

P.E.R.C. NO. 2017-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and-

PERC Docket No. CO-2015-042

IFPTE LOCAL 195,

Charging Party.

MARCIA DAVIS,

OAL Docket No. CSV 14106-14
Agency Docket No. 2015-788

Appellant,

-and-

MOUNTAINVIEW YOUTH CORRECTIONAL
FACILITY, DEPARTMENT OF CORRECTIONS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission adopts the initial decision of an administrative law judge (ALJ) dismissing an unfair practice charge that challenged the discipline of a civilian correctional facility employee. The charge alleged that the Department of Corrections violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5), when it disciplined the employee allegedly in retaliation for her activities as a shop steward for IFPTE Local 195. The Commission concurs with the ALJ that the charging party failed to show that protected activity was a motivating factor in the employer's decision to discipline the employee.

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, Christopher S. Porrino, Attorney
General (Robert Strang, of counsel)

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

DECISION

On October 7, 2014, Marcia Davis (Davis) was removed from her employment as a communications operator for the Mountainview Youth Correctional Facility (Mountainview), Department of Corrections, on charges of insubordination, conduct unbecoming a public employee, and other sufficient cause. The disciplinary

charges against Davis were precipitated by a verbal confrontation between Davis and her supervisor, Sgt. Michael Cicerale. Davis appealed her removal to the Civil Service Commission, which transmitted the matter to the Office of Administrative Law for determination.

Before Davis' removal became effective, her union, IFPTE Local 195, filed an unfair practice charge with the Public Employment Relations Commission (PERC) against the Department of Corrections. The charge, filed on September 3, 2014, alleged that Davis was being disciplined, as she had been in the past, in retaliation for her activities as a shop steward for the local. On December 8, 2014, Local 195 amended the charge by adding that Davis was disciplined in retaliation also for her having pursued a civil service appeal. Both the initial and amended charge assert violations of section 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq.^{1/} On December 12, 2014, the Director of Unfair Practices

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 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."

issued an unfair practice complaint only with respect to the "a(1)" and "a(3)" allegations.

On March 13, 2015, the Department of Corrections filed with the Office of Administrative Law a motion to consolidate the Civil Service and PERC matters. By Order dated September 11, 2015, the Department's motion was granted. By Joint Order of PERC and the Civil Service Commission, the unfair practice charge was consolidated with Davis' disciplinary appeal, and PERC was assigned the predominant interest.

A hearing was held on April 26 and May 10, 2016. The parties filed post-hearing briefs. On July 15, 2016, Administrative Law Judge (ALJ) Robert Bingham, II, issued an initial decision. He dismissed the unfair practice charge finding that Local 195 failed to prove the charge by the preponderance of the evidence. He sustained the disciplinary charges, but he recommended that the penalty be modified to a six-month suspension without pay.

On July 27, 2016, Local 195 filed exceptions to the initial decision. However, the exceptions actually assert that the recommendations of the ALJ are correct and should be adopted. That is, Local 195 does not take issue with the ALJ's findings of fact or legal conclusions. Rather, it argues that the ALJ properly reduced the penalty utilizing the principle of progressive discipline.

On July 27, 2016, the Department of Corrections also filed exceptions to the initial decision. The Department requests that PERC and the Civil Service Commission modify the initial decision, but only as to the penalty. The Department argues that the Civil Service Commission should affirm Davis' termination.

Importantly, neither party addresses the ALJ's findings and conclusions with regard to the PERC matter. Thus, for example, the charging party does not suggest that the ALJ disregarded or overlooked evidence in support of the charge or that he misapplied governing law. The exceptions, therefore, should be understood as only pertaining to the Civil Service matter.

With regard to the unfair practice charge, the ALJ correctly noted that it is unlawful for public employers, their representatives or their agents to discriminate relative 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 the [Act]." N.J.S.A. 34:13A-5.4a(3). The ALJ also noted that In re Bridgewater Township, 95 N.J. 235 (1984) sets forth the appropriate test for evaluating whether an employee has been subjected to retaliation for exercising protected union activity. After reciting the test, the ALJ stated:

Here, there is insufficient evidence in the record that Davis was engaged in protected activity that was a substantial motivating factor in her termination. Other than her

reference to knowledge gained as a union representative, the record is void as to her participation in union activity. Further, the assertion that the [Department] provoked an argument with Cicerale and then removed Davis, all because she filed unanswered complaints after reinstatement [from an earlier suspension] and knowing that she was an outspoken union representative, is nothing more than mere speculation. Therefore, I **CONCLUDE** that the charging party has not met its burden of proof as to the charge of unfair labor practice.

Our review of the record, including the parties' post-hearing briefs, satisfies us that the entirety of the charging party's case with regard to the unfair labor practice charge was an allegation that the Department knew Davis had been outspoken on behalf of herself and other union members whom she represented as a shop steward and conjecture that because of that knowledge, the Department "sought to provoke an argument between Ms. Davis and Sgt. Cicerale." (Charging Party's post-hearing brief) No evidence was adduced during the administrative hearing that supports this allegation or the charge generally. We also note that none of the exhibits admitted into evidence pertain to or establish any element of a violation of N.J.S.A. 34:13a-5.4a(1) or (3).

We agree with the ALJ's assessment that the "record does not show that the subject discipline here was related to either union activity by Davis or her exercise of protected rights as a union member." Accordingly, we adopt the ALJ's conclusion that the

Department did not violate the Act. Pursuant to the Order of Consolidation, this case shall proceed to the Civil Service Commission. As we concur with the ALJ's recommendation that the unfair practice charge was not proven, we leave it to the Civil Service Commission to consider the parties' arguments as to the appropriate penalty. See e.g. In re Stallworth, 208 N.J. 182, 194-198 (2011).

ORDER

The unfair practice complaint is dismissed. The remaining aspect of the case is transferred to the Civil Service Commission.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Eskilson recused himself.

ISSUED: August 18, 2016

Trenton, New Jersey