P.E.R.C. NO. 2019-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LINDEN,

Respondent,

-and- Docket No. CO-2015-101

TEAMSTERS LOCAL 469,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts, in part, a Hearing Examiner's recommended decision following a hearing on a Complaint issued on unfair practice charges filed by Teamsters Local 469, finding that the City of Linden independently violated 5.4a(1) through its conduct in connection with: the grievant's protected activity of filing a grievance challenging his assignment to "mail duty"; the imposition of discipline against the grievant following a councilwoman's complaint for his being out of uniform; incidents in City Hall in which the councilwoman photographed the grievant's footwear with her cell phone and made a lewd hand gesture to the grievant; and the councilwoman's pursuit of a desk audit of the grievant's job, all of which had a tendency to interfere with employees' protected rights. However, the Commission finds that the record does not establish that the City violated 5.4a(3) with regard to the imposition of discipline for the grievant being out of uniform. The Commission otherwise rejects the City's exceptions, including its argument that the doctrine of *res judicata* should apply to bar the prosecution of unfair practice charges in light of Local 469's successful subsequent challenge via grievance arbitration to the discipline imposed on the grievant.

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. 2019-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LINDEN,

Respondent,

-and- Docket No. CO-2015-101

TEAMSTERS LOCAL 469,

Charging Party.

Appearances:

For the Respondent, Rogus McCarthy, LLC (Daniel J. McCarthy, of counsel)

For the Charging Party, Timothy R. Hott, Esq.

DECISION

This case is before the Commission on exceptions filed by Respondent, City of Linden (City), to a Report and Recommended Decision of a Commission Hearing Examiner, [H.E. No. 2018-12, 44 NJPER 437 (¶123 2018)]. The Charging Party, Teamsters Local 469 (Local 469) filed a response to the City's Exceptions.

On October 28, 2014 and December 15, 2016, Local 469 filed an unfair practice charge and amended charge against the City. Local 469 alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1), (2) and (3).[1/] when the City

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, (continued...)

primarily through the actions of a City councilperson retaliated against shop steward G.B. for engaging in activities protected by the Act.

A Complaint and Notice of Hearing issued on the allegations that the City had violated subsections 5.4a(1) and 5.4a(3). The portion of the charge alleging a violation of subsection 5.4a(2) was dismissed.

On May 17, 2018, after a two-day hearing, the filing of exhibits and briefs, Commission Hearing Examiner Wendy L. Young issued a Report and Recommended Decision containing Findings of Fact and Conclusions of Law. She concluded:

> 1. The City of Linden violated 5.4a(3) and a(1), both derivatively and independently, when it filed charges seeking a 3-day suspension against shop steward G.B. for being out of uniform.[2/] It then imposed that discipline.[3/] The hearing examiner

---

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

2/ G.B. had filed a grievance over "mail-duty" a few days before the issuance of the Preliminary Notice of Disciplinary Action (PNDA) and a day after a council meeting at which the councilperson objected to his appointment to a temporary construction code position because he was a blue collar, not a white collar, worker.

3/ On September 15, 2014, an arbitrator sustained Local 469's
(continued...)

determined that the timing of the issuance of the Preliminary Notice of Disciplinary Action (PNDA) as well as the manner in which the City's part-time Labor Relations Specialist investigated the complaint of the councilperson supported an inference of hostility to protected activity.

2. Two City Hall incidents -- one involving the councilperson taking photos of G.B.'s footwear with her cell phone and another in which she made a lewd hand gesture to G.B. in front of witnesses -- on September 23, 2014, support an independent 5.4a(1) violation.

3. The actions of the councilperson in pressing for a desk audit of G.B.'s job independently violated 5.4a(1) of the Act.

4. The councilperson's filing of charges of harassment with the police and against G.B. did not constitute retaliation for protected activity, because the charges grew out of actions on the part of G.B. that were not protected.[4/]

The City's exceptions do not challenge any of the Hearing Examiner's Findings of Fact, which are supported by references to the hearing transcripts and exhibits admitted into evidence. See

---

3/ (...continued)
grievance challenging the discipline and overturned G.B.'s suspension.

4/ In November 2014, G.B. followed the councilperson during election day and on other occasions, taking pictures of her car and VIN resulting in her receipt of five parking tickets issued by G.B., who had never previously issued parking citations. The Hearing Examiner found that these incidents demonstrated personal animosity between G.B. and the councilperson, that was unrelated to hostility to G.B.'s exercise of protected activity.

H.E. No. 2018-12 at pp. 3 to 28. We adopt her Findings of Fact, summarized below.[5/]

The facts focus primarily on the interactions from the Fall of 2013 through December of 2015, between G.B., an 18-year City employee holding the blue collar position of senior maintenance repairer and a councilperson elected in 2011. They show:

Mail Duty Comments and Grievance

- In the Fall of 2013, G.B. was temporarily working as a mail sorter in the construction code office, a position normally performed by clerical employees represented by Local 469.

- At an October 15, 2013 City council meeting, the councilperson objected to G.B.'s assignment because she considered G.B. to hold a blue collar position and the construction code office clerical employees were white collar. The next day G.B. filed the "mail duty" grievance that agreed with the premise that mail sorting was clerical work but also commented:

  We must always be mindful that elected officials are merely TEMPORARY VISITORS to City business; conversely we the work force and our CAPABLE department heads always have, and always will work TOGETHER for the betterment of our fine City for many years to come.

- The hearing examiner stated that the record could not support finding that the councilperson was aware that G.B. had filed the mail duty grievance.

5/ This summary omits facts pertaining to the incidents that the Hearing Examiner determined were not unfair practices as Local 469 has not filed cross-exceptions.

Discipline for Being Out of Uniform

- On October 9, 2013, the councilperson observed G.B. out of uniform, namely wearing white sneakers, as opposed to steel toed boots, which she considered necessary for employee safety. She also alleged that G.B. was not wearing a green uniform shirt, both of which are violations of the City's uniform policy. At that time it did not appear that the councilperson and G.B. had contact with each other or that they even knew each other personally or professionally even though G.B. is assigned to city hall where the councilperson is often present.

- The councilperson submitted the "out of uniform" complaint against G.B. to Allan Roth who held a part-time position as City labor relations specialist and personnel officer.

- On October 22, 2013, approximately two weeks after the councilperson filed her complaint and six days after G.B. filed his "mail duty" grievance, Roth wrote to G.B. serving him with a Preliminary Notice of Disciplinary Action charging him with violations of the uniform and dress code policies as well as conduct unbecoming a public employee and insubordination based on the October 9 complaint. The Notice sought a three-day suspension.[6/]

- Although G.B. had been seen "out of uniform" on previous occasions before October 9, 2013, Roth had never initiated discipline against him.

- On October 24, 2013, G.B. filed a grievance challenging the disciplinary notice. Specifically, G.B. wrote:

  # 1) This is harassment & retaliatory, plain & simple

6/ Roth attributed the two-week gap between the October 9, 2013 complaint and the issuance of the preliminary notice of discipline to his part-time position (e.g. he just did not have enough time to get around to it).

> # 2) I am in full uniform each and every day while on duty. My co-worker and I wear our personal footwear (sneakers) when arriving and exiting City Hall, be it for work or lunch. Period.
>
> # 3) My/our uniform shirt is worn daily. As previously discussed with Al MacDonald, Tony Coplan, and Mike Broderick. We are constantly in & out of this building, going from hot to cold in every season throughout the year. It is perfectly acceptable to wear an overshirt and or jacket, as these garments are not provided by the City.
>
> # 4) [The councilperson] is obsessed with power rather than progress. If she really cared about our hard-working taxpayers, she'd eliminate the considerable expense of uniforms and simply provide each employee with a photo I.D. to be worn around the neck at a cost of approximately $ 1.46 per employee, fabricated by our L.P.D. I.D. Bureau.
>
> # 5) I demand a written apology from this Councilperson, and needless to say, I will not accept one minute of suspension on this matter.
>
> This harassment must end immediately!

- An arbitrator conducted a hearing on August 5, 2014, and issued an award on September 15, 2014 overturning the discipline. The arbitrator ruled that the City had not proven that G.B. was on duty when the alleged uniform violation had occurred but may have been on his lunch break.

Incidents at City Hall

- On September 23, 2014, eight days after an arbitrator overturned G.B.'s 3-day suspension, there were two incidents in city hall between G.B. and the councilperson. The first took place on the first floor near the council office and the second occurred on the second floor hallway near the courtroom.

- G.B. was working and walking past the council office when he observed the councilperson in the

office. Upon viewing G.B., she rushed out of the office, made a comment about his being out of uniform and, specifically, about his footwear. The councilperson then stooped down and took pictures of his feet with a teal-colored telephone.[7/]

- Later that morning when G.B. was on the second floor, he saw the councilperson approaching him. He turned and said, "have a nice day." The councilperson then threw up her left arm and lifted her middle finger to him. After the gesture, G.B. responded to her, "just so you know, you're on camera." G.B. was shocked and was not sure how to respond to the councilperson's gesture, since as a councilperson she controlled his destiny (e.g. hiring and firing).[8/]

The Desk Audit

- The councilperson requested that the Civil Service Commission (CSC) conduct a desk audit of 50 to 60 City employees. However, a CSC employee emailed the councilperson asking her to prioritize the desk audit so that a smaller audit could be conducted. This was the first time an elected official made such a request.

- On September 4, 2014, the councilperson submitted a list of five employees in priority order for the audit, listing G.B. (senior maintenance repairer) in the number one position at the top of the list. The councilperson did no investigation concerning the titles or functions of the individuals she was requesting be audited prior to submitting her original and revised requests.

7/ G.B. stood still during the picture taking, but asked the councilperson if she had enough pictures and told her that if his uniform was at issue, she would find a doctor's note in the City's personnel office. The councilperson did not respond to G.B. but continued to take pictures. G.B. walked away.

8/ A surveillance video confirmed the incident but was not clear enough regarding the finger gesture. The Hearing Examiner credited G.B.'s testimony.

- G.B. received a copy of the CSC employee's email. G.B.'s position had not previously been audited, and he had not been advised by his supervisors that an audit was being done. G.B. immediately brought the email to the attention of Local 469's President. G.B. had always received top marks in his yearly performance reviews and was concerned about the audit.

- On February 19, 2015, the CSC official wrote to the City's Chief Financial Officer Alexis Zach confirming the audit of G.B. and the five other employees. However, on February 23, 2015, Linden Municipal Attorney Daniel Antonelli rescinded the City's request for the desk audit.

EXCEPTIONS

The City questions the Hearing Examiner's conclusion that the initiation of discipline against G.B. for being out of uniform was an act of retaliation in violation of 5.4a(3) for G.B.'s filing of the "mail duty" grievance, concerning the occasional assignment of clerical work to blue collar employees, including G.B., represented by Local 469, because the councilperson's "out of uniform" complaint against G.B. preceded the filing of the mail duty grievance.[9/]

9/ The City challenged the recommendation that the Commission find a violation of 5.4a(3) because:

A. Based on the doctrine of res judicata, the arbitration award overturning the discipline imposed against G.B., precluded prosecution of the unfair practice charge alleging that the discipline was imposed in retaliation for G.B.'s alleged protected conduct.

B. As acknowledged by the Hearing Examiner, the chronology of events does not support a finding

(continued...)

The Hearing Examiner (H.E. No. 2018-12 at 40) articulated this explanation for finding a nexus between the uniform complaint and the mail grievance:

> Finally, the fact that [the councilperson] could not have known about the October 16 mail-duty grievance when she made her initial complaint about G.B. on October 9 is immaterial. G.B. filed his grievance in response to [the councilperson's] opposition at the October 15 council meeting to his temporary appointment as a construction code position, a position [the councilperson] considered white collar. The next day G.B. filed the grievance on behalf of unit members asserting that assigning mail duty to them is clerical and therefore inappropriate. In the grievance he referred to elected officials as temporary visitors to City business, arguably a swipe at the Council generally and [the councilperson] specifically.

The City also asserts that G.B.'s unprotected behavior concerning the photographing of the councilperson's vehicle and the issuance of the parking citations, (see H.E. No. 2018-12, Findings of Fact 42 to 48) neutralizes the councilperson's actions regarding the desk audit, photos of G.B.'s footwear and her allegedly obscene hand gestures and precludes basing violations of the Act on those incidents.

This argument turns the chronology of events on its head. G.B.'s unprotected actions occurred after all of the events found

---

9/ (...continued)
that the councilperson was aware of any protected conduct by G.B. when she directed that he be disciplined for being out of uniform.

by the Hearing Examiner to have a tendency to interfere with the exercise of employee rights. An employee's intemperate reaction to or unprotected conduct occurring after an employer had committed unfair practices, does not excuse violations of the Act. See In re Bridgewater Tp., 95 N.J. 235 (1984) (employee's allegedly intemperate reaction to personnel actions affecting him did not neutralize determination that employer violated N.J.S.A. 34:13A-5.4a(3)).

ANALYSIS

Initially, we reject the employer's exception that the doctrine of res judicata applies because Local 469's successful challenge via grievance arbitration to the discipline imposed on G.B. precludes the prosecution of the unfair practice charges.

Res judicata does not apply because a contractual grievance and an unfair practice charge are separate and distinct causes of action. (Cf. State v. Council of New Jersey State College Locals, 153 N.J. Super. 91 (App. Div. 1977), certif. den. 78 N.J. 326 (1978) (distinguishing contractual grievance from unfair practice charge and holding initiation of grievance arbitration does not expand time for filing an unfair practice charge).[10/]

10/ It does not appear from the record that the City made this argument to the Hearing Examiner. If the City believed that the arbitration award precluded, in whole or in part, the prosecution of the unfair practice charges, than it would have been logical to raise that issue before the start of the first day of hearing and the presentation of evidence.

In assessing whether the City violated 5.4a(3), when it disciplined G.B., the Hearing Examiner applied In re Bridgewater Tp., 95 N.J. 235 (1984), noting:

> [N]o 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.[11/]
>
> [Id. at 246.]

Regarding those incidents that were determined to independently violate 5.4a(1) the Hearing Examiner declared:

> An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994).[12/] Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER (¶17197 1986).

The Hearing Examiner concluded that the City engaged in independent violations of 5.4a(1) through the conduct described

---

11/ She also noted that timing could aid in determining motivation, albeit timing alone may not be a conclusive factor. H.E. No. 2018-12 at 37.

12/ Orange Tp. was cited with approval by the Appellate Division of the Superior Court in City of Garfield and PBA Local 46, 201 L.R.R.M. 3468, 41 NJPER 177 (¶63 App. Div. 2014), aff'g P.E.R.C. No. 2013-88, 40 NJPER 54 (¶20 2013).

in connection with the "mail duty" grievance, the discipline for being out of uniform, the September 23, 2014 City Hall incidents, and the pursuit of the desk audit (the request for which was later withdrawn by the City attorney) including placing G.B. at the top of the list.

We fully concur with these recommendations. The common theme in each of these instances is the unusual, unnecessary, perhaps unprecedented, and in the case of the desk audit, arguably unauthorized intervention of an elected official into day-to-day workplace issues resulting in strict and arbitrary enforcement of workplace rules against an employee/Union official that had not previously been applied by supervisors and City department heads in the way the elected official insisted upon.[13/] Those actions had a tendency to interfere with an employee's exercise of statutory rights and lacked a legitimate and substantial business justification.

13/ Here, as set forth in Finding of Fact 7, footnote 5, of the Hearing Examiner's report, between G.B. and the Councilperson there were two layers of City employees responsible for the day-to-day oversight of and interaction with employees: department heads and supervisors. Accordingly, the Hearing Examiner reasonably concluded that in intervening in situations that would normally be handled by immediate supervisors or department heads, the actions of the councilperson had a tendency to interfere with employees' willingness to engage in protected activity. Cf. Mine Hill Tp., where the independent violation of N.J.S.A. 34:13A-5.4a(1) was based upon the actions of the Mayor in threatening to reduce the size of the police department if the PBA pursued interest arbitration.

However, we do not find that the record establishes that the City violated 5.4a(3) with regard to the imposition of the three-day suspension of G.B. that stemmed from the complaint made by the Councilperson on September 9, 2013 accusing G.B. of being out of uniform. Her disciplinary complaint preceded her comments at the September 15 Council meeting about blue collar employees being assigned to clerical work. The "out of uniform" issue was not connected to the "mail duty" grievance.[14/] But as with the other incidents, having an elected official, as opposed to a supervisory or managerial employee, press for the discipline of an employee tends to interfere with the willingness of employees to exercise protected rights, regardless of whether employees are actually dissuaded from so doing.

We thus adopt the hearing examiner's recommendations except for her conclusion that the City violated 5.4a(3). However, that modification does not affect her recommendations of a cease-and-desist order and a posting as the remedy necessary to rectify the City's violations of the Act.

ORDER

We hereby ORDER as follows:

14/ Although it can be inferred from the text of G.B.'s "mail duty" grievance that elected officials should not be involved in work assignments, both G.B. and the councilperson took the position that mail sorting in the office of the Construction Code Official should be performed by white collar clerical employees.

A. That the City of Linden cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly: (1) when it issued a preliminary notice of disciplinary action seeking a three-day suspension and subsequently issued discipline against shop steward G.B. for being out of uniform; (2) when on September 23, 2014 in city hall a councilperson photographed G.B.'s footwear and later that day made a lewd gesture to G.B. in front of witnesses; and (3) when in September 2014 Cosby-Hurling requested a desk audit of five employees naming G.B. first in priority order to be audited.

B. That the City take the following affirmative action:

1. 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) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Within twenty (20) days of receipt of this decision, the City notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: April 25, 2019

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: (1) when it issued a preliminary notice of disciplinary action seeking a three-day suspension and subsequently issued discipline against shop steward G.B. for being out of uniform; (2) when on September 23, 2014 in city hall a councilperson photographed G.B.'s footwear and later that day made a lewd gesture to G.B. in front of witnesses; and (3) when in September 2014 Councilperson requested a desk audit of 5 employees naming G.B. first in priority order to be audited.

Docket No. CO-2015-101

CITY OF LINDEN
(Public Employer)

Date: _____

By: _____

This 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, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830

APPENDIX "A"