, two electricians, and two painters. 2014 Initial Decision at 5, 50. Among those laid-off were carpenter Gerard Costella, STA President; carpenter Raymond Ramos, STA Vice President; electrician Abdus Akbar, STA Trustee; and carpenter Kurt Blanchard, STA Shop Steward. Ibid. Five of the laid-off STA workers, including Costella and Ramos, had Civil Service status. Ibid. Janet Abrahams, NHA Chief of Operations, selected which STA workers would be laid-off after checking with crew supervisors Patel, Jacobs, Chavous, McNair, and Tillery, who provided the number of workers not needed by title. Id. at 35-36, 41-42, 50. Ms. Abrahams provided the list to Sibyl H. Bryant, NHA Chief Human Resources Officer, who identified specific individuals to be laid-off based on seniority and Civil Service status. Ibid. Abrahams revised Bryant's layoff list to replace carpenter Stanley Cimpric with carpenter and STA Vice President Raymond Ramos, who had more seniority than Cimpric. Id. at 36, 42, 50. This was accomplished by changing Cimpric's title to welder. Ibid. Abrahams testified that she knew Cimpric actually worked as a welder, not a carpenter, and that she needed to keep her only welder on staff. Id. at 42.

The ALJ found that STA members, with a few exceptions, were assigned to Central Maintenance and that when a site needed certain maintenance repairs, the site had to make a referral to Central Maintenance for the work to be done by an STA member.

Id. at 44. The site was then charged for the work done by the STA member in response to the referral, but Abrahams testified that the payments from referrals did not cover the costs of the STA members in Central Maintenance. Id. at 40, 44. Abrahams testified that because payments from referrals were not covering costs, there was a deficit in the Central Maintenance cost center which prompted her decision to layoff employees. Id. at 40-41. She testified that the layoff decision was based on the NHA's staffing needs and that the layoff resulted in savings of more than \$1 million annually. Id. at 42, 50.

Bryant testified that in 2010, the NHA's funding from HUD was reduced, so she met with Abrahams to discuss budgetary concerns. 2014 Initial Decision at 35. She testified that they discussed how STA members in Central Maintenance were not covering their costs, and that STA had not been impacted by previous layoffs at NHA. Ibid.

Legal Analysis

Allegations of anti-union discrimination are governed by In re Bridgewater Tp., 95 N.J. . 235 (1984). The 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 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.

In determining that the NHA was not hostile to the STA's protected union activity, and that anti-union animus was not a substantial or motivating factor in the layoff or title change, the ALJ referred back to pages 52-58 of his 2014 Initial Decision.

The ALJ found that the testimonies of Abrahams and Bryant credibly explained the NHA's motivation for the layoff, stating:

The NHA produced the testimony of Sibyl H. Bryant and Janet Abrahams, who explained explicitly the reasons for the layoffs of the STA members in 2010. Ms. Bryant and Ms. Abrahams were credible witnesses, and their testimony was cogent and readily believable. Under the circumstances, their testimony is accepted as true. After the NHA had reduced its staff by approximately fifty percent from 2006 to 2009 as a result of cuts in funding, Ms. Bryant and Ms. Abrahams became aware of an additional reduction from HUD for 2010.

Ms. Abrahams considered the STA because its receipts from referrals were not covering its costs, there was a general reduction in the amount of maintenance due to changes in the NHA's housing stock and it had not had any previous layoffs. Ms. Abrahams conferred with crew supervisors to identify positions that could be eliminated. The crew supervisors identified by job title the positions that could be eliminated, and Ms. Abrahams decided to layoff employees from these positions. Ms. Bryant was then given the task of identifying the specific individuals who would be laid-off on the basis of seniority and Civil Service status.

2014 Initial Decision at 52.

The ALJ also found that the numbers of STA employees laid-off from the various trades did not indicate any unequal targeting of particular trades or of employees with Civil Service status. He stated:

On its face, the layoff creates a more equal balance among the trades, and the STA offered no evidence that there was a need for a larger number of carpenters Based upon a seniority list, which includes the date on which the individual was hired by the NHA, it may be determined that as of June 10, 2010, twenty-nine of forty-three STA members had been hired by May 1997, equaling sixty-seven percent. Using this same method, eight of the thirteen employees who were laid-off had Civil Service status, equaling sixty-two percent. Thus, it does not appear that employees with Civil Service status were laid-off disproportionately.

2014 Initial Decision at 56-57.

Finally, regarding the title change of Cimpric from carpenter to welder which resulted in STA Vice President Ramos

being laid-off, the ALJ found that the NHA offered a credible explanation. He stated:

Ms. Abrahams realized that the layoff of Mr. Cimpric would result in the loss of the NHA's only welder. A review of Mr. Cimpric's work log for the period from June 1, 2009, to June 30, 2010, indicates that he worked almost exclusively as a welder. Under the circumstances, STA's argument that the NHA changed Mr. Cimpric's title in order to target Mr. Ramos for a layoff is unpersuasive.

2014 Initial Decision at 57.

We may not reject or modify an ALJ's findings of fact as to issues of credibility unless we find them to be arbitrary, capricious or unreasonable or not supported by sufficient, competent, and credible evidence in the record. N.J.S.A. 52:14B-10(c). We find no basis to disturb the ALJ's findings that the way in which the layoff list was developed through soliciting numbers of employees by title who were no longer needed, and the way it was implemented based on seniority, supports the NHA's proffered staffing and financial reasons for the layoffs. The ALJ did not ignore the testimony of STA members regarding allegations of remarks indicative of anti-union animus. The ALJ addressed the statements, all of which were hearsay, and did not find them particularly probative. He found that regardless of any anti-union animus that may have been inferred from such statements, that they "are overborne by the testimony

of Ms. Abrahams and Ms. Bryant as to the actual motivation for the layoffs.” 2014 Initial Decision at 58.

Having carefully reviewed the record and the ALJ’s 2014 Initial Decision and Initial Decision on remand, we find that his findings of fact as to issues of credibility are supported by sufficient, competent, and credible evidence in the record. We therefore adopt his findings of fact and his legal conclusion that the NHA did not violate the Act.

Pursuant to the Order of Consolidation, this case shall proceed to the Civil Service Commission.

ORDER

The unfair practice Complaint is dismissed. The remaining aspects of the case are transferred to the Civil Service Commission.

BY ORDER OF THE COMMISSION

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

ISSUED: October 29, 2015

Trenton, New Jersey